Nos. 17-16886, 17-16887

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Plaintiffs-Appellees,

v.

JEFFERSON B. SESSIONS, III, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

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STATEMENT OF JURISDICTION

Plaintiffs in these two related cases invoked the district court's jurisdiction under 28 U.S.C. § 1331. In a single order entered in both cases, the district court entered a preliminary injunction on April 25, 2017. Preliminary Injunction Order (PI Order) [ER 52]. The government filed timely motions for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) on May 23, 2017, which the district court denied on July 20, 2017. Recons. Order [ER 32]. The government filed timely notices of appeal on September 18, 2017. [ER 105, 107]; *see* Fed. R. Civ. P. 4(a)(1)(B). Jurisdiction for these appeals was premised on 28 U.S.C. § 1292(a)(1).

On November 20, 2017, the district court granted summary judgment to plaintiffs and converted its preliminary injunction into a permanent injunction. Summ. J. Order (SJ Order) [ER 4]. The court then entered final judgment in the Santa Clara case on November 22, 2017, Judgment [ER 3], and entered final judgment in the San Francisco case on December 7, 2017, Judgment [ER 1]. The government filed timely notices of appeal on December 14, 2017. [ER 101, 103]; *see* Fed. R. Civ. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

An Executive Order directs the Attorney General and the Secretary of Homeland Security to, "in their discretion and to the extent consistent with law, . . . 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 government has construed the provision to direct the Attorney General and the Secretary to exercise existing authority. The issues are:

1. Whether the district court erred in construing the provision as purporting to provide unilateral authority to impose new conditions on all federal funding from any source, and enjoining it on that basis.

2. Whether, even assuming the district court properly construed the Executive Order, the district court erred in extending its injunction beyond the plaintiffs in this case.

STATEMENT OF THE CASE

A. Executive Order 13,768

On January 25, 2017, the President issued Executive Order 13,768. The Executive Order states that "[s]anctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States." Exec. Order No. 13,768 (EO), 82 Fed. Reg. 8799, § 1 (Jan. 25, 2017) [ER 187]. A single operative provision of the Executive Order is at issue here. That provision, section 9(a), begins by stating 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." "In furtherance of this policy," the Order states that "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." EO § 9(a) [ER 189].

The referenced provision of federal law, 8 U.S.C. § 1373, was enacted in 1996 and states that "[n]otwithstanding 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, [the Department of Homeland Security (DHS)] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); *see also id.* § 1373(b) (prohibiting persons or agencies from prohibiting or restricting a government entity from sending to DHS, maintaining, or exchanging with other government entities information regarding immigration status).

The Executive Order goes on to state that the Secretary of Homeland Security has the "authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction." EO § 9(a) [ER 189]. And it 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." *Id.*

Section 9 also has two reporting requirements. First, it requires the Secretary of Homeland Security, on a weekly basis, to "make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise

failed to honor any detainers with respect to such aliens." EO § 9(b) [ER 189]. The referenced detainers are requests by the federal government for states and localities to notify the federal government before they release from state custody particular aliens who may be subject to removal, and in certain circumstances to briefly extend their detention to allow the federal government to assume custody. 8 C.F.R. § 287.7(a), (d). Second, the Executive Order requires 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." EO § 9(c) [ER 189].

In the final section of the Executive Order, entitled "General Provisions," the Order reiterates that "[t]his order shall be implemented consistent with applicable law and subject to the availability of appropriations." EO § 18(b) [ER 190].

B. Facts and Prior Proceedings

1. On January 31, 2017, six days after the Executive Order was issued, the City and County of San Francisco instituted an action to challenge the Executive Order. The County of Santa Clara filed its own action on February 3, 2017. Both suits preceded any action by the federal government based on the Executive Order, and preceded any announcement of how the Order would be interpreted. In particular, the Secretary of Homeland Security had not yet designated any sanctuary jurisdictions, and the government had not declared its intention to withhold any grant funding.

Both plaintiffs sought preliminary injunctions, and the district court considered the cases together (although it did not formally consolidate them).

In opposing the preliminary injunction, the government stated that Section 9(a) constitutes a direction to the Attorney General and the Secretary of Homeland Security to exercise existing authority to impose and enforce conditions on federal grants that require compliance with 8 U.S.C. § 1373. It thus affects only those federal grants that are administered by the Department of Justice or the Department of Homeland Security. And the Executive Order does not condition any grant on compliance with 8 U.S.C § 1373. Such conditions may be imposed, as consistent with law, only by the Attorney General and the Secretary of Homeland Security pursuant to their existing authority. The government also explained that it was not novel for the Department of Justice to condition receipt of funds on compliance with 8 U.S.C. § 1373, and noted that the Department of Justice had already applied this condition to certain grants in 2016.

On April 25, 2017, in an order issued in both cases, the district court issued a preliminary injunction premised on its conclusion, in direct conflict with the government's understanding of the Executive Order, that the Order purports to give the Secretary of Homeland Security and the Attorney General "unilateral authority to impose new conditions on federal grants." PI Order 14 [ER 65] (quotation marks omitted). The court rejected as "implausible" the government's view that the Order applies only to grants issued by the Department of Justice and the Department of

Homeland Security, stating that the "Department of Justice is responsible for federal law enforcement throughout the country, not just within its own Department," and that there was no provision of the Order that limited "Federal grants" to grants issued by those two agencies. *Id.* at 15 [ER 66]. The court also noted that other provisions of the Order that mention federal funds (none of which are at issue here) are not limited to the Department of Justice and the Department of Homeland Security. The court stated that "[t]he Government attempts to read out all of Section 9(a)'s unconstitutional directives to render it an ominous, misleading, and ultimately toothless threat," PI Order 14 [ER 65], but declared that the Executive Order had to be read to have legal effect rather than as a statement of the President's policies, *id.* at 15-16 [ER 66-67].

In assessing the likelihood that the Executive Order would be enforced against plaintiffs, the district court relied on "numerous statements" from government leaders that, in the court's view, "reaffirm[ed] the Government's intent to enforce the Order and to use the threat of withholding federal funds as a tool to coerce states and local jurisdictions to change their policies." PI Order 23 [ER 74] (quoting statement by the President that he did not "want to defund anybody" but "[i]f they're going to have sanctuary cities, we may have to do that. Certainly that would be a weapon."); *id* at 20 [ER 71] (citing statement by Attorney General that "urg[ed] states and local jurisdictions to comply with . . . 8 U.S.C. Section 1373" and stated that "failure to remedy violations could result in withholding grants, termination of grants, and

disbarment or ineligibility for future grants" (first alteration in original)). The court noted that in public statements, federal officials had mentioned a number of jurisdictions including California, and San Francisco in particular, as examples of sanctuary jurisdictions. *Id.* at 25-26 [ER 76-77].

Having interpreted the Executive Order to impose new conditions on all sources of federal funding, the district court concluded that plaintiffs had standing based on the uncertainty created by the possible imposition of new, unidentified conditions. PI Order 19 [ER 70]. The court also concluded that the case was ripe, because the only remaining uncertainty related to whether the government would take enforcement action, a question that the court believed is present in every pre-enforcement case. *Id.* at 34 [ER 85].

The district court's discussion of plaintiffs' likelihood of success on the merits was premised on its interpretation of the Executive Order as directing imposition of conditions not already authorized by law. On the basis of this interpretation, the court first concluded that the Order likely violates the separation-of-powers doctrine because it "purports to give the Attorney General and the Secretary [of Homeland Security] the power to place a new condition on federal funds (compliance with Section 1373) not provided for by Congress." PI Order 36 [ER 87]. Second, the court concluded that the Order likely violates the Spending Clause by "purport[ing] to retroactively condition all 'federal grants' on compliance with Section 1373." *Id.* at 38 [ER 89]. Third, the court concluded that the Order impermissibly "attempts to

conscript states and local jurisdictions into carrying out federal immigration law," in violation of the Tenth Amendment. *Id.* at 39 [ER 90]. Fourth, the court held that the Executive Order was likely void for vagueness because it did not make clear what conduct would lead to defunding or enforcement action, and did not provide clear standards for enforcement action. *Id.* at 41-43 [ER 92-94]. Finally, the court held that the order likely violated the Due Process Clause because ineligibility to receive federal funds would be determined "through a discretionary and undefined process." *Id.* at 43 [ER 94].

Stating that plaintiffs would suffer irreparable harm in the form of budgetary uncertainty from a possible withdrawal of all federal funding, the district court held that the balance of harms favored plaintiffs. PI Order 47-48 [ER 98-99].

Although the only plaintiffs are San Francisco and Santa Clara, the court concluded that it could properly issue a nationwide injunction because the Executive Order was invalid on its face. PI Order 48 [ER 99]. The district court's order concluded by stating that "[t]he defendants (other than the President) are enjoined from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions. This injunction does not impact the Government's ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. 1373, nor does it restrict the Secretary from developing regulations or preparing guidance on designating a jurisdiction as a sanctuary jurisdiction." PI Order 49 [ER 100].

2. On May 22, 2017, the Attorney General issued a Memorandum making clear that the Justice Department's understanding of the Executive Order was that presented to the district court in its consideration of plaintiffs' preliminary-injunction motion. *See* Memorandum for All Department Grant-Making Components (AG Mem.) [ER 184]. The memorandum stated that the Attorney General has "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." *Id.* at 1 [ER 184]. The Attorney General explained that the Order "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." *Id.* at 1-2 [ER 184-85]. The Attorney General further explained that the Executive 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." *Id.* at 2 [ER 185]. Rather, the Executive Order "directs the Attorney General and the Secretary of Homeland Security to exercise, as appropriate, their lawful discretion." *Id.*

The Attorney General stated that to carry out the Executive Order, the Department of Justice would "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." AG Mem. 2 [ER 185]. The requirement would apply to any existing grant that already "expressly contains this certification condition and to future grants for which the Department is statutorily authorized to impose such a condition," and "grantees will receive notice of their obligation." *Id.*

The Attorney General also stated that he had consulted with the Secretary of Homeland Security and 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.'" AG Mem. 2 [ER 185]. The Attorney General acknowledged that the "definition of 'sanctuary jurisdiction' is narrow," but stated that the Executive Order does not limit the Department's authority to act in other ways, separate and apart from the Order. *Id.*

3. Relying on the Attorney General's Memorandum, the government sought reconsideration of the district court's preliminary injunction pursuant to Rule 59(e). The government sought, in the alternative, clarification that the court's order does not prohibit the government from imposing additional conditions on grant programming based on sources independent of the Executive Order.

The district court denied reconsideration. The court stated that the Attorney General's Memorandum did not constitute a basis for reconsideration because it merely adopted "the same interpretation the government proposed at oral argument," which the court had already "assessed and rejected . . . as not legally plausible." Recons. Order 7 [ER 38]. The court concluded that the Attorney General's

Memorandum was not "the kind of binding authority that would genuinely dispel the Counties' fear of unlawful enforcement." *Id.* at 9 [ER 40]. The court treated the Attorney General's Memorandum not as a legal opinion, but rather as a plan of enforcement that did not affect other agencies. *Id.* at 9-12 [ER 40-43]. Finally, the court observed that the Attorney General could revoke the Memorandum at any time, or that "the President could replace the Attorney General to revoke it." *Id.* at 13 [ER 44]. The court stated that the problem with a law that confers excessive discretion cannot be resolved by having the official who received excessive discretion impose a revocable limitation on himself. *Id.*

In response to the government's motion for clarification, the district court included in the same order a footnote stating that "[t]he government correctly reads the PI Order as enjoining only section 9(a) of the Executive Order. The PI Order does not address or enjoin any other independent authority that may allow the government to impose grant conditions on funds, as no such issue was before the court." Recons. Order 1 n.1 [ER 32 n.1].

4. The government appealed the preliminary-injunction order in both cases, and this Court consolidated the appeals. Before the government filed its opening brief, the district court granted summary judgment to plaintiffs and entered a permanent nationwide injunction. The court declared that its new order "plows no new ground," but just "summarize[s]" reasons for the ruling that were "further described in [the court's] earlier Orders." SJ Order 2 [ER 5].

The district court reasoned that "[i]f Section 9(a) does not direct the Attorney General and the Secretary to place new conditions on federal funds, then it only authorizes them to do something they already have the power to do." SJ Order 17 [ER 20]. The court concluded that this reading would leave the provision without "legal effect." *Id.*

The district court held that the Executive Order violates the separation of powers because it purports "to give the Attorney General and the Secretary the power to place a new condition on federal funds (compliance with Section 1373) not authorized by Congress." SJ Order 19 [ER 22]. It stated that the Executive Order exceeds federal authority under the Spending Clause because it "purports retroactively to condition all 'federal grants' on compliance with Section 1373"; because "there is no nexus between Section 1373 and most categories of federal funding, such as funding related to Medicare, Medicaid, transportation, child welfare services, immunization and vaccination programs, and emergency preparedness"; and because the "Executive Order threatens to deny sanctuary jurisdictions all federal grants, hundreds of millions of dollars on which the Counties rely." *Id.* at 21-22 [ER 24-25].

The district court also held that plaintiffs "have demonstrated that under their reasonable interpretation, the Executive Order equates 'sanctuary jurisdictions' with 'any jurisdiction that ignored or otherwise failed to honor any detainers' and therefore places such jurisdictions at risk of losing all federal grants." SJ Order 23 [ER 26] (quoting EO § 9(b) [ER 189]). This interpretation of the Executive Order, which the

government had also disclaimed, was not premised on the provision relating to federal grants, which applies to "jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions)." EO § 9(a) [ER 189]. Rather, the district court quoted a reporting requirement contained in section 9(b) of the Order, which requires the Secretary of Homeland Security, on a weekly basis, to "make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens." EO § 9(b) [ER 189]. Based on its conclusion that the Executive Order "seeks to condition all federal grants on honoring civil detainer requests," the court concluded that "it is likely unconstitutional under the Tenth Amendment because it seeks to compel the states and local jurisdictions to enforce a federal regulatory program through coercion." SJ Order 23 [ER 26].

The district court held that the Executive Order was unconstitutionally vague because it does not provide "clear guidance on how to comply with its provisions or what penalties will result from non-compliance." SJ Order 26 [ER 29]. The court also held that the Executive Order fails to provide procedural due process because the Order does not contemplate any notice or administrative or judicial procedure to challenge enforcement actions taken under the Order. *Id.* at 27 [ER 30].

The district court then entered an injunction that permanently enjoins the defendants "from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions." SJ Order 28 [ER 31]. The court held that

"[b]ecause Section 9(a) is unconstitutional on its face, and not simply in its application to the plaintiffs here, a nationwide injunction against the defendants other than President Trump is appropriate." *Id.*

After accepting San Francisco's voluntary dismissal of a claim not at issue here, the district court entered final judgment in both cases. Judgment [ER 1]; Judgment [ER 3]. The government filed new notices of appeal and moved to consolidate the cases with the pending appeals from the preliminary-injunction order. Plaintiffs have moved to dismiss the preliminary-injunction appeals as moot; the government took no position on that motion provided that the schedule for the preliminary-injunction appeals remained in effect.

C. Other Pending Proceedings

There are two other pending cases challenging the same Executive Order. *See City of Chelsea v. Trump*, No. 17-cv-10214 (D. Mass. filed Feb. 8, 2017); *City of Seattle v. Trump*, No. 17-cv-497 (W.D. Wash. filed Mar. 29, 2017). In addition, the district court here has dismissed a related case filed by the City of Richmond. *See City of Richmond v. Trump*, No. 17-cv-1535, 2017 U.S. Dist. LEXIS 133422 (N.D. Cal. Aug. 21, 2017). The court concluded that the government's public statements had not indicated that it intended to enforce the Executive Order specifically against Richmond. *Id.* at *9-12. Accordingly, Richmond did not have "a well-founded fear of enforcement under the Executive Order." *Id.* at *13.

SUMMARY OF ARGUMENT

1. The challenged Executive Order provides that "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." EO § 9(a) [ER 189]. On its face, this provision directs the Attorney General and the Secretary, to the extent permitted by law, to impose and enforce a condition on federal grants that requires recipients to comply with 8 U.S.C. § 1373. Moreover, the Attorney General has stated, and the government has repeatedly explained in this litigation, that the government construes the Executive Order to direct those two officials to exercise their existing authority to impose and enforce this condition where permitted by law. The district court recognized that the Order, thus understood, directs no action not otherwise authorized by law and is not properly enjoined.

The district court mistakenly concluded that the Executive Order unambiguously foreclosed the Attorney General's understanding. In the court's view, unlike Executive Orders that merely direct government officials in the exercise of their existing authority, this Executive Order purports to grant new authority and compels the Attorney General and the Secretary of Homeland Security to impose new conditions on all federal funding, without regard to whether the conditions are

otherwise authorized. The court further concluded that such conditions must be imposed on funding entirely unrelated to the Departments of Justice and Homeland Security. Having interpreted the Order in this manner, the court declared that it was "entirely inconsistent with law," and should therefore be enjoined.

This reading of the Executive Order formed the basis of the court's conclusion that plaintiffs have standing, that their claims are ripe, and that the Order is not legally sustainable. The district court erred in insisting that the text of the Order compels a reading that would render it unlawful. Indeed, the Order unambiguously requires that its implementation should involve no action inconsistent with law. And even if the Order's text did not expressly require this reading, it would be improper for a court to presume that the President intended to direct unlawful action, contrary to the standard presumption that the Executive Branch intends to act lawfully. Otherwise, numerous executive orders would be subject to constitutional challenge based on overly broad readings of the text.

2. Even if this Court were to adopt the district court's reasoning, it would be necessary to limit the scope of the injunction to the plaintiffs in this case. This Court has long recognized that, in the absence of class certification, courts lack authority to provide relief that benefits only third parties. This conclusion follows both from principles of Article III standing and from fundamental precepts regarding the exercise of equitable discretion.

Even if a provision is held to be invalid on its face, an injunction is warranted only insofar as it is necessary to provide complete relief to plaintiffs. The district court ignored these principles when it issued a nationwide injunction. The portion of the injunction that applies to funds that would not flow to plaintiffs in this case should be reversed.

STANDARD OF REVIEW

This Court "review[s] for abuse of discretion the district court's imposition of a permanent injunction, but review[s] any determination underlying the grant of the injunction by the standard that applies to that determination." *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). Here, the permanent injunction was premised on a grant of summary judgment, which "is reviewed de novo." *Id.*

ARGUMENT

I. The district court's injunction was premised on a misreading of the Executive Order that is contrary to the Order's plain language and that the government has consistently disclaimed.

A. Plaintiffs lack standing to challenge the Executive Order, properly construed, and also have no likelihood of success on the merits.

1. The challenged Executive Order provides that "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." EO § 9(a) [ER 189]. On its face, the provision directs two Cabinet officials to ensure, "to the extent consistent with law," that "federal grants" are not awarded to entities that willfully refuse to comply with 8 U.S.C. § 1373. The President has thus directed those two officials to include compliance with 8 U.S.C. § 1373 as a condition on a particular federal grant, or to enforce such a condition if it is already in place, if they otherwise have authority to do so. The Order also explicitly preserves their discretion generally, and specifically preserves their discretion insofar as they may deem it necessary to excuse noncompliance for law enforcement purposes.

The Order's plain text makes clear its limited scope. The Order is directed to the Attorney General and the Secretary of Homeland Security, and does not purport to control the actions of other agencies. It applies to "federal grants," not to the broader category of federal funds (referenced elsewhere in the Order, *see, e.g.*, EO § 2(c) [ER 187]). And it does not purport to authorize government officials to impose conditions that they lack statutory authority to impose, instead expressly stating that action should be taken only "to the extent consistent with law." *Id.* § 9(a) [ER 189]; *see also id.* § 18(b) [ER 190] ("This order shall be implemented consistent with applicable law . . . .").

The Department of Justice has consistently confirmed this natural reading of the Executive Order. The Attorney General issued a Memorandum for All Department Grant-Making Components, which states 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." AG Mem. 1 [ER 184].

The Memorandum further explains that the Executive Order "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," and that the Executive 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." AG Mem. 1-2 [ER 184-85]. The Executive Order simply "directs the Attorney General and the Secretary of Homeland Security to exercise, as appropriate, their lawful discretion." *Id.* at 2 [ER 185]; *see also* Letter from Samuel R. Ramer, Acting Assistant Att'y Gen., Office of Legislative Affairs, Dep't of Justice, to Senators Elizabeth Warren and Edward J. Markey (Mar. 7, 2017) [ER 186] (explaining that "[a]s directed by the Order, the Department of Justice is in the process of identifying, in its discretion, what actions, if any, can lawfully be taken in order to encourage state and local jurisdictions to comply with federal law").

The Attorney General explained that the Department of Justice would implement the Executive Order by "requir[ing] 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." AG Mem. 2 [ER 185]. Such a requirement will apply both to any existing grant that already "expressly contains this

certification condition and to future grants for which the Department is statutorily authorized to impose such a condition." *Id.* In either case, "grantees will receive notice of their obligation." *Id.*

2. The district court properly did not suggest that plaintiffs would be entitled to an injunction if the court accepted the government's consistent interpretation of the Executive Order. The court's analysis of standing, ripeness, and the merits is premised entirely on its conclusion that the Executive Order means something very different from the Attorney General's understanding. In the district court's view, the only "plausible" interpretation of the Executive Order is that it directs the Attorney General and the Secretary of Homeland Security to impose funding conditions not otherwise authorized by law. And while declining to give weight to the Attorney General's interpretation of the Order, the court further presumed that the Attorney General would compel agencies not even subject to the Order to withhold federal funding, because the "Department of Justice is responsible for federal law enforcement throughout the country, not just within its own Department." PI Order 15 [ER 66].

This assumption underlies the district court's conclusion that plaintiffs' claims are justiciable because of the "potential loss of all federal grants" or the possibility of a "sudden and unanticipated cut" in grant funding. SJ Order 15 [ER 18]. Only on this basis could the court posit, for example, that the federal government might cut off "funding related to Medicare, Medicaid, transportation, child welfare services,

immunization and vaccination programs, and emergency preparedness." *Id.* at 21 [ER 24]. The court did not suggest that there would be any prospect of such injuries if, as the Attorney General has explained, the Executive Order contemplates that any effort to impose or enforce funding conditions will be justified by existing authority to implement a particular grant program, and will afford notice and an opportunity to be heard.

It is axiomatic that plaintiffs cannot establish standing or ripeness without demonstrating that there is a realistic danger that the Executive Order will be enforced against them. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). The Executive Branch has confirmed that the Order itself *cannot* be enforced against anyone, because it merely constitutes a directive to federal government officials about how to exercise their existing authority. Bedrock principles require that the suits be dismissed because plaintiffs' injury is premised on a counterfactual understanding of the Executive Order and the Attorney General has made clear that the government will not attempt to impose or enforce conditions not otherwise authorized by law.

The district court's analysis of the merits rests on the same erroneous premises. The various statutory and constitutional defects described in the court's opinions could arise only if the Executive Order had the effect ascribed to it by the district court. The district court has always recognized that the Order, as understood by the Executive Branch, has no such implications. The postulated problems depend,

instead, on the assumption that the Executive Order purports to provide new authority that is not conferred by statute; that grant conditions will be imposed in circumstances in which they are not germane; and that plaintiffs will be compelled to comply with the Executive Order itself, rather than with conditions authorized by law that are imposed in connection with federal grants. *See* SJ Order 19-22 [ER 22-25]. The Executive Order, as consistently construed by the government, gives rise to no such concerns, and such concerns are flatly at odds with the Order's text, which specifies, among other things, that any restrictions on funding should be imposed only "to the extent consistent with law." EO § 9(a) [ER 189].

B. The district court's interpretation of the Executive Order cannot be reconciled with the Order's text, much less override the government's consistent interpretation.

1. The district court held that the government's lawful interpretation of the Executive Order was "not legally plausible in light of the Executive Order's plain language." SJ Order 2 [ER 5]. And, in rejecting the government's explanation "that the Executive Order does not change the law, but merely directs the Attorney General and Secretary to enforce existing law," the court declared that "to read the Executive Order as the federal government desires requires rewriting, not just reinterpretation." *Id.* at 17 [ER 20] (quotation marks and brackets omitted).

It is unclear what "plain language" underlies the court's conclusion or why the Attorney General's understanding of the Executive Order requires "rewriting." The section of the summary-judgment opinion that rejects the Attorney General's view of

the Executive Order quotes no language of the Order that would lend any support to that conclusion. *See* SJ Order 17 [ER 20]. The only language of the Executive Order quoted in that section of the court's opinion is the Order's requirement that any actions taken by the Attorney General or the Secretary of Homeland Security be "consistent with law," which is precisely the point urged by the government.

The relevant discussion in the preliminary-injunction order likewise fails to explain why the Executive Order's plain language compels the district court's construction. *See* PI Order 12-16 [ER 63-67]. The district court pointed out that the relevant provision of the Executive Order states that "'sanctuary jurisdictions' are '*not eligible to receive*' federal grants." *Id.* at 14 [ER 65] (quoting EO § 9(a) [ER 189] (district court's emphasis)). Based on this language, the district court stated that the Executive Order "purports to delegate to the Attorney General and the Secretary the authority to place a new condition on federal grants." *Id.* As noted, that language, which is expressly qualified by the phrase "to the extent consistent with law," is properly understood to direct the Attorney General and the Secretary to exercise their existing authority.

The district court erred in declaring that the government's position "is in conflict with the Order's express language and is plainly not what the Order says." PI Order 14 [ER 65]. The district court, not the Attorney General, undertook to rewrite the terms of the Executive Order. The district court noted that it was construing the Order to be "entirely inconsistent with law." *Id.* That conclusion cannot plausibly be

squared with the Order's express direction to take actions "to the extent consistent with law." EO § 9(a) [ER 189]; *see also id.* § 18(b) [ER 190] (Executive Order to be "implemented consistent with applicable law").

The district court's suggestion that the Executive Order could withdraw federal funding from jurisdictions that do not comply with federal detainer requests likewise has no basis in the Order's text. The provision of the Executive Order that relates to federal grants does not mention detainer requests, but instead applies to "jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions)." EO § 9(a) [ER 189]. Detainers are referenced in a separate provision, not at issue here, that merely imposes a reporting requirement: "To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary [of Homeland Security] shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens." *Id.* § 9(b) [ER 189]. It is thus clear that when the Executive Order meant to refer to detainer requests, it did so expressly. The reporting provision in no way threatens federal funding, much less "seeks to condition all federal grants on honoring civil detainer requests." SJ Order 23 [ER 26].

There is likewise no basis for enjoining the provision of the Executive Order that directs 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." EO § 9(a) [ER 189]. The provision, on its face, plainly has no direct effect on the plaintiffs here, who could contest any enforcement action instituted by the Attorney General in the appropriate forum. The district court did not identify any language of the Executive Order compelling the Attorney General to act in an impermissible manner, and indeed acknowledged that the Executive Order does not specify what enforcement action is contemplated. SJ Order 23 [ER 26]. The court nonetheless presumed, contrary to basic presumptions in favor of lawful constructions, that the Attorney General would implement the provision in a manner that was unconstitutional. *See id.* at 23-24 [ER 26-27]; *cf. Arizona v. United States*, 567 U.S. 387, 415 (2012) ("inappropriate to assume" that state enactment will be construed in an impermissible manner); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (per curiam) (presumption that statutes should be construed to be lawful); Restatement (Second) of Contracts § 203(a) (same for contracts).

2. The district court rejected the government's interpretation of the Executive Order based in substantial part on the court's view that the Executive Order, as construed by the government, would be "legally meaningless." SJ Order 17 [ER 20]. The court thought it implausible that an Executive Order would "only authorize[] [the Attorney General and the Secretary] to do something they already have the power to do." *Id.*

There is nothing novel about a President issuing an Executive Order to guide his subordinates in their implementation of existing law. The President has the

constitutional authority, "as head of the Executive Branch, to 'supervise and guide' executive officers in 'their construction of the statutes under which they act.'" Office of Legal Counsel, *Proposed Executive Order Entitled "Federal Regulation,"* 5 Op. O.L.C. 59, 60 (1981) (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)). The President may "require agencies to exercise their discretion, within statutory limits," in accordance with the terms of an Executive Order. *Id.* at 63. And Presidents regularly exercise their supervisory authority over how executive officers carry out their statutory responsibilities. *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 1(b), (Sept. 30, 1993) (directing agencies on how to exercise regulatory authority, "to the extent permitted by law and where applicable"); Exec. Order No. 13,563, 76 Fed. Reg. 3821, § 1(b) (Jan. 18, 2011) (similar); Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 2 (Dec. 12, 2002) (directing agencies, "to the extent permitted by law," to be guided by certain principles when "formulating and implementing policies that have implications for faith-based and community organizations"); Exec. Order No. 13,765, 82 Fed. Reg. 8351, § 2 (Jan. 20, 2017) (directing agencies to "exercise all authority and discretion available to them" to waive certain requirements "[t]o the maximum extent permitted by law").

The D.C. Circuit's discussion in analyzing an Executive Order in *Building & Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), illustrates these principles. The D.C. Circuit recognized that when the President "directs his subordinates how to proceed in administering federally funded projects,

but only 'to the extent permitted by law,'" the consequence is that "if an executive agency . . . may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law." *Id.* at 33. No court has suggested that orders of this kind are legally meaningless.

3. At bottom, the district court's rulings rest not on the Order's "plain language" but on the court's conception of "the Order's broad intent." PI Order 15 [ER 66]. The issue is not the "intent" that might be imputed to the Order, but the Order's text as consistently interpreted by the Executive Branch. And, in any event, the government's interpretation is consistent with the Order's stated intent, which is to withdraw federal money from sanctuary jurisdictions and to enforce 8 U.S.C. § 1373 to the extent permitted by law. *See* EO § 2(c) [ER 187] ("except as mandated by law"); *id.* § 9(a) [ER 189] ("to the fullest extent of the law"). Compliance with legal requirements is a theme running throughout the text of the Order. *See id.* §§ 7, 8, 10(b), 12, 14, 18(b) [ER 188-90] (stating that actions should be taken only as "permitted by" or "consistent with" law).

Various statements of public officials about their desire to withdraw federal money from sanctuary jurisdictions and to ensure compliance with 8 U.S.C. § 1373, *see, e.g.*, SJ Order 3 [ER 6], reflect the intention to enforce 8 U.S.C. § 1373 as a grant condition wherever permitted by law. And in any event, such statements cannot alter the plain meaning of the Executive Order. *See Barclays Bank PLC v. Franchise Tax Bd.*

of Cal., 512 U.S. 298, 329-30 (1994) (declining to ascribe legal significance to "Executive Branch actions—press releases, letters, and *amicus* briefs—[that] are merely precatory").

The court's analysis of justiciability and the merits thus rests on a reading of the Order at odds with its plain text and with the interpretation of the Executive Branch. A court does not properly exercise its equitable powers to prohibit conduct that is not contemplated by the Executive Order's text and that has been expressly disclaimed by the Attorney General. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The extraordinary remedy of an injunction is not warranted "in order to remove any 'temptation' for the [defendant] to participate in [unlawful] activities," in the absence of proof that the defendant has concrete plans to engage in unlawful conduct. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 583 (1971). Rather, "[a]n injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal *and that the defendant, if not enjoined, will engage in such conduct*." *Id.* at 584 (emphasis added).

The D.C. Circuit thus rejected a challenge to an Executive Order when the "plaintiffs raise[d] the prospect that, notwithstanding the President's instruction that the Executive Order be applied only '[t]o the extent permitted by law,' a particular agency may try to give effect to the Executive Order when to do so is inconsistent with the relevant funding statute." *Building & Constr. Trades Dep't*, 295 F.3d at 33

(second alteration in original). Concerns about hypothetical unlawful funding decisions provided "no warrant to relieve the plaintiffs of their burden in this facial challenge to show that [the relevant provision] of the Order is without any valid application." *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)). Here, similarly, neither the Executive Order's text nor the government's consistent interpretation of it suggests that the Order is unlawful in any respect, much less that it is without any valid application. No injunction is warranted.

II. Any injunctive relief should be limited to the plaintiffs.

As we have shown, the district court's conclusion that injunctive relief was warranted rests on an error of law. Even assuming, however, that this Court were to agree with the district court's reasoning, it would be necessary to vacate the injunction insofar as it extends to entities other than the plaintiffs in this case. Vacatur is required by principles of Article III standing and by limitations on a court's equitable authority.

A. In the absence of class certification, plaintiffs lack standing to seek relief on behalf of parties not before the court.

To establish standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quotation marks omitted). "[S]tanding is not dispensed in gross," and the plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates,*

Inc., 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted). As this Court has recognized, "our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 730 n.1 (9th Cir. 1983).

Thus, in *Alvarez v. Smith*, 558 U.S. 87, 92 (2009), the plaintiffs lacked standing to seek declaratory and injunctive relief against the State's practice of keeping property in custody without a prompt post-seizure hearing because the plaintiffs had already received the seized property or forfeited their claims to it. The Supreme Court explained that since class certification had been denied, the "only disputes relevant here are those between these six plaintiffs and the State's Attorney . . . and those disputes are now over." *Id.* at 93; *see also Monsanto*, 561 U.S. at 163 (holding that the plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency order] on the ground that it might cause harm to other parties").

The same principles inform the Supreme Court's repeated admonition that the standing requirements of Article III preclude a court from granting relief that is not directed to remedying the injury asserted by the plaintiff. Thus, for example, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Supreme Court held that the plaintiffs lacked standing to challenge Forest Service regulations after the parties had resolved the controversy regarding the application of the regulations to the project that had caused the plaintiffs' injury. Noting that the plaintiffs' "injury in fact with regard to that project ha[d] been remedied," *id.* at 494, the Court held that to allow the

plaintiffs to challenge the regulations "apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the face of Article III's injury-in-fact requirement." *Id.*

This Court has thus recognized the "elementary principle" that in the absence of class certification, plaintiffs are "not entitled to relief for people whom they do not represent." *Zepeda*, 753 F.2d at 730 n.1. Were it otherwise, any individual plaintiff "could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases." *Id.* The Seventh Circuit has likewise squarely held that a district court may not "grant relief to non-parties" where an injunction limited to the party would provide complete relief, stating that a broader injunction "exceed[s] the district judge's powers under Article III of the Constitution." *McKenzie v. City of Chicago*, 118 F.3d 552, 555 & n.* (7th Cir. 1997); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.").

Under these principles, San Francisco and Santa Clara do not have standing to seek an injunction broader than necessary to remedy their own asserted injuries. And neither plaintiff can plausibly assert that an injunction that extends to other jurisdictions is necessary to remedy the plaintiffs' claimed harm, which is entirely based on the withdrawal of money that would go to San Francisco and Santa Clara.

B. Equitable principles foreclose an injunction greater than necessary to provide complete relief to plaintiffs.

Even apart from the requirements of Article III, the district court's injunction runs afoul of fundamental limitations on a court's exercise of its equitable powers. The "Supreme Court has cautioned that 'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs' before the Court." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Thus, "[i]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification." *Id.* (quoting *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996)); *see also Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating injunction insofar as it applied to persons other than the plaintiff).

In *Los Angeles Haven Hospice*, this Court agreed with the district court that a Department of Health and Human Services regulation was facially invalid, but nonetheless vacated an injunction insofar as it barred the Department of Health and Human Services from enforcing the regulation against entities other than the plaintiff. The Court recognized that relief benefitting parties not before the Court is authorized only "if such broad relief is necessary to give prevailing parties the relief to which they are entitled." *Los Angeles Haven Hospice*, 638 F.3d at 664 (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)).

Similarly, in *Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263 F.3d 379 (4th Cir. 2001), the Fourth Circuit vacated an injunction that precluded the Federal Election Commission from enforcing, against any entity, a regulation found to have violated the First Amendment. The court explained that an injunction covering the plaintiff "alone adequately protects it from the feared prosecution," and that "[p]reventing the FEC from enforcing [the regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff]." *Id.* at 393.

As this Court has also recognized, "nationwide injunctions 'have a detrimental effect by foreclosing adjudication by a number of different courts and judges.'" *Los Angeles Haven Hospice*, 638 F.3d at 664 (quoting *Califano*, 442 U.S. at 702). "[A]llowing only one final adjudication deprives the Supreme Court of the benefit it receives from permitting multiple courts of appeals to explore a difficult question before it grants certiorari." *Id.* (citing *United States v. Mendoza*, 464 U.S. 154, 160 (1980)); *see also Virginia Soc'y for Human Life*, 263 F.3d at 393 (permitting nationwide injunction "would 'substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.'" (quoting *Mendoza*, 464 U.S. at 160)). Here, the same legal issues have been presented in three other lawsuits (one of which the district judge here dismissed for lack of standing), but a nationwide injunction effectively renders that litigation meaningless. *See City of Chelsea v. Trump*, No. 17-cv-10214 (D. Mass.); *City of Seattle v. Trump*, No. 17-cv-497 (W.D. Wash.); *City*

of Richmond v. Trump, No. 17-cv-1535, 2017 U.S. Dist. LEXIS 133422 (N.D. Cal. Aug. 21, 2017).

In addition, nationwide injunctions provide plaintiffs all the benefits of a class action without any of the burdens or obligations. Once a single plaintiff prevails, the district court issues the relief that might have been appropriate if it had certified a class of all affected parties. But insofar as the federal government prevails, it gains none of the benefits of prevailing in a class action and, in particular, cannot preclude other plaintiffs from filing suit to relitigate the same issues.

C. The district court's analysis cannot be reconciled with binding precedent.

The district court did not even purport to apply the longstanding principle that it lacks authority to enter an injunction broader than necessary to afford relief to the plaintiffs. Instead, the district court stated that "[b]ecause Section 9(a) is unconstitutional on its face, and not simply in its application to the plaintiffs here, a nationwide injunction against the defendants other than President Trump is appropriate." SJ Order 28 [ER 31]; *see also* PI Order 48 [ER 99] (similar). This conclusion cannot be reconciled with the cases discussed above: in *Los Angeles Haven Hospice*, for example, this Court affirmed the district court's holding that a regulation was facially invalid, but vacated the imposition of an injunction extending beyond the plaintiff. *See Los Angeles Haven Hospice*, 638 F.3d at 665.

The two cases relied on by the district court are inapposite. In *Califano v. Yamasaki*, the Supreme Court determined that the district court had not abused its discretion in certifying a nationwide class. *Califano*, 442 U.S. at 703. The Court did not remotely suggest that a nationwide injunction would be warranted in the absence of class certification, much less that a nationwide injunction should be afforded as a matter of course whenever a plaintiff succeeds on a facial challenge. To the contrary, the Court's analysis was entirely focused on the class-certification question, as evidenced by the sentence upon which the district court in this case relied: "*Nor is a nationwide class inconsistent with principles of equity jurisprudence*, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff *class*." *Id.* at 702 (emphasis added); *cf.* SJ Order 28 [ER 31] ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." (alteration in original)).

Even in the context of class certification (as opposed to relief in the absence of class certification), the Supreme Court cautioned that "a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano*, 442 U.S. at 702-03. And as noted above, the Supreme Court held in *Alvarez* that in the absence of class certification, plaintiffs lack authority to seek relief on behalf of parties not before the court. *Alvarez*, 558 U.S. at 93.

In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a lawsuit brought by two States, this Court declined to stay a nationwide temporary restraining order regarding a prohibition on entry into the United States of certain categories of individuals. The Court emphasized the stay posture and pointed out that it need not conclusively resolve the issue of the proper geographic scope of the injunction. *Id.* at 1167. And the Court concluded that "the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders." *Id.* That case thus represents, at most, an application of the principle that injunctive relief that benefits third parties can be awarded when such relief is necessary to provide complete relief to the plaintiffs. *See Bresgal*, 843 F.2d at 1170-71 ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*" (emphasis in original)). As noted above, that principle has no application here, as neither San Francisco nor Santa Clara can plausibly argue that they have a cognizable legal interest in federal grants awarded to other jurisdictions across the country.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court, other than the cases as to which a consolidation motion is pending.

s/ Daniel Tenny
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,248 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
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