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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Plaintiff,

v.

JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Principal Deputy Assistant Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and DOES 1-100,

Defendants.

Case No. 17-cv-4701

PLAINTIFF STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date:	February 28, 2018
Time:	2:00 p.m.
Dept:	2
Judge:	Honorable William H. Orrick
Trial Date:	December 10, 2018
Action Filed:	August 14, 2017

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INTRODUCTION

For the past year, the Trump Administration has attempted to rely on extra-statutory authority to coerce state and local jurisdictions into foregoing laws and policies they determined best protect public safety in order to satisfy the Administration's immigration enforcement demands. In its First Amended Complaint ("FAC"), Plaintiff State of California ("the State") challenges the unprecedented, unconstitutional, and unlawful actions jeopardizing the State's ability to receive Edward Byrne Memorial Justice Assistance Grants ("JAG") and Community Oriented Policing Services ("COPS") grants. First, Defendants improperly added three immigration enforcement conditions, at least two of which are without any statutory authority, to the $28.3 million in JAG formula grants that the State and its local jurisdictions are authorized by statute to receive this fiscal year.[1] Second, to justify withholding funding from the State on the basis of the third condition, Defendants transformed a narrow statute, 8 U.S.C. § 1373 ("Section 1373"), which prohibits restrictions on the exchange of immigration and citizenship status information, into a sweeping mandate requiring state and local jurisdictions to allow the disclosure of essentially all information about their residents to federal immigration authorities.[2] In seeking to dismiss all of the State's claims, ECF No. 77 ("MTD"), Defendants ask this Court to disregard two federal courts that have found two of these immigration enforcement conditions are likely to be unconstitutional, and ignore a Northern District of California decision, which read Section 1373 narrowly. Defendants' motion should be denied in full.

DEVELOPMENTS SINCE FILING OF THE FAC

The State filed its Amended Complaint on October 13, 2017. On October 31, the State moved to preliminarily enjoin Defendants from enforcing the Section 1373 Condition against the

[1] Those conditions require jurisdictions to adopt an affirmative "statute," "rule," "regulation," "policy," or "practice" that is "designed to ensure": (a) Department of Homeland Security ("DHS") agents access to detention facilities to interview inmates who are "aliens" or believed to be "aliens" ("the Access Condition"); and (b) provide 48 hours advance notice to DHS regarding the scheduled release date of an "alien" upon request ("the Notification Condition"). FAC ¶ 84.

[2] The third condition requires jurisdictions to certify compliance with Section 1373 under penalty of perjury ("the Section 1373 Condition," and with the Access and Notification Conditions, "the Immigration Enforcement Conditions"). FAC ¶ 77. Even if the Court determines that the JAG Section 1373 Condition is unlawful, the State additionally requests declaratory relief, *contra* MTD at 2, because compliance with Section 1373 is also a condition for COPS. FAC ¶ 100.

State on account of the TRUTH Act, California Government Code section 7283 *et seq.*, and the State's Confidentiality Statutes.[3] ECF No. 17. The next day, Defendants sent the Board of State and Community Corrections ("BSCC"), the entity that receives the State's share of JAG funds, a preliminary non-compliance letter ("Alleged Non-Compliance Letter") asserting that three provisions of the recently adopted California Values Act, Government Code section 7284 *et seq.*, may "violate 8 U.S.C. § 1373, depending on how [the State] interprets and applies them." Defs.' Req. for Judicial Notice ("Defs. RJN"), Ex. N at 1. Those provisions: (i) generally prohibit inquiries into an individual's immigration status (Cal. Gov't Code § 7284.6(a)(1)(A)); (ii) define the circumstances under which law enforcement may respond to immigration authorities' requests for release dates (*id.* § 7284.6(a)(1)(C)); and (iii) prohibit the sharing of "personal information" for immigration enforcement purposes when that information is not available to the public (*id.* § 7284.6(a)(1)(D)). Defs. RJN, Ex. N at 1-2. As to the first provision, Defendants said that to comply with Section 1373, the State must certify it interprets that provision as "not restrict[ing] California officers and employees from requesting information regarding immigration status from federal immigration officers." *Id.* at 2. For the notification request and personal information provisions to comply with Section 1373, Defendants said the State must certify it "interprets and applies these provisions to not restrict California officers from sharing information . . . regarding release date[s] and home address[es]." *Id.* at 1. If the State could not so "certify," then "[USDOJ] has determined that these provisions violate [Section 1373]." *Id.* at 1-2. Defendants further "reserve[d] [their] right to identify additional bases of potential violations." *Id.* at 2.

In total, since October 2017, Defendants have sent similar letters to 35 jurisdictions challenging their compliance with Section 1373, including to two jurisdictions, in part, on the basis of adopting laws or policies similar to California's Confidentiality Statutes. FAC ¶ 116; Defs. RJN, Ex. N; Pl.'s Req. for Judicial Notice ("Pl. RJN"), Exs. A, B, and C.

On November 13, BSCC responded to the letter it received, and certified that the Values Act does not restrict law enforcement from inquiring about an individual's immigration status

[3] "The State's Confidentiality Statutes" as defined here, are: California Penal Code sections 422.93, 679.10, 679.11; California Welfare and Institutions Code sections 827 and 831; and California Code of Civil Procedure section 155.

with other governmental entities. Defs. RJN, Ex. O at 1. BSCC could not provide the requested certification as to the other two provisions, and informed Defendants that the Values Act regulates the sharing of release date information and home addresses because that information is not covered by Section 1373. *Id.* at 2. On January 24, 2018, Defendants responded that they still have concerns about the State's compliance with Section 1373, and asked the BSCC to produce by February 23, under threat of subpoena, "orders, directives, instructions, or guidance to your law enforcement employees" about communicating with USDOJ, DHS, and Immigration and Customs Enforcement ("ICE"). Pl. RJN, Ex. D.

In the meantime, on November 29, Defendants awarded the California Department of Justice ("CalDOJ") a $1 million COPS grant that they said CalDOJ will be unable to "draw down" while Defendants "inquir[e] . . . whether [CalDOJ] complies with 8 U.S.C. § 1373." Pl. RJN, Ex. E at 20. Also, when the Values Act went into effect, ICE Acting Director Thomas Homan chastised California, calling for USDOJ to withhold funding, and "charge" elected officials with crimes, for those jurisdictions that do not meet the Administration's immigration enforcement demands. Pl. RJN, Ex. F at 2. DHS Secretary Kirstjen Nielsen has since confirmed in Congressional testimony that Defendant USDOJ is "reviewing" ways to charge state and local officials as the ICE Acting Director suggested. Pl. RJN, Ex. G at 102-03.

After Defendants sent the Alleged Non-Compliance Letter, on November 7, the State filed an amended motion for preliminary injunction to prevent Defendants from enforcing the Section 1373 Conditions against the State on account of the Values Act and the Amended TRUST Act, California Government Code section 7282 *et seq.*, as well as the TRUTH Act and the State's Confidentiality Statutes. ECF No. 26. The Court heard the motion on December 13, 2017, and took the parties' arguments under submission. ECF No. 73. On January 18, 2018, the State alerted the Court that the Values Act became effective on January 4, 2018. ECF No. 78.

The State has not yet moved to enjoin the Access and Notification Conditions because those conditions are currently subject to a nationwide preliminary injunction after the Northern District of Illinois determined that Chicago was likely to succeed on its claims that Defendants exceeded their statutory authority in imposing them. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951

(N.D. Ill. 2017), No. 17-2991 (7th Cir. argued Jan. 19, 2018). Another district court, while preliminarily enjoining the JAG Section 1373 Condition on other grounds, found that the Access and Notification Conditions "were issued without appropriate authority," concluded that the Section 1373 Condition is arbitrary and capricious under the APA, and also concluded that Philadelphia was likely to succeed in its claims that all of the conditions "are improper under settled principles of the Spending Clause, the Tenth Amendment, and principles of federalism." *City of Philadelphia v. Sessions*, No. 17-cv-3894, --- F.Supp. 3d ---, 2017 WL 5489476, at *4, 33 (E.D. Pa. Nov 15, 2017), *appeal docketed*, No. 18-1103 (3d Cir. Jan. 18, 2018).

LEGAL STANDARD

A court should grant a Rule 12(b)(1) motion to dismiss only if "the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory Antitrust Litig. v. Micron Tech., Inc.*, 546 F.3d 981, 984-85 (9th Cir. 2008). A Rule 12(b)(6) motion to dismiss should be granted only if the complaint fails to state a cognizable legal theory or allege facts sufficient to support a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010). For either type of motion, the Court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[G]eneral factual allegations of injury resulting from the defendants' conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). If the plaintiff alleges "enough facts to state a claim to relief that is plausible on its face," the motion must be denied. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court may consider documents "submitted as part of the complaint" or documents and facts subject to judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)).

LEGAL ARGUMENTS

I. THE JAG ACCESS AND NOTIFICATION CONDITIONS VIOLATE THE SEPARATION OF POWERS AND EXCEED CONGRESSIONAL AUTHORITY (CAUSES OF ACTION 1 AND 3)

The U.S. Constitution grants the spending power to Congress, art. I, § 8, cl. 1, and Congress has "broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This is especially so "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). Moreover, courts must avoid reading statutes in a manner that "'intrude[s] upon traditional state criminal jurisdiction' . . . absen[t] . . . a clear indication that" Congress intended to do so. *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). Thus, Defendant cannot unilaterally insert conditions into grant awards without clear authorization from Congress. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013) ("both" an agency's "power to act and how they are to act is authoritatively prescribed by Congress"). Since Congress has neither added the Access and Notification Conditions through statute, nor delegated to Defendants the authority to require JAG recipients to comply with such conditions, the conditions violate the Separation of Powers. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86, 588 (1952) (where Congress did not exercise or delegate its authority, it was unconstitutional for the Executive Branch to "direct[] that a presidential policy be executed in a manner prescribed by the President.").

A. The Access and Notification Conditions Are Inconsistent with the JAG Authorizing Statute

Defendants point to no provision of the JAG authorizing statute that affirmatively supports the imposition of the Access and Notification Conditions. *See* MTD at 9-11. Indeed, the text, purpose, and legislative history of JAG reveal that Defendants lack the authority to impose the Access and Notification Conditions.

The carefully crafted JAG authorizing statute, 34 U.S.C. §§ 10151-58, is designed to give "each State" and "each unit of local government" an allocation according to a precise statutory formula. 34 U.S.C. § 10156(a), (d)(2). Congress prescribed only ministerial requirements and certifications for JAG recipients, including that jurisdictions comply with applicable laws. *E.g.*, 34 U.S.C. § 10153(a)(5); *see also Jama v. ICE*, 543 U.S. 335, 341 (2005) (courts will "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"). As a result, Defendants must disburse the funds appropriated by Congress to state and local jurisdictions in accord with the statutory formula as long as the jurisdiction complies with the conditions that exist in federal law. *See Train v. City of New York*, 420 U.S. 35, 45-46 (1975) ("We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from the allotment and obligation."). Defendants do not have "unfettered discretion as to when and how" the federal funds appropriated to JAG formula grants may be used because a formula grant "circumscribes that discretion." *State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099, 1109 (8th Cir. 1973) (limiting executive discretion to allocate funding under statute authorizing formula grants; "only an analysis of the statute itself can dictate the latitude of the questioned discretion").

Congress's overarching goal in creating JAG was to provide state and local governments with "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" to local law enforcement. H.R. Rep. No. 109-233, at 89 (2005).[4] Consistent with this goal, when creating the current incarnation of the grant program, in 2006, the Legislature repealed the only immigration related requirement that ever existed for JAG, which obligated the chief executive officer of each state receiving funding to provide certified records of criminal convictions of "aliens." Immigration Act of 1990, Pub. L. No. 101-649, § 507(a)(11), 104 Stat. 4978, 5050-51 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(6), 105 Stat. 1733, 1751 (1991) (repealed 2006). Defendants' imposition of the Access and Notification Conditions interprets the JAG

[4] The legislative history is replete with recognition of local control to support local public safety priorities. *E.g.*, 151 Cong. Rec. S12814 (statement of Sen. Dayton) ("Byrne grants fund local law enforcement to combat the most urgent public safety problems in their own communities.").

authorizing statute as including the very type of immigration condition that Congress repealed. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *see also Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision of the Constitution that authorizes the President to enact, to amend, or to repeal statutes."). More recently, Congress has repeatedly declined to attach immigration enforcement conditions to JAG, further reinforcing its intent to detach immigration enforcement from JAG funding. *See, e.g.*, Pl. RJN, Exs. H-K.

B. Section 10102 Does Not Provide USDOJ with the Authority to Impose the Access and Notification Conditions

Recognizing that the JAG authorizing statute provides Defendants no justification for the Access and Notification Conditions, Defendants claim instead that these new conditions are permitted under 34 U.S.C. § 10102(a)(6), which allows the agency to add "special conditions on all grants." Defendants' view would transform an administrative provision into one providing limitless discretion to the agency. But, Congress "does not . . . hide elephants in mouseholes," nor "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Any such delegation of authority, moreover, would have to be clear and unambiguous, given federalism concerns. *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1370 (D.C. Cir. 1990) ("Congress' carefully chosen design for allocating safety responsibility . . . should not be interpreted to confer any broader safety authority upon [the federal agency] than is expressly provided, given the federalism values which permeate the entire structure of the . . . Act.").

Section 10102(a)(6) provides no such clarity. In 2006, when Section 10102(a)(6) was amended to permit OJP to "plac[e] special conditions on all grants," the term "special conditions" had a precise meaning—one that does not encompass the ability to add the Access and Notification Conditions. According to a USDOJ regulation in place at the time, Defendants could impose "special grant or subgrant conditions" only on "high-risk" grantees. 28 C.F.R. § 66.12 (removed Dec. 19, 2014). This language was based on the grants management common rule

adopted by the Office of Management and Budget ("OMB"), and followed by "all Federal agencies" when administering grants to state and local governments.[5]

Federal statutes and regulations have historically identified "special conditions" not as any conditions that the Executive Branch wishes to impose on all grantees, but rather as conditions that federal agencies may place on particular high-risk grantees that have struggled or failed to comply with grant conditions in the past. *E.g.*, 20 U.S.C. § 1416(e)(1)(C); 7 C.F.R. § 550.10 (removed Oct. 11, 2016); 34 C.F.R. § 80.12 (removed Dec. 19, 2014); 45 C.F.R. § 74.14 (removed Dec. 19, 2014). That is what Congress meant in Section 10102(a)(6) as well. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) ("[W]hen a statute uses [a term of art]," courts "assume" that "Congress intended it to have its established meaning."); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 147 (1920) ("Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government."). Indeed, USDOJ still embraces this narrow meaning of "special condition" by distinguishing the new Section 1373 "Special Award Condition" added to CalDOJ's COPS grant as a "High Risk Condition," while the grant's other conditions are identified simply as "Award Terms and Conditions." *Compare* Pl. RJN, Ex. E at 5 *with id.* at 20.

It is against this backdrop that any delegation of authority must be interpreted. *See Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) ("[P]rinciples of our federal system . . . belie the notion that Congress would use an obscure grant of authority to regulate areas traditionally supervised by the States' police power."). When Congress wanted to add substantive compliance conditions to JAG, it has done so. *E.g.*, 34 U.S.C. §§ 20927(a) (permitting 10 percent penalty on JAG funds for failing to "substantially implement" the Sex Offender Registration and

[5] Recompilation of OMB Circular A-102 (as amended Aug. 29, 1997), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A102/a102.pdf ("Agencies may impose special conditions or restrictions on awards to 'high risk' applicants/grantees. . . ."). When OMB transitioned from the grants management common rule to uniform guidance in 2014, and revised "special condition" to "specific condition," *see* 2 C.F.R. § 200.207, the meaning of the term did not change. *See* Uniform Guidance Crosswalk from Existing Guidance to Final Guidance at 4 (linking new "specific condition" provision to previous "special condition" provision), https://obamawhitehouse.archives.gov/sites/default/files/omb/fedreg/2013/uniform-guidance-crosswalk-from-predominate-source-in-existing-guidance.pdf.

Notification Act); 30307(e)(2) (permitting 5 percent penalty on JAG if a State fails to adopt Prison Rape Elimination Act standards); *cf. Pennhurst*, 451 U.S. at 23 ("When Congress intended to impose conditions on the grant of federal funds . . . it proved capable of doing so in clear terms."). In contrast, there is no statutory authority that "even hint[s]" at requiring compliance with the Access and Notification Conditions, or conferring a broad delegation of authority for JAG.[6] *Arlington Cent. Sch. Dist.*, 548 U.S. at 297.

Defendants' fear that the State's interpretation of Section 10102(a)(6) would jeopardize "all of the[] longstanding and never-before-challenged [JAG] conditions" is unfounded. *See* MTD at 1. Other JAG conditions are tethered to the authorizing statute that require grantees and their programs to: (a) comply with the provision of "this part," 34 U.S.C. § 10153(a)(5)(A) & (D); (b) "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require," *id.* § 10153(a)(4); and (c) comply with "all other applicable Federal laws," *id.* § 10153(a)(5)(D). None of these other conditions need to rely on Section 10102(a)(6) as a basis for imposing them. *See* Analysis of FY 2016 Byrne JAG Award Special Conditions, Ex. F to Pl's Mem. in Supp. of Mot. for Prelim. Inj., *Philadelphia*, *supra* (E.D. Pa. Sept. 28, 2017), ECF No. 21-11.

If Congress intended to provide broad authority to the Executive Branch to impose such conditions, it would have said so. All of Congress's actions in connection with JAG and otherwise—providing flexibility to jurisdictions, expressly removing a condition related to immigration enforcement, repeatedly rejecting the attachment of funding conditions to immigration enforcement, and using precise and narrow terminology to define the authority to add conditions outside the JAG authorizing statute—point toward one conclusion: The Access and Notification Conditions are not permitted. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144, 155-56, 160 (2000) (considering Congress's actions of rejecting bills adopting the agency's interpretation of its authority, and other legislative action "[t]aken together" to

[6] Further undercutting the imposition of the Access and Notification Conditions is 34 U.S.C. § 10228(a),which is codified in the same chapter as the JAG authorizing statute, and prohibits the use of federal law enforcement grants to exercise "any direction, supervision, or control" over a state or local police force or criminal justice agency.

conclude that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

II. THE JAG IMMIGRATION ENFORCEMENT CONDITIONS VIOLATE THE SPENDING CLAUSE (CAUSES OF ACTION 2 AND 3)

Congress may only use its spending power to place funding conditions that are related "'to the federal interest in particular national projects or programs.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Conditions on federal funds must also be "unambiguous," so that recipient jurisdictions may "exercise their choice knowingly, cognizant of the consequences of their participation" in the federal program. *Pennhurst*, 451 U.S. at 17. "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist.*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17). The JAG Immigration Enforcement Conditions fail these tests.

A. There is an Insufficient Nexus Between the JAG Immigration Enforcement Conditions and the Federal Purpose of JAG

The Immigration Enforcement Conditions do not have a sufficient nexus to the federal interest in the funding program, as evident by the legislative history of JAG, case law, and the INA itself. Critically, none of the JAG Immigration Enforcement Conditions were created by Congress. *See* 34 U.S.C. §§ 10151-58. Instead, the legislative history reveals that Congress did not intend for JAG funding to be conditioned on immigration enforcement, *supra* at 5-7, and did not intend for immigration enforcement to be a purpose in allotting JAG funding. The Anti-Drug Abuse Act of 1988 created the Edward Byrne Memorial State and Local Law Enforcement Assistance Program grants ("Byrne Grants") to be used toward programs that improve the criminal justice system. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6091(a), 102 Stat. 4181, 4329 (1988). From 1988 to 2006, Congress identified 29 purpose areas for Byrne Grant funding.[7] For Fiscal Year 1996, Congress separately authorized Local Law Enforcement Block

[7] Decl. of Lee Sherman in Supp. of California's Opp'n of Def's Mot. to Dismiss ("Sherman Decl."), Ex. A (identifying the 29 Byrne Grant purposes).

Grants ("LLEBG") with 9 "purpose areas" targeted to local governments for "reducing crime and improving public safety."[8] When Congress merged the Byrne Grant and LLEBG programs in 2006 to form the current JAG program, Congress consolidated the 38 purpose areas into 8 to support "criminal justice" programs. 34 U.S.C. 10152(a)(1). At no point did Congress identify a purpose area of immigration enforcement. *See Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 532 (N.D. Cal. 2017), *appeal docketed*, No. 17-17480 (9th Cir. Dec. 14, 2017) ("The conditions placed on congressional spending must have some nexus with the purpose of the implicated funds.").

Since Congress did not connect immigration enforcement to JAG funding, the Immigration Enforcement Conditions do not pass muster under the cases relied upon by Defendants. *See* MTD at 14. In *Dole*, a condition requiring a minimum drinking age of twenty-one in order for a state to receive federal highway funds was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Dole*, 483 U.S. at 208. In *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), the Ninth Circuit determined that a condition prohibiting state prisons from using federal dollars to infringe on prisoners' individual liberties "b[ore] some relationship to the purpose of the federal spending" for prisoner rehabilitation. *Id.* at 1067. Here, "[i]mmigration law has nothing to do with enforcement of local criminal laws," which is what JAG is intended to support. *Philadelphia*, 2017 WL 5489476, at *48. Immigration enforcement is generally civil in nature, and predominantly the responsibility of the federal government. *Arizona v. United States*, 567 U.S. 387, 396 (2012); MTD at 3. The use of one program (criminal justice funding) to advance the purposes of another (civil immigration enforcement) cannot satisfy the nexus test.[9] *See Texas v. United States*, No. 15-cv-151, 2016 WL 4138632, at *17 (N.D. Tex. Aug. 4, 2016) (finding Spending Clause claim viable because challenged health

[8] Local Government Law Enforcement Block Grants Act of 1995, HR 728, 104th Cong. (1995), first authorized as part of the Dep't of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-12 (1996); *see* Sherman Decl., Ex. B (identifying the 9 LLEBG purposes).

[9] The definition of "criminal justice" in the same chapter as the JAG authorizing statute, *see* MTD at 4-5, reinforces this distinction. "Criminal justice" is defined as "activities pertaining to *crime* prevention, control, or reduction, or the enforcement of the *criminal* law." 34 U.S.C. § 10251(a)(1) (emphasis added). The statute provides several examples of criminal law enforcement, none of which specifies immigration enforcement. *See id.*

insurance fee is not "'directly related,' let alone 'reasonably related'" to Medicaid as its purpose was to fund a different federal program).

Defendants' reliance on provisions within the INA to support the imposition of these conditions (MTD at 14-15) is irrelevant as the INA does not authorize JAG. Whatever the federal government's interest may be in encouraging voluntary local assistance in immigration enforcement as a general matter, that is not an interest manifested in the JAG program. *Supra* at 10-11. Moreover, the relationship between "criminal justice" and the JAG Section 1373 Condition—which the State does not "largely concede[]" complies with the Spending Clause, *contra* MTD at 17—is especially attenuated by this Administration's expanded focus on the removal of all "classes or categories of removable aliens." Pl. RJN, Ex. L at 2. A large number of immigration violators (such as visa overstayers) are subject only to civil penalties, for whom there is absolutely no intersection between immigration and criminal law. *E.g.*, 8 U.S.C. §§ 1182(a)(6)(A) & (9)(B), 1202(g); 1227(a)(1)(B). Following the Administration's directive, immigration authorities have substantially increased enforcement against those without criminal convictions or criminal history. Pl. RJN, Ex. M at 7 (showing 150% increase in ICE at-large arrests for non-criminal immigration violators between FY 2016 and FY 2017). Since Defendants view Section 1373 as applying to "every person in the United States," Pl. RJN, Ex. N at 12:23-25, the condition requires state and local governments comply with respect to persons who may have only violated the civil immigration laws. The Section 1373 Condition has no relationship to the JAG criminal justice programs for such non-criminal offenders.

B. The Access and Notification Conditions Provide the State with Inadequate Notice of What the Conditions Require

In addition, the Access and Notification Conditions violate the Spending Clause by failing to provide the State clear notice of what the conditions require.[10] Unlike the other conditions

[10] The State does not allege that the JAG Section 1373 Condition is ambiguous (MTD at 11) because, as discussed *infra* at 25-26, the State's position is that the statutory text of Section 1373 is unmistakably clear in only prohibiting restrictions on the exchange of information that squarely establishes a person's immigration or citizenship status. Defendants' muddying of the clear language of the statute with their ever-expanding misinterpretation of Section 1373, at minimum, supports the State's basis for declaratory relief.

Defendants highlight (MTD at 13), Defendants have not, and cannot, identify a federal statute that provides guidance on the Access or Notification Conditions (*see* Defs. RJN, Ex. B ¶¶ 19, 23), and have not issued specific guidance about the conditions. *Compare id.* ¶¶ 20, 21 (referring to guidance on the OJP website for those conditions) *with id.* ¶¶ 55, 56 (the Access and Notification Conditions with no reference to guidance). For example, the conditions fail to explain whether the undefined term "designed to ensure" means that a jurisdiction must adopt a policy specifically directed to the Access and Notification Conditions, or whether general regulations or practices regarding the treatment of detention facilities are sufficient. FAC ¶ 87. This "vague language does not make clear what conduct [the conditions] proscribe[] or give[] jurisdictions a reasonable opportunity to avoid [their] penalties." *Cty. of Santa Clara*, 250 F. Supp. 3d at 532.

The Access Condition is uniquely problematic, because the term "access" is undefined, with no guidance of what and how much "access" jurisdictions must provide. *See* Defs. RJN, Ex. B ¶ 55. The Access Condition also fails to provide the State with notice of whether a law or policy that requires local jurisdictions to inform inmates of their right to have a lawyer present or to decline an interview with ICE would violate the condition. FAC ¶ 86. Defendants' apparent erroneous classification of California's TRUTH Act as "denying requests by ICE officers . . . to enter prisons and jails to make arrests," *see id.* ¶ 109 n.10, when the law does not deny ICE access, further obscures what Defendants would consider to be a violation.

III. THE JAG IMMIGRATION ENFORCEMENT CONDITIONS ARE ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE APA (CAUSE OF ACTION 4)

A. Defendants' Imposition of the JAG Immigration Enforcement Conditions is Final Agency Action that is Judicially Reviewable

Defendants attempt to divert the Court from reviewing the unconstitutionality and unlawfulness of the Immigration Enforcement Conditions by contending that the Immigration Enforcement Conditions are not final agency action, and therefore, are unreviewable. *See* MTD at 16-17. However, the decision to require jurisdictions to comply with the Immigration Enforcement Conditions in order to receive JAG funds is "final agency action" because it meets the two requirements set forth by the U.S. Supreme Court: (1) it marks the "consummation of the

agency's decisionmaking process"; and (2) it is one where "rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted); *see also Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014) ("[C]ourts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled").

First, Defendants already decided to make Section 1373 an applicable law for JAG in 2016, and for FY 2017, to require all jurisdictions to certify compliance under penalty of perjury with Section 1373 before JAG funds will be disbursed. FAC ¶¶ 73, 75, 77; *cf. Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (federal agency guidance document is final agency action where it "commands," "requires," "orders," and "dictates," provides "the States their 'marching orders,'" and the agency "expects the States to fall in line"). Similarly, Defendants have made the final decision to include the Access and Notification Conditions, and to require jurisdictions to comply. FAC ¶ 76. Defendants already awarded grants with the JAG Immigration Enforcement Conditions, and they have stated that the State will receive the same conditions with "substantively identical language." *See* Pl. RJN, Ex. O ¶ 8. Therefore, Defendants' new assertion that "USDOJ has not reached a final determination as to whether to grant or deny the State's FY 2017 Byrne JAG Application," MTD at 16, raises additional legal problems. JAG is a formula grant. Having made awards to some jurisdictions for FY 2017, Defendants lack authority to refuse to carry out the remaining statutory allocations or to deny JAG funds to the State if it satisfies the conditions enumerated in the authorizing statute. *Supra* at 6; *see also In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (despite "policy reasons . . . even the President does not have unilateral authority to refuse to spend the funds").

Second, the JAG Immigration Enforcement Conditions trigger "legal consequences" and "the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff to either alter its conduct, or expose itself to potential liability." *Texas v. United States*, 201 F. Supp. 3d 810, 824 (N.D. Tex. 2016) (internal quotation marks omitted). Here, by requiring the chief legal officer to certify compliance under penalty of perjury with the Section 1373 Condition, and the grantee to certify compliance with all three conditions

under penalty of perjury, *see* FAC, Ex. A, App. IV ¶ 3(a), Defendants have committed to a view that requires California to act. *See Texas*, 201 F. Supp. 3d at 824 ("[A]n agency can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding. . . .") (internal quotation marks omitted); *see also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016) (recognizing the "pragmatic approach" that the U.S. Supreme Court has "long taken to finality").

B. The JAG Immigration Enforcement Conditions Are Arbitrary and Capricious

For an agency action to survive as not being arbitrary and capricious, the agency must not: (a) rely on factors which Congress did not intend for it to consider; (b) fail to consider an important aspect of the problem; or (c) offer an explanation for its decision that runs counter to the evidence before the agency. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency action here fails all of the above.

First, Defendants have not, and cannot, demonstrate that they acted consistent with factors that Congress intended. The Access and Notification Conditions have no support in the JAG authorizing statute or federal immigration law. *Supra* at 5-7, 10-12. Before 2016, JAG was never linked to Section 1373. Then, in 2016, without providing any evidence that Congress intended for immigration enforcement to be a purpose area for JAG, USDOJ declared Section 1373 an "applicable law." FAC ¶¶ 75, 81. At no point have Defendants explained how the new conditions are consistent with the underlying goals of JAG, or with Congress's intent in adopting JAG. That the federal government may have an interest in immigration enforcement, MTD at 18-19, does not mean that the interest is sufficiently connected to the JAG authorizing statute to satisfy the arbitrary and capricious analysis. *See Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 186-87 (3rd Cir. 1983) (invalidating agency action on grant conditions as arbitrary and capricious where the agency sought "to accomplish matters not included in that statute").

Defendants have not met the other requirements of the arbitrary and capricious analysis. Defendants attach two documents to their motion which they purport contains the justification for the two conditions: the 2016 Office of Inspector General ("OIG") Memorandum and a July 25,

2017 "Backgrounder on Grant Requirements" issued by the Office of Public Affairs. MTD at 18; Defs. RJN, Exs. P, Q. In neither document do Defendants show that they considered the ample evidence from jurisdictions around the country that law enforcement policies that collaborate and build trust with immigrant communities result in positive criminal enforcement and safety outcomes. *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem. . . ."); *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) ("The agency, however, is required to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made. . . .") (internal quotation marks omitted). USDOJ has not "cogently explain[ed] why it has exercised its discretion in a given manner" with respect to the Immigration Enforcement Conditions. *State Farm*, 463 U.S. at 48.

Although "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009), the documents relied upon by Defendants fail to justify the new conditions. The OIG Memorandum does not discuss or contemplate how the conditions are consistent with Congress's intent in adopting JAG or, as discussed above, the contrary evidence before the agency. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is. . . a reason for holding an interpretation to be an arbitrary and capricious change from an agency practice under the Administrative Procedure Act."). Neither does the Backgrounder on Grant Requirements. A general recitation of a "goal of increasing information sharing," *see* Defs. RJN, Ex. Q, "[falls] short of the agency's duty to explain why it deemed it necessary to overrule its previous position." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). Defendants' failure to provide a reasoned justification for the policy reversal merits denial of Defendants' motion as to the State's APA claim. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007) (agency decision was arbitrary and capricious where "record does not indicate that the decision

was the output of a rational decision-making process" and agency "departed from its two-decade-old precedent without supplying a reasoned analysis for its change of course").

IV. THE STATE IS ENTITLED TO A DECLARATORY JUDGMENT THAT THE IDENTIFIED STATE LAWS COMPLY WITH SECTION 1373 (CAUSE OF ACTION 5)

A. The State's Declaratory Judgment Claim is Justiciable

1. The State Has Standing to Seek a Declaration that the Amended TRUST Act, TRUTH Act, and State Confidentiality Statutes Comply with Section 1373

To bring a claim under the Declaratory Judgment Act, a plaintiff must demonstrate an "actual controversy," such that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Cty. of Santa Clara v. Trump*, No. 17-cv-574, --- F. Supp. 3d ---, 2017 WL 3086064, at *10 (N.D. Cal. Jul. 20, 2017) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). An entity facing an enforcement action may prove standing by demonstrating a well-founded fear of enforcement and a threatened injury that is "sufficiently real and imminent" or "is itself causing present injury." *Cty. of Santa Clara*, 250 F. Supp. 3d at 519 (citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)), *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)). Defendants argue that since they have yet to take any agency action against the State's other laws, the State has no standing to seek a declaration on any statute other than the Values Act. MTD at 21-22. However, Defendants' actions against the State and other jurisdictions have created a real and immediate controversy about whether the amended TRUST Act,[11] TRUTH Act, and State Confidentiality Statues comply with Section 1373.

Defendants' focus on the Alleged Non-Compliance Letter about the Values Act ignores the other occasions the federal government has called out California's laws. On March 31, 2017, Defendant Sessions, presumably referring to the TRUTH Act, incorrectly stated that the "State of California . . . ha[s] enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by . . . denying requests by ICE officers and agents to enter

[11] Since the Amended TRUST Act, Cal. Gov't Code § 7282.5(a), regulates the provision of release dates in the same manner as the Values Act, which Defendants object to, standing separately exists for the TRUST Act on that basis as well.

prisons and jails to make arrests." *See* FAC ¶ 109 n.10. ICE Acting Director Homan later testified before Congress that jurisdictions that "have some sort of policy where they don't . . . allow [ICE] access to the jails" violate Section 1373. *Id.* ¶ 109. On April 21, 2017, before the State's adoption of the Values Act, Defendants Sessions and USDOJ claimed that California "ha[s] laws that potentially violate 8 U.S.C. § 1373." *Id.* ¶ 110. As this Court already found in the litigation surrounding the Executive Order directed at sanctuary jurisdictions, "[t]he Government's specific criticisms of . . . California," which occurred prior to the passage of the Values Act, "support a well-founded fear that [the jurisdictions] . . . could be subject to defunding indirectly through enforcement against California." *Cty. of Santa Clara*, 250 F. Supp. 3d at 524; *see Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 233 (6th Cir. 1985) (state had standing, despite no pending enforcement action, when the federal government's position rendered uncertain the effective enforcement of the state statute).

The record that has developed since further demonstrates the State's basis for standing as to these statutes. Defendants have sought to enforce Section 1373 against laws and policies similar to the State's Confidentiality Statutes. *See* Pl. RJN, Exs. B at 1-2, C at 1; Def.'s Opp'n to Mot. for Prelim. Inj., *Philadelphia*, *supra* (E.D. Pa. Oct. 12, 2017), ECF No. 28, at 38-39 (stating the city's crime victim policy "do[es] not comply with Section 1373" on its "face"). In *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), the Supreme Court concluded that one set of plaintiffs had standing to challenge a law because they intended to engage in the same speech subject to prior enforcement actions. *Id.* at 2346. In *Texas*, 201 F. Supp. 3d at 820, the district court found that enforcement actions against other non-party jurisdictions with similar policies as the litigant states provided Texas and other states standing to challenge the Title IX guidance that was the basis of those enforcement actions. *Id.* at 820. Likewise, Defendants' actions against other jurisdictions with similar laws present a credible fear that Defendants are planning to enforce Section 1373 against the State's statutes. To be sure, Defendants have kept their options open by expressly "reserv[ing] the right to identify additional bases of potential violations of 8 U.S.C. § 1373." Defs. RJN, Ex. N at 2. The State need not wait for Defendants to "drop the hammer" in order for the State to "have its day in court." *Hawkes*, 136 S. Ct. at 1815.

Because Defendants' interpretation of Section 1373 and the certification requirements undermine the State's "exercise of its sovereign power to create and enforce a legal code . . . it inflict[s] on the state the requisite injury-in-fact." *Va. ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (internal quotation marks and emphasis omitted). Defendants' actions also threaten a "loss of [JAG] funds promised under federal law" and awarded COPS funds, which, "satisfies Article III's standing requirement." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015). Additionally, the certification requirement creates legal jeopardy because the Attorney General and counsel for local jurisdictions must affirm compliance under penalty of perjury. FAC ¶ 77. In fact, as Defendants made clear at the hearing on the preliminary injunction, they expect that any jurisdiction that executes their certification agrees with "the Government's interpretation" of Section 1373. Pl. RJN, Ex. P at 29:16-19. These circumstances collectively support a well-founded fear of enforcement and injury that is "real and immediate." *O'Shea*, 414 U.S. at 496.

2. The State's Request for a Declaration that the Values Act Complies with Section 1373 is Ripe

While conceding that the State has standing to seek a declaration that the Values Act complies with Section 1373, Defendants argue that the State must wait until the completion of the administrative process for the State's declaratory judgment claim to be ripe. MTD at 22-24.[12] However, as both the Supreme Court and Ninth Circuit have recognized, in challenges like this where the issue turns on whether there is a substantial risk that the harm will occur, the constitutional standing and ripeness issues "boil down to the same question." *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)); *see also Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014) (stating constitutional "ripeness coincides squarely with standing's injury in fact prong" and evaluating claim on basis of whether alleged injury is "imminent") (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)).

[12] Defendants do not challenge the ripeness of the State's declaratory relief claim as to the other state statutes. *See* MTD at 22.

Injury in fact, and thus ripeness, is shown where there is "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). For constitutional ripeness, the Ninth Circuit "look[s] to a three-part test: (1) whether the plaintiff has articulated a clear plan to violate the law in question; (2) whether there has been a threat of prosecution from the state; and (3) whether the statute at issue has previously been enforced." *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009) (citing *Thomas*, 220 F.3d at 1138-39). "In other words, 'a genuine threat of enforcement' is sufficient to render a claim ripe for review." *Id.* (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987)). California satisfies this standard because: (1) the State's response to the Alleged Non-Compliance Letter effectively "articulated a clear plan to violate [Defendants' interpretation of] the law in question;" (2) Defendants made a "threat of prosecution" against California in the letter and in public statements; and (3) Defendants sought to enforce Section 1373 35 times since October 2017, including against California. *See, e.g.*, Defs. RJN, Ex. N; Pl. RJN, Exs. A, B, and C.

Although Defendants argue that the State's Values Act claim is constitutionally unripe, they continue to focus their argument on elements consistently associated with prudential ripeness. *See* MTD at 22-24 (discussing need for further factual development, availability of administrative process, and lack of administrative finality).[13] "The Supreme Court has . . . question[ed] 'the continuing vitality of the prudential ripeness doctrine' and highlighted that prudential ripeness is distinct from constitutional ripeness." *Cty. of Santa Clara*, 250 F. Supp. 3d at 529 (quoting *Susan B. Anthony List*, 134 S. Ct. at 2347). The Ninth Circuit has declined to analyze prudential ripeness when constitutional ripeness is satisfied. *Mont. Envtl. Info. Ctr.*, 766 F.3d at 1188 n.3. And this Court found that "contingent future events" do not necessarily make a matter unripe, for if that was so, "virtually all pre-enforcement cases would be non-justiciable on prudential

[13] Although Defendants insist that their cited cases involve more than prudential ripeness, that is exactly what these cases support. *See* MTD at 20-21 & n.7. For example, Defendants rely on *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), which *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014), describes as setting the standard for prudential ripeness. *Id.* at 900.

ripeness grounds." *Cty. of Santa Clara*, 250 F. Supp. 3d at 529 (placing *United States v. Texas* analysis in the prudential ripeness inquiry).[14]

Regardless of how Defendants characterize the prudential ripeness test, the State satisfies the additional considerations of fitness and hardship as well. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). A case involving an agency action is prudentially ripe when: (1) delayed review causes hardship to the plaintiff; (2) judicial intervention does not inappropriately interfere with administrative action; and (3) further factual development is unnecessary. *Id.* All support ripeness here.[15] First, there is "substantial hardship" from delayed review due to the legal jeopardy of signing the 2017 certification under penalty of perjury and the prospect of subsequent claw back. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). The State also presently faces a hardship because Defendants have withheld the State's awarded COPS funds pending completion of their "inquiry" into the State's Section 1373 compliance. Pl. RJN, Ex. E. Furthermore, under 28 C.F.R. § 18.5(i), Defendants may suspend the State's JAG funding pending completion of the administrative process.

Second, judicial action would not inappropriately interfere with administrative action. Defendants made clear in the Alleged Non-Compliance Letter that they view the Values Act as violating Section 1373 unless BSCC certifies that it interprets and applies the Act to not restrict the sharing of release dates and home addresses. BSCC could not so certify, presenting a purely legal question regarding the proper reach of Section 1373. *See, e.g.*, *Texas*, 201 F. Supp. 3d at 824 (rejecting argument that administrative process should finish where issues were "purely legal" and defendants asserted plaintiffs were non-compliant with their view of the statute). Under the "firm prediction" rule, which the Ninth Circuit has adopted, "if the court can make a

[14] In any event, the "contingent future events" in *United States v. Texas*, 523 U.S. 296 (1998), are distinguishable because Texas had "no idea of whether or when" the state law would be enforced, rendering a triggering potential enforcement action by the federal government uncertain. *Id.* at 299-300. Here, a specific enforcement action has already begun. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835 (9th Cir. 2001), also relied upon by Defendants, deals with a Fifth Amendment constitutional takings claim, which has its own specific ripeness test. *Id.* at 850-51.

[15] Although Defendants cite to the *Chicago* court's denial of the city's motion for reconsideration on its Section 1373 claim, MTD at 23, that portion of the *Chicago* opinion is dicta as the court had already determined that the city's as-applied challenge should be denied because the court's decision on the underlying motion was based on a facial challenge of Section 1373. *City of Chicago v. Sessions*, No. 17-cv-5720, 2017 WL 5499167, at *3 (N.D. Ill. Nov. 16, 2017).

firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may well be a justiciable controversy." *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 69 (1993) (O'Connor, J., concurring); *accord Immigrant Assistance Project of the L.A. Cty. Fed'n of Labor (AFL-CIO) v. INS*, 306 F.3d 842, 861-62 (9th Cir. 2002) (holding that under the firm prediction rule, "a suit challenging a benefit conferring rule is . . . not 'necessarily unripe' simply because the agency has *not yet denied* a filed application.") (emphasis in original); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1436 (9th Cir. 1996) (determining there to be a justiciable conflict because the Ninth Circuit could "firmly predict that [the] application would be denied").

Defendants' reference to USDOJ regulations, MTD at 23, does not matter. The Alleged Non-Compliance Letter does not appear to begin the administrative process. *See* 28 C.F.R. § 18.5(a)-(b). The regulations also say nothing about the present situation—where the State seeks a determination relating to its ability to certify compliance for future grants. The State cannot be required to comply with an administrative process that does not exist. *See Darby v. Cisneros*, 509 U.S. 137, 138, 146-47 (1993). Additionally, the State's interests "weigh heavily against requiring administrative exhaustion" when later court action would cause "undue prejudice" in the form of "an indefinite [administrative] timeframe" and, as described above, "irreparable harm if unable to secure immediate judicial consideration." *McCarthy v. Madigan*, 503 U.S. 140, 146-47 (1992) (superseded by statute as recognized by *Woodford v. Ngo*, 548 U.S. 81, 84-85 (2006)). Further, an administrative remedy is inadequate here since an agency hearing officer lacks "institutional competence" to determine "the constitutionality of a statute." *Id.* at 147-48.[16] Under similar circumstances, a court has applied these factors and found that a state need not exhaust the administrative process to initiate a legal action to prevent the federal government from penalizing it for failing to meet certain federal funding conditions. *Hodges v. Shalala*, 121 F. Supp. 2d 854,

[16] Defendants address only the third exception to administrative exhaustion: "where the administrative body is shown to be biased or has otherwise predetermined the issue." *McCarthy*, 503 U.S. at 148; *see* MTD at 23 n.8. Defendants' repeated statements about the reach of Section 1373 created a certain legal conflict here, and in any event, the two other exceptions apply.

870 (D.S.C. 2000) (finding harm of incurred penalties, the constitutionality of a statute at issue, and the agency decision was "somewhat of a foregone conclusion").

Third, as Defendants concede, *see* Pl. RJN, Ex. Q at 7, no factual development is necessary to decide whether the State's laws comply with Section 1373 on their face. Courts routinely and properly decide declaratory judgment actions about a state law's potential textual conflicts with federal laws without factual development. *See, e.g.*, *Pac. Gas*, 461 U.S. at 201 (holding declaratory judgment action "need not await" factual development of California's implementation of the challenged laws since issue was "predominantly legal"); *Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996) (deciding issue of federal preemption of state law on its face without "further factual development"). Moreover, there is no requirement that a declaratory relief claim remove all "legal jeopardy," *contra* MTD at 23, where the statute itself explicitly makes relief available "whether or not further relief is or could be sought." 28 U.S.C. § 2201; *see Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014); *MedImmune*, 549 U.S. at 128-29. Defendants' recent request that the State produce documents in connection to its compliance with Section 1373 is a red herring. *See* Pl. RJN, Ex. D. Defendants have already "determined" that the Values Act does not comply with their interpretation of Section 1373 by virtue of the State's failure to provide confirmation that the Values Act does not regulate the exchange of release dates and home addresses to immigration authorities. *See* Defs. RJN, Exs. N, O.

B. The Values Act Complies with Section 1373

Defendants also misinterpret both the Values Act and Section 1373 to justify withholding funding from the State. *See* MTD at 24-27. As an initial matter, the Values Act contains a savings clause that permits compliance with all aspects of Section 1373, Cal. Gov't Code § 7284.6(e), meaning the Values Act complies with Section 1373 on its face. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 592 (2011) (the "authoritative statement" of a statute is its plain text, including its savings clause). Accordingly, the Values Act does not prohibit the disclosure of a name for the purpose of making an inquiry about a person's immigration status with governmental entities. *Contra* MTD at 26.

Furthermore, the Values Act provisions regulating the exchange of release dates and "personal information," Cal. Gov't Code § 7284.6(a)(1)(C)-(D), do not violate Section 1373 because these provisions do not restrict the exchange of "information regarding . . . citizenship and immigration status." Defendants, however, urge this Court to go beyond the plain text of the statute and rule contrary to Judge Spero's decision in *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994 (N.D. Cal. 2017), *appeal docketed*, No. 17-16283 (9th Cir. June 21, 2017) and adopt an expansive interpretation of "information regarding . . . citizenship and immigration status" that encompasses essentially anything about an individual's "identity." *See* MTD at 26.[17]

This Court should reject Defendant's convoluted and erroneous reading of Section 1373. To start, Defendants claim that the omission of "regarding" in Section 1373(c) suggests its use in Section 1373(a) intended that provision to cover more than just status information. MTD at 25. But the absence of "regarding" in Section 1373(c) can be attributed to that subsection solely covering information in the possession of federal immigration authorities. Federal immigration authorities, presumably, have definitive information about a person's "citizenship or immigration status," so there is no need to use the "regarding" qualifier. *Cf.* MTD at 26. Section 1373(a), however, covers information that state and local governments may have "regarding" the citizenship or immigration status of a person, which is not available in the immigration authorities' databases, and that is not definitive, but on its face, demonstrates a person's status. *See, e.g.*, *United States v. Quintana*, 623 F.3d 1237, 1238 (8th Cir. 2010) (state highway patrol communicated to Customs and Border Patrol information about person who was not in CBP's database). Defendants also contend that 8 U.S.C. § 1357(g)(10) ties "immigration status" to "presence," and observe that a dictionary defines "presence" as "being in a certain place and not elsewhere." MTD at 26. But Section 1357(g)(10) refers to a person "not lawfully present," in

[17] Defendants largely ignore *Steinle* and completely ignore Judge Spero's holding regarding Section 1373. *See* MTD at 26. Instead, Defendants rely solely on the California Court of Appeal's discussion of Section 1373's legislative history in *Bologna v. City & Cty. of San Francisco*, 192 Cal. App. 4th 429 (Cal. Ct. App. 2011). *Steinle* rejected *Bologna's* analysis: "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Steinle*, 230 F. Supp. 3d at 1014-15 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)); *see also Arlington Cent. Sch. Dist.*, 548 U.S. at 304 (dismissing relevance of legislative history when it was the sole support for the position that expert fees were recoverable under the federal law).

other words, to one's "*unlawful* presence," which the INA itself defines narrowly as occurring when an individual is "present . . . after the expiration of the period of stay authorized by the Attorney General or is present . . . without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii).

Moreover, such language does not explain how, as Defendants suggest, release dates, home addresses, or other information about a person's identity is "regarding" an individual's immigration status (or unlawful presence). *See* MTD at 26-27. Because Section 1373's restrictions directed at state and local governments "alter the usual constitutional balance between the States and the Federal Government, [Congress] must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460-61 (quoting *Will*, 491 U.S. at 65); *see also Bond*, 134 S. Ct. at 2089. In *Gregory*, the Supreme Court applied the "plain statement rule" to "avoid a potential constitutional problem" that would interfere with the "authority of the people of the States to determine the qualifications of their most important government officials." 501 U.S. at 463-64. When it was not clear that Congress intended to include judges within an exception to the federal Age Discrimination in Employment Act, the relevant test was whether "Congress ha[d] made it clear that judges are *included*" because "it must be plain to anyone reading the Act that it covers judges." *Id.* at 467 (emphasis in original). Since it was not clear, the Court determined that the statute did not apply to state judges. *Id.* In *Bond*, despite the perpetrator violating the plain text of a federal criminal statute banning "chemical weapons" for non-peaceful purposes, the Court declined to adopt the federal government's expansive definition of "chemical weapons" that would "alter sensitive federal-state relationships" by transforming "traditionally local criminal conduct into a matter for federal enforcement." *Bond*, 134 S. Ct. at 2091 (quoting *United States v. Bass*, 404 U.S. 336, 349-50 (1971)) (quotation marks omitted).

Congress did not make Section 1373 "unmistakably clear" that information about a person's home address or family members is governed by the statute. Notwithstanding the Northern District's holding in *Steinle* that "no plausible reading of 'information regarding . . . citizenship or immigration status' encompasses the release date of an undocumented inmate," 230 F. Supp. 3d at 1015, Defendants also argue that "release dates" fall within the scope of Section

1373 because of their relevance to the federal government's responsibilities to take inadmissible immigrants into custody upon release by the State. MTD at 26-27 (citing 8 U.S.C. § 1226). However, while a person's criminal offense, which law enforcement may disclose under the Values Act, Cal. Gov't Code § 7284.6(b)(2), may alter the immigration status of a person, an individual does not become more or less "lawfully present" upon release from state custody. *See* 8 U.S.C. §§ 1226(c), 1231(a) (setting procedures for when immigration authorities may take a person into custody, without connecting a person's lawful status to his or her release date).

The Court need not look further than other provisions within the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, which created Section 1373, to find language better suited to cover the type of information that Defendants now seek to inject into Section 1373. If Congress wanted Section 1373 to prohibit restrictions on the exchange of all information about an individual's identity, it could have used the "*any information which relates to an alien*" language from Section 384 of the same Act (8 U.S.C. § 1367) (emphasis added), which generally prohibits disclosure of such information. Other provisions of the Act similarly demonstrate that Congress knew how to use precise terminology when it wished to cover information about a person's address, nationality, or associations.[18] As the *Steinle* court concluded: "if the Congress that enacted [the Act] had intended to bar *all* restrictions of communication between local law enforcement and federal immigration authorities, or specifically to bar restrictions of sharing inmates' release dates, it could have included such language in the statute." 230 F. Supp. 3d at 1015 (emphasis in original); *see also Custis v. United States*, 511 U.S. 485, 492 (1994) (Congress's use of specific language in one provision of a statute demonstrates that "when Congress intended to" include that language, "it knew how to do so").

[18] *See, e.g.*, *id.* § 302, 8 U.S.C. § 1225(a)(5) (permitting immigration officers to ask applicants "any information . . . regarding the purposes and intentions of the applicant . . . including the applicant's intended length of stay . . . and whether the applicant is inadmissible"); *id.* § 241, 8 U.S.C. § 1231(a)(3)(C) (requiring an immigrant "to give information . . . about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate"); *id.* § 414, 8 U.S.C. § 1360(c)(2) (requiring the Social Security Commissioner to provide "information regarding the name and address of the alien").

C. Enforcing Section 1373 Against the Values Act Would Constitute Unconstitutional Commandeering

Defendants' enforcement of Section 1373 against the Values Act presents another problem: it commandeers the State's oversight of governmental employees and handling of its residents' confidential personal information in violation of the Tenth Amendment. Defendants cannot evade the Tenth Amendment commandeering analysis by framing the issue as a Spending Clause question of a "condition on receipt of federal funds that the State and its subdivisions are free to accept or reject." MTD at 28. Congress did not condition JAG (or COPS) funding on compliance with any aspect of Section 1373. Rather, Defendants have invoked their ability to require compliance with "applicable federal laws" as their basis for imposing the Section 1373 Conditions for JAG and COPS. *See id.* at 5, 7. Therefore, the Section 1373 Conditions are confined to what the "applicable federal law" requires or prohibits to the extent the Tenth Amendment allows, and nothing more. If the conditions are not so limited, then Defendants certainly lack authority to impose them. *See Cty. of Santa Clara*, 250 F. Supp. 3d at 531-32.

Thus, the relevant question for this Court is whether Section 1373 can be enforced against the State's statutes under the Tenth Amendment of the Constitution. The answer is no. Both *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), hold that the federal government may not "commandeer" state and local governments and officials by "directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 162; *see also Printz*, 521 U.S. at 937. *Printz*, which considered the constitutionality of the Brady Act's mandates to law enforcement officers, is particularly informative.[19] The *Printz* Court rejected Defendants' argument that "important purposes" of a statute, in this case, the "express goals of the INA," MTD at 28, can prevent a Tenth Amendment violation where "the whole *object* of the law [is] to direct the functioning of the state executive." 521 U.S. at 931-32 (emphasis in original). *Printz* also establishes that the intrusion on state

[19] *Printz* does not undermine the State's position (*contra* MTD at 30) just because the Court distinguished the Brady Act's background check mandate from statutes that require the provision of information. The Supreme Court expressly left open the question of whether such statutes violate the Tenth Amendment. 521 U.S. at 918.

sovereignty is "worse" when the federal government strips away at a State's discretion to make policies in areas "within [its] proper sphere of authority," *id.* at 927-28; and the Constitution's objectives of preserving local accountability are undermined when a federal directive forces state and local governments to absorb costs and take the blame for implementing a federal program. *Id.* at 920, 930; *see also Koog v. United States*, 79 F.3d 452, 457-60 (5th Cir. 1996) ("Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies.").

The same concerns that animated *Printz* apply to Defendants' enforcement of Section 1373 against the Values Act. The "whole object" of Defendants' interpretation of Section 1373 is to command the State to allow the unfettered use of its resources and personnel to provide information for federal immigration enforcement purposes. *Printz*, 521 U.S. at 932. As with the Brady Act, Defendants' enforcement of Section 1373 here to information that is not "available to the public," *see* MTD at 24, regulates "information that belongs to the State and is available to them only in their official capacity." *Printz*, 521 U.S. at 932 n.17. Just as local law enforcement officers were the face of public disapproval for standing between a gun purchaser and a gun with the Brady Act, *id.* at 930, enforcing Section 1373 against the confidentiality provisions in the Values Act would cause the State and its law enforcement to be unjustly blamed if witnesses and victims are less inclined to report crimes, and relationships between immigrant communities and law enforcement are strained as a result. *See* FAC ¶¶ 41, 119. In addition, the enforcement of Section 1373 against the Values Act intrudes on the State's discretion to make nuanced decisions regulating the specific circumstances where personal information and release dates are protected from disclosure. *See* Cal. Gov't Code § 7284.6(a)(1)(C)-(D). Finally, like the mandated background checks in *Printz*, the prohibition on commandeering applies with maximum force because Defendants' interpretation of Section 1373 directs the functioning of state and local law enforcement "within their proper sphere of authority," *i.e.* determining how best to address crime and public safety. *Printz*, 521 U.S. at 928; *see also United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and

vindication of its victims."). No less of a concern here is how "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself —the police officers of the 50 States." *Printz*, 521 U.S. at 922.

Printz is more analogous to Section 1373's application than the unsuccessful challenge to the Driver's Privacy Protection Act's ("DPPA") regulation on "handling of information" in *Reno v. Condon*, 528 U.S. 141 (2000). *See* MTD at 29. First, *Reno* allowed Congress to regulate states as operators of databases and sellers of information in the same manner that Congress regulates private entities. 528 U.S. at 151. Here, Section 1373 is not "generally applicable," but rather a specific prohibition and command on the actions of state and local governments to allow use of their resources and personnel for a federal program, an issue that the Supreme Court explicitly left open in *Reno*. *See id.* Second, the DPPA did not encroach on states' sovereignty by expressly permitting the disclosure of information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." 18 U.S.C. § 2721(b)(1). Third, by limiting the State from protecting the confidentiality of its residents, the Defendants here do what the statute in *Reno* did not: "require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151.[20]

Although two federal courts have upheld Section 1373 against facial constitutional challenges, neither ruling is dispositive here, and both underscore the significant concerns about extending Section 1373 to conflict with the Values Act. In *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), the Second Circuit held that Section 1373 was facially constitutional, but recognized:

> The City's concerns [about confidentiality] are not insubstantial. The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved. Preserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees.

[20] Similarly, *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002), *see* MTD at 29, is not availing, where the Fourth Circuit upheld a statute regarding the provision of information because it did not "preempt[] or overrid[e] any State law" that provided greater benefits or protections, requiring nothing more than that "authorized, or provided by [the state's] own legislative command." *Id.* at 214. The opposite is true here.

179 F.3d at 36. The Second Circuit acknowledged the Tenth Amendment may limit Section 1373 from being "an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees," but did not consider those arguments in earnest because the city's policy promoted "non-cooperation while allowing City employees to share freely the information in question with the rest of the world." *See id.* at 37. The district court in *Chicago* also expressed concern with Section 1373's "practical" impact of limiting state and local governments' ability "to decline to administer or enforce a federal regulatory program" and "extricate their state or municipality from involvement in a federal program." 264 F. Supp. 3d at 949.

Conversely, the Values Act and Amended TRUST Act regulate the sharing of release dates and "personal information" when that information is not "available to the public." Unlike in *City of New York*, the State is not selectively restricting the exchange of confidential information with immigration authorities to "frustrate[] federal programs." 179 F.3d at 35. Therefore, the federal government's command that state and local governments allow the use of "information that belongs to the State and is available to them only in their official capacity" to be disclosed to immigration authorities, even when disclosure is similarly prohibited to everyone else, violates the Supreme Court's holding in *Printz*. 521 U.S. at 932 n.17.

CONCLUSION

For the foregoing reasons, California requests that Defendants' Motion be denied in full.

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