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 14

15 IN THE UNITED STATES DISTRICT COURT

16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 SAN FRANCISCO DIVISION

18 COUNTY OF SANTA CLARA,

19 Plaintiff,

20 v.

21 DONALD J. TRUMP, *et al.*,

22 Defendants.

No. 3:17-cv-00574-WHO

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS;
MEMORANDUM OF POINT AND
AUTHORITIES**

Date: July 19, 2017

Time: 2:00 p.m.

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28NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on Wednesday, July 19, 2017, at 2:00 p.m., or as soon thereafter as counsel may be heard, before The Honorable William H. Orrick, in Courtroom 2, 17th Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the defendants will move, and hereby do move, for dismissal of this action under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on the following Memorandum of Points and Authorities, the evidence and records on file in this action, and any other written or oral evidence or argument that may be presented at or before the time this motion is heard by the Court.¹

MEMORANDUM OF POINTS AND AUTHORITIESINTRODUCTION

On January 25, 2017, the President signed Executive Order 13,768 for the declared purpose of “direct[ing] executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States.” *See* Exec. Order No. 13,768, § 1, 82 Fed. Reg. 8,799 (Jan. 30, 2017). Section 9 of the Order, which is the subject of this litigation, directs the Attorney General and the Secretary of Homeland Security (“Secretary”), “in their discretion and to the extent consistent with law, [to] ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 . . . are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes” *Id.* § 9(a). Section 9 also instructs the Attorney General to take “appropriate enforcement action” against any entity that violates Section 1373 or has a statute or policy that “prevents or hinders the enforcement of Federal law.” *Id.* Section 1373 provides, among other things, that no government entity or official may prohibit or restrict the sending or receiving of information regarding the citizenship or immigration status of any individual to federal immigration authorities. 8 U.S.C. § 1373(a).

¹ Plaintiff names “DOES 1-100” as defendants in this matter but does not identify those individuals or specify the capacity in which they are being sued (Doc. 1 ¶ 24). Undersigned counsel does not purport to represent those individuals, and claims against them are not at issue in this motion to dismiss. Moreover, because those individuals have not been named or served, granting this motion would resolve this litigation in its entirety.

1 The Order is a presidential directive, directed to the Attorney General, the Secretary, and
2 other federal officials. It does not purport to alter the existing requirements of Section 1373 (or
3 any other federal law), to impose new burdens on state or local jurisdictions, or to expand the
4 legal authority of the Attorney General or the Secretary. Rather, it simply announces the policy
5 of the Executive Branch and directs the Attorney General and the Secretary, in their discretion
6 and consistent with their existing legal authority, to ensure that jurisdictions that willfully refuse
7 to comply with Section 1373 not be eligible to receive federal grants and to take enforcement
8 action as appropriate. *Id.*

9 The Attorney General, in the exercise of his discretion under Section 9(a) of the Order and
10 his overall responsibility to advise executive department heads, *see* 28 U.S.C. § 512; 28 C.F.R.
11 § 0.5(c), has issued authoritative, binding guidance regarding the implementation of Section 9(a).
12 *See* Mem. from Att’y Gen. for All Dep’t Grant-Making Components (May 22, 2017) (Attachment
13 1 hereto) (hereinafter AG Mem.).² Among other things, the AG Memorandum provides (1) that
14 the grant eligibility provision in Section 9(a) applies “solely to federal grants administered by the
15 Department of Justice or the Department of Homeland Security [“DHS”], and not to other sources
16 of federal funding[,]” (2) that the Department of Justice (“DOJ”) will require jurisdictions
17 applying for certain DOJ-administered grants “to certify their compliance with federal law,
18 including 8 U.S.C. § 1373,” (3) that the certification will be required only where the agency is
19 “statutorily authorized to impose such a condition,” (4) that “[a]ll grantees will receive notice of
20 their obligation to comply with section 1373,” and (5) that only “jurisdiction[s] that fail[] to
21 certify compliance with section 1373 will be ineligible to receive [an] award[.]” AG Mem. at 1-2.

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24 ² This Court can freely consider the AG Memorandum on this motion to dismiss without
25 affecting the nature of the motion. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th
26 Cir. 1988) (“[I]t is proper for the district court to take judicial notice of matters of public record
27 outside the pleadings and consider them for purposes of the motion to dismiss.”) (internal
28 quotation marks omitted); *Aguilar v. Wells Fargo Bank, N.A.*, No. 12-CV-03653 YGR, 2012 WL
5915124, at *2 (N.D. Cal. Nov. 26, 2012) (stating that court “may consider matter that is properly
the subject of judicial notice, such as court filings and other public records, without converting a
motion to dismiss into one for summary judgment”).

1 With Respect to Iran and Syria”). The Secretary has also consistently exercised similar executive
2 discretion in the enforcement of federal immigration law. *See, e.g.*, Mem. from John Kelly, Sec’y
3 of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Protection, et
4 al., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).³

5 The INA contains a number of provisions regarding the involvement of state and local
6 authorities in the enforcement of immigration law. For example, Section 287(g) of the INA
7 authorizes the Secretary to enter into written agreements with a state or local government under
8 which officers of such government may “perform a function of an immigration officer in relation
9 to the investigation, apprehension, or detention of aliens in the United States.” 8 U.S.C.
10 § 1357(g)(1). Likewise, the INA provides for cooperation with DHS in the “identification,
11 apprehension, detention, or removal of aliens not lawfully present in the United States,” even
12 without a formal cooperation agreement. *Id.* § 1357(g)(10)(B). Another provision, 8 U.S.C.
13 § 1373, ensures the sharing of information between federal and state actors:

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

18 *Id.* § 1373(a); *see* Pub. L. No. 104-208, Div. C, Title VI, § 642, 110 Stat. 3009, 3009-707 (1996).
19 Section 1373 also proscribes prohibiting or restricting any government entity from “maintaining”
20 information regarding the immigration status of any individual. 8 U.S.C. § 1373(b).

21 Well before the issuance of Executive Order 13,768, the compliance of state and local
22 governments with Section 1373 has been of interest to federal agencies because such govern-
23 ments are recipients of federal grants. For example, the Inspector General of the Department of
24 Justice issued a memorandum on May 31, 2016, as plaintiff notes (Doc. 1 ¶ 43), describing a
25 concern that several state and local governments receiving federal grants were not complying
26 with 8 U.S.C. § 1373. *See* Mem. from Michael E. Horowitz, Inspector Gen., to Karol V. Mason,

27 ³ This memorandum is available at [https://www.dhs.gov/sites/default/files/
28 publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-
Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

1 Assistant Att’y Gen., Office of Justice Programs, *Department of Justice Referral of Allegations of*
2 *Potential Violations of 8 U.S.C. § 1373 by Grant Recipients* (May 31, 2016), available at
3 <https://oig.justice.gov/reports/2016/1607.pdf>. Although the Inspector General observed that some
4 applications of certain local ordinances might be inconsistent with Section 1373, *id.* at 4-8, the
5 report nevertheless noted that “no one at DHS . . . has made a formal legal determination whether
6 certain state and local laws or policies violate Section 1373, and we are unaware of any
7 Department of Justice decision in that regard.” *Id.* at 8 n.12.

8 II. Executive Order 13,768

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

15 As permitted by the INA, Executive Order 13,768 establishes priorities regarding aliens
16 who are subject to removal from the United States under the immigration laws. *Id.* § 5, 82 Fed.
17 Reg. at 8,800. Several provisions of the Order instruct officials to take actions directing future
18 conduct, including instructions to promulgate certain regulations within one year, to take “all
19 appropriate action” to hire additional immigration officers, to seek agreements with state and
20 local officials under Section 287(g) of the INA (referred to above), to develop a program to
21 ensure adequate prosecution of criminal immigration offenses, and to establish an office to
22 provide certain services to victims of crimes committed by removable aliens. *Id.* §§ 6, 7, 8, 11,
23 13, 82 Fed. Reg. at 8,799-802. Throughout, the Order specifies that federal officials are to take
24 these actions as “permitted by law” or as “consistent with law.” *Id.* §§ 7, 8, 9(a), 10(b), 12, 14,
25 17, 18(b), 82 Fed. Reg. at 8,799-802.

26 Section 9 of the Executive Order provides that “[i]t is the policy of the executive branch to
27 ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall
28 comply with 8 U.S.C. 1373.” Section 9(a) directs federal agencies to achieve that policy:

1
2 In furtherance of this policy, the Attorney General and the Secretary [of Homeland
3 Security], in their discretion and to the extent consistent with law, shall ensure that
4 jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary juris-
5 dictions) are not eligible to receive Federal grants, except as deemed necessary for
6 law enforcement purposes by the Attorney General or the Secretary. The Secre-
7 tary has the authority to designate, in his discretion and to the extent consistent
8 with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall
9 take appropriate enforcement action against any entity that violates 8 U.S.C. 1373,
10 or which has in effect a statute, policy, or practice that prevents or hinders the
11 enforcement of Federal law.

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

16 III. The AG Memorandum

17 On May 22, 2017, the Attorney General issued a Memorandum regarding the
18 implementation of Executive Order 13,768. *See* AG Mem. at 1. The Attorney General has a
19 statutory duty to advise executive department heads on “questions of law,” 28 U.S.C. § 512, and
20 to furnish formal legal opinions to executive agencies, 28 C.F.R. § 0.5(c). Also, although the
21 Secretary principally administers the immigration laws, the INA provides that “the determination
22 and ruling by the Attorney General with respect to all questions of law shall be controlling.”
23 8 U.S.C. § 1103(c)(1). By longstanding tradition and practice, the Attorney General’s legal
24 opinions are treated as authoritative by the heads of executive agencies. *See, e.g., Tenaska*
25 *Washington Partners II, L.P. v. United States*, 34 Fed. Cl. 434, 439 (1995); Randolph D. Moss,
26 *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52
27 Admin. L. Rev. 1303, 1319-20 (2000).

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

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

20 PROCEDURAL BACKGROUND

21 Santa Clara County filed this action on February 3, 2017 (Doc. 1). Plaintiff filed a motion
22 for preliminary injunction against the implementation of Section 9 of the Executive Order, which
23 the Court granted on April 25, 2017 (Doc. 98). Defendants filed a motion for reconsideration or
24 clarification of the preliminary injunction on May 23, 2017 (Doc. 113), which remains pending.

25 ARGUMENT

26 A claim should be dismissed under Rule 12(b)(1) if the court lacks subject matter
27 jurisdiction to consider it. The jurisdiction of the federal courts is limited to “Cases” and
28 “Controversies.” U.S. Const., Art. III, § 2. “Jurisdiction is power to declare the law, and when it

1 ceases to exist, the only function remaining to the court is that of announcing the fact and
2 dismissing the cause.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998). Courts
3 should “presume that [they] lack jurisdiction unless the contrary appears affirmatively from the
4 record,” *Renne v. Geary*, 501 U.S. 312, 316 (1991), and “the party asserting subject matter
5 jurisdiction has the burden of proving its existence,” *Robinson v. United States*, 586 F.3d 683,
6 685 (9th Cir. 2009); see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

7 Additionally, a claim should be dismissed under Rule 12(b)(6) of the Federal Rules of
8 Civil Procedure if it “fail[s] to state a claim upon which relief can be granted.” A motion under
9 Rule 12(b)(6) “tests the legal sufficiency” of a complaint. *Navarro v. Block*, 250 F.3d 729, 732
10 (9th Cir. 2001). On such a motion, the district court accepts all “plausible,” “well-pleaded”
11 factual allegations as true, *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 315 (9th Cir. 2017);
12 *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016), but need not
13 accept “a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009). The complaint is subject to dismissal if it fails to “state a claim to relief that is plausible
15 on its face.” *Id.* “A complaint may be dismissed for failure to state a claim where the factual
16 allegations do not raise the right to relief above the speculative level.” *In re ATM Fee Antitrust*
17 *Litig.*, No. C 04-2676 CRB, 2010 WL 2557519, at *4 (N.D. Cal. June 21, 2010).

18 Plaintiff’s Complaint contains five claims: Count 1 alleges that the grant eligibility
19 provision in Section 9(a) of the Executive Order violates the constitutional Separation of Powers
20 and the Spending Clause (Doc. 1 ¶¶ 118-134).⁴ Count 2 alleges that Section 9(a) of the Order is
21 unconstitutionally vague under the Fifth Amendment, and Count 3 alleges that Section 9(a)
22 violates the procedural due process requirements of the Fifth Amendment. Count 4 alleges that
23 the provision in Section 9(a) requiring the Attorney General to take “appropriate enforcement
24 action” against certain entities violates the Tenth Amendment. All of these claims should be
25 dismissed for lack of standing and ripeness under Rule 12(b)(1), as made even clearer by the AG
26

27 ⁴ Count 1 is entitled “Violation of the Separation of Powers Inherent in the U.S.
28 Constitution,” but it argues that the grant eligibility provision violates both the constitutional
Separation of Powers and the Spending Clause.

1 Memorandum. Also, all of plaintiff's claims against the Executive Order should be dismissed
2 under Rule 12(b)(6) because the Order is only an internal Executive Branch directive with no
3 direct effect on the City.

4 Assuming the Court reaches the merits, plaintiff's first four claims should be dismissed
5 for failure to state a claim on which relief can be granted under Rule 12(b)(6), and the last claim
6 should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). In relation to the
7 merits of Count 1, the AG Memorandum makes clear that the grant eligibility provision will be
8 applied only where authorized by statute, and that the limitations on the spending power
9 described in *South Dakota v. Dole*, 483 U.S. 203 (1987), will be followed. In relation to Count 2,
10 the AG Memorandum authoritatively clarifies the meaning and scope of Section 9(a), such that
11 the County cannot show that it is "impermissibly vague in all its applications" as required for a
12 facial vagueness challenge. See *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d
13 1133, 1146 (9th Cir. 2009). And in relation to Count 3, since the AG Memorandum clarifies (1)
14 that Section 9(a) is limited to certain grants administered by DOJ and DHS, (2) that "grantees will
15 receive notice of their obligation to comply with section 1373," and (3) that the usual procedures
16 of grant making and revocation will apply, see AG Mem. at 1-2, the County cannot show that it
17 will be deprived of any process that may be "due."

18 Finally, in relation to Count 4, defendants have taken no "enforcement action" against
19 Santa Clara County under Section 9(a) of the Executive Order and there is no indication that any
20 such action is imminent, such that the County lacks standing to challenge that provision in the
21 Order, and its challenge is not ripe.

22 Plaintiff's claims are all the more difficult to sustain because these are facial challenges to
23 an Executive Order. The Supreme Court has held that a facial challenge is "the most difficult
24 challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In this
25 context, "the challenger must establish that no set of circumstances exists under which the
26 [challenged enactment] would be valid." *Id.*

27 As the Supreme Court has observed, "[f]acial challenges are disfavored for several
28 reasons." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). First,
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1 “[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of
2 premature interpretation of [enactments] on the basis of factually barebones records.” *Id.* (internal
3 quotation marks omitted). Additionally, such challenges “run contrary to the fundamental
4 principle of judicial restraint that courts should neither anticipate a question of constitutional law
5 in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is
6 required by the precise facts to which it is to be applied.” These rules apply to Executive Orders
7 as much as to statutes and regulations. *See Am. Fed’n of State, Cty. & Mun. Employees v. Scott*,
8 717 F.3d 851, 862-63 (11th Cir. 2013); *NTEU v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989). As
9 further discussed below, Santa Clara County’s Complaint fails to establish that the Executive
10 Order would be invalid under all circumstances.

11 I. Plaintiff Lacks Standing and Its Claims Are Unripe

12 Article III of the Constitution requires that a plaintiff have standing and that its claims be
13 ripe for judicial consideration. To have standing, the plaintiff must show that it has suffered
14 “concrete,” “palpable” injury, *see Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), and, for the
15 claims to be ripe, the challenged enactment must have been “formalized and its effects felt in a
16 concrete way.” *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). As discussed in
17 Defendants’ Motion for Reconsideration or, in the Alternative, Clarification of the Court’s Order
18 of April 25, 2017, the AG Memorandum makes even clearer that these requirements are not
19 satisfied here and that, therefore, all of the County’s claims must be dismissed for lack of
20 standing and ripeness (Doc. 113 at 8-12).

21 II. Plaintiff Fails to State Any Viable Claim Regarding the Executive Order,
22 Which Is an Internal Directive and Does Not Directly Affect the Plaintiff

23 In any event, the Court should dismiss all of plaintiff’s challenges to Executive Order
24 13,768 because the Order only directs internal Executive Branch policy and does not directly
25 affect the plaintiff. Courts in this Circuit have distinguished between Executive Orders that only
26 “implement policy as a product of executive authority,” and those that effectuate an authority
27 explicitly vested in the President through an act of Congress. *See Chen v. Schiltgen*, No. C-94-
28 4094 MHP, 1995 WL 317023, at *5 (N.D. Cal. May 19, 1995), *aff’d sub nom. Chen v. INS*, 95

1 F.3d 801 (9th Cir. 1996); *Legal Aid Soc’y of Alameda County v. Brennan*, 608 F.2d 1319, 1330
2 n.14 (9th Cir. 1979).

3 The former type of Executive Order does not carry the independent force of law; rather, it
4 serves only as an internal Executive Branch directive. The Executive Order in this action falls
5 into that category. This is even clearer in light of the AG Memorandum, which indicates that the
6 challenged provisions of the Order are directives to the Attorney General and the Secretary of
7 Homeland Security regarding their exercise of *existing* statutory and constitutional authority. AG
8 Mem. at 1-2. Because the Order is an internal Executive Branch policy directive, the County
9 cannot plead viable challenges against it. *Cf. United States v. Pickard*, 100 F. Supp. 3d 981, 1011
10 (E.D. Cal. 2015) (rejecting a Tenth Amendment challenge to a statement of agency policy on the
11 grounds that a policy statement “is a very different creature from a statute” in that it does not bind
12 States as would a statute).

13 Moreover, consistent with its internal nature, the Executive Order does not directly affect
14 the plaintiff. It does not impose conditions on federal grants or any requirements on state or local
15 jurisdictions. Rather, the Order “establish[es] immigration enforcement as a priority for this
16 Administration,” AG Mem. at 1, in an effort to “ensure that our Nation’s immigration laws are
17 faithfully executed.” Exec. Order 13,768 at 1. It directs the appropriate executive officials to
18 prioritize means for achieving that priority.

19 At no point, however, does the Order purport to directly impose affirmative obligations on
20 state or local jurisdictions. Rather, the Attorney General and the Secretary are to enforce the
21 Order’s directives “to the extent permitted by law.” Exec. Order 13,768, § 9(a). Consistent with
22 that directive, the Executive Order “does not call for the imposition of grant conditions that would
23 violate any applicable constitutional or statutory limitation . . . [n]or does the Executive Order
24 purport to expand the existing statutory or constitutional authority of the Attorney General and
25 the Secretary . . . in any respect.” AG Mem. at 1-2. Rather, in the event the Secretary or the
26 Attorney General determines to impose obligations on a grant program pursuant to the directives
27 contained the Order, such as certification of compliance with 8 U.S.C. § 1373, that obligation
28

1 may be imposed only where existing legal authority allows, and only where grantees are given
2 “notice of their obligation[s].” *Id.* at 2.

3 III. Plaintiff Fails to State a Viable Challenge to Section 9(a) of the
4 Executive Order, as Elucidated by the AG Memorandum

5 Assuming the Court reaches the merits, plaintiff’s claims under the Separation of Powers,
6 the Spending Clause, and the Due Process Clause should be dismissed for failure to state a claim
7 upon which relief can be granted, especially in light of the AG Memorandum.

8 A. Plaintiff Fails to State a Viable Claim under the Separation of Powers

9 Count 1 in plaintiff’s Complaint alleges that the grant eligibility provision of Section 9(a)
10 violates the Separation of Powers by “claim[ing] for the executive branch powers exclusively
11 assigned to Congress” under the Constitution (Doc. 1 ¶ 129). Article I of the Constitution confers
12 on Congress the authority to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts
13 and provide for the common Defence and general Welfare of the United States.” U.S. Const. Art.
14 I, § 8, cl. 1. As this Court has said, Congress may, “[i]ncident to” its spending power, “attach
15 conditions on the receipt of federal funds,” *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-
16 WHO, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (quoting *Dole*, 483 U.S. at 206), and
17 “Congress can delegate some discretion to the President to decide how to spend appropriated
18 funds” so long as “any delegation and discretion is cabined by [relevant] constitutional
19 boundaries.” 2017 WL 1459081, at *21; *see DKT Mem’l Fund Ltd. v. AID*, 887 F.2d 275, 280-81
20 (D.C. Cir. 1989) (upholding conditions on spending imposed by President where statute
21 authorized President to set certain “terms and conditions as he may determine”).

22 Especially as elucidated by the AG Memorandum, the grant eligibility provision is
23 consistent with this division of constitutional responsibilities. The Executive Order requires the
24 Attorney General and Secretary of Homeland Security to condition grant eligibility on
25 compliance with 8 U.S.C. § 1373 “to the extent consistent with law.” The AG Memorandum
26 makes clear that the Order does not “purport to expand the existing statutory or constitutional
27 authority of the Attorney General and the Secretary . . . in any respect” and “does not call for the
28 imposition of grant conditions that would violate any applicable constitutional or statutory

1 limitation.” AG Mem. at 1-2. Even more specifically, the Memorandum confirms that
2 compliance with Section 1373 will be imposed as a condition of grant eligibility only where the
3 agency “is statutorily authorized to impose such a condition.” *Id.*

4 In fact, Congress has frequently authorized agencies administering certain grant programs
5 to impose discretionary conditions on the receipt of funds. Those statutory authorizations have
6 taken a variety of forms, including authorizing an agency to ensure that a grant recipient complies
7 “with all provisions of . . . applicable Federal laws,” *see* 42 U.S.C. § 3752(a)(5)(D) (governing
8 DOJ grant program), or allowing an agency to “plac[e] special conditions” on certain grants under
9 appropriate circumstances. *See id.* § 3712(a). Pursuant to these types of statutory authorizations,
10 DOJ has already conditioned eligibility for participation in three DOJ-administered grant
11 programs on the applicant’s certification of compliance with Section 1373. *See generally* Tr. of
12 Oral Arg. at 35:4-6, *City & Cnty. of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Apr.
13 14, 2017) (identifying the three programs); 2017 WL 1459081, at *4 (same).

14 Further, as noted above, a party challenging the facial constitutionality of an Executive
15 Order must establish that the Order would be unconstitutional in all its applications. *See Salerno*,
16 481 U.S. at 745 (facial challenge must establish that “no set of circumstances exists under which
17 [the enactment] would be valid”); *see also Am. Fed’n of State, Cty. & Mun. Employees*, 717 F.3d
18 at 862-63; *NTEU v. Bush*, 891 F.2d at 101. That standard is necessarily impossible to meet in
19 relation to plaintiff’s Separation of Powers claim, since Congress frequently authorizes the
20 Executive to impose discretionary conditions on the receipt of federal grants.

21 Therefore, especially in light of the AG Memorandum, plaintiff cannot state a viable claim
22 for violation of the constitutional Separation of Powers.

23 B. Plaintiff Fails to State a Viable Claim under the Spending Clause

24 Count 1 of plaintiff’s Complaint also alleges that the grant eligibility provision exceeds
25 the federal power under the Spending Clause (Doc. 1 ¶¶122-132). This Clause provides that
26 Congress may “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide
27 for the common Defence and general Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1.
28 As the Supreme Court has held, “Congress may attach conditions on the receipt of federal funds,

1 and has repeatedly employed the power to further broad policy objectives by conditioning receipt
2 of federal moneys upon compliance by the recipient with federal statutory and administrative
3 directives.” *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation marks omitted).

4 The Court in *Dole* described certain limitations or potential limitations on the spending
5 power. Most basically, “the exercise of the spending power must be in pursuit of ‘the general
6 welfare’” – as stated in the Spending Clause itself, *id.* at 207 – and conditions on the receipt of
7 federal funds must be stated “unambiguously” so that recipients can “exercise their choice
8 knowingly, cognizant of the consequences of their participation.” *Id.* (citing *Pennhurst State Sch.*
9 *& Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“The legitimacy of Congress’ power to legislate
10 under the spending power thus rests on whether the State voluntarily and knowingly accepts the
11 terms of the ‘contract.’ There can, of course, be no knowing acceptance if a State is unaware of
12 the conditions or is unable to ascertain what is expected of it.”) (citations omitted) (hereinafter
13 *Pennhurst*). Additionally, the Court observed in *Dole*, “our cases have suggested (without
14 significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated
15 to the federal interest in particular national projects or programs,” and that “in some circum-
16 stances the financial inducement offered by Congress might be so coercive as to pass the point at
17 which pressure turns into compulsion.” 483 U.S. at 207-08, 211 (internal quotation marks
18 omitted). And finally, the Court said that “other constitutional provisions may provide an
19 independent bar to the conditional grant of federal funds.” *Id.* at 207-08.

20 Although these are limitations on *congressional* power, the plaintiff herein alleges that the
21 grant eligibility provision imposes conditions on spending that “would be unconstitutional even if
22 imposed by Congress” (Doc. 1 ¶ 132). Specifically, the County alleges that the provision
23 “impose[s] a condition on federal spending retroactively”; that it imposes conditions not “reason-
24 ably related to the federal interest to which the expenditure relates”; that it “requires County law
25 enforcement officers to undertake actions that are themselves unconstitutional”; and that it
26 imposes conditions that are “profoundly coercive to the County” (*id.* ¶ 131). Particularly in light
27 of the AG Memorandum, each of these assertions is without merit.

1 Focusing on the “knowing acceptance” aspect of *Dole* and *Pennhurst*, Santa Clara County
2 asserts, first, that the grant eligibility provision unconstitutionally “impose[s] a condition on
3 federal spending retroactively” (*id.* ¶ 131(i)).⁵ See 2017 WL 1459081, at *22 (“Because states
4 must opt-in to a federal program willingly, fully aware of the associated conditions, Congress
5 cannot implement new conditions after-the-fact.”). As described above, however, the AG
6 Memorandum makes clear that the grant eligibility provision will be implemented by “requiring
7 jurisdictions applying for certain [DOJ] grants to certify their compliance with federal law,
8 including 8 U.S.C. § 1373, as a condition for receiving an award.” AG Mem. at 2. Thus, the AG
9 Memorandum continues, “[a]ll grantees will receive notice of their obligation to comply with
10 section 1373” ahead of time, and the grant eligibility provision will be applied to “[a]ny
11 jurisdiction that fails to certify compliance.” *Id.* Necessarily, therefore, potential grantees will be
12 able to “exercise their choice knowingly, cognizant of the consequences of their participation” in
13 grant programs that include this condition. *Dole*, 483 U.S. at 207. The plaintiff cannot show that
14 the grant eligibility provision will fail this aspect of *Dole* in all its applications, as necessary in
15 this facial challenge. See *Salerno*, 481 U.S. at 745.

16 Second, plaintiff alleges that the grant eligibility provision imposes conditions that are not
17 “reasonably related to the federal interest to which the expenditure relates” (Doc. 1 ¶ 131(ii)). As
18 the Court of Appeals has observed, however, this aspect of *Dole* suggests only a “possible
19 ground” for invalidating an enactment, and does not impose an “exacting standard”:

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

27 *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (citing *Dole*, 483 U.S. at 207).

28 ⁵ Plaintiff does not allege that the grant eligibility provision violates the requirement that
federal grant conditions be stated “unambiguously.” *Dole*, 483 U.S. at 207. In any event, for the
reasons stated herein, any such claim would be without merit in light of the AG Memorandum.

1 Thus, conditions on federal funding must only “bear some relationship to the purpose of the
2 federal spending.” 314 F.3d at 1067 (quoting *N.Y. v. United States*, 505 U.S. 144, 167 (1992));
3 *see Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004)
4 (noting that Supreme Court has never “overturned Spending Clause legislation on relatedness
5 grounds”).

6 Especially as implemented by the AG Memorandum, the grant eligibility provision easily
7 meets this standard. The provision will be applied only to grants administered by the Department
8 of Justice and the Department of Homeland Security – that is, the primary law enforcement
9 agency of the United States and the agency responsible for the admission and removal of non-
10 citizens. AG Mem. at 1. DHS is the very agency whose communication with state and local
11 government officials is protected by Section 1373. Moreover, the grant eligibility provision will
12 be applied only to “certain . . . grants” as to which the agency “is statutorily authorized to impose
13 such a condition.” *Id.* at 2. Plaintiff alleges that the grant eligibility provision “applies to, and
14 would bar the County from being eligible for funding for, Medicare and Medicaid programs,
15 transportation, child welfare services, elder care programs, mental health services, immunization
16 and vaccine programs” (Doc. 1 ¶ 131(ii)). The AG Memorandum has eliminated any possibility
17 that the grant eligibility provision could be applied in relation to any of those categories of federal
18 funding.

19 Third, plaintiff alleges that the grant eligibility provision exceeds the spending power by
20 “requir[ing] County law enforcement officers to undertake actions that are themselves
21 unconstitutional” (Doc. 1 ¶ 131(iii)). The Court in *Dole* emphasized the narrowness on this
22 limitation on the federal spending power, noting that “the ‘independent constitutional bar’
23 limitation . . . is not . . . a prohibition on the indirect achievement of objectives which Congress is
24 not empowered to achieve directly.” 483 U.S. at 210. Rather, the Court said, this limitation
25 “stands for the unexceptionable proposition that the power may not be used to induce the States to
26 engage in activities that would themselves be unconstitutional. Thus, for example, a grant of
27 federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and
28

1 unusual punishment would be an illegitimate exercise of the Congress' broad spending power."

2 *Id.* at 210-11.

3 The grant eligibility provision does not "induce" Santa Clara County to violate any such
4 constitutional prohibition. As stated in the AG Memorandum, that provision merely requires
5 grantees to certify compliance with 8 U.S.C. § 1373, which proscribes prohibiting or restricting
6 the sharing of information with federal immigration authorities. *See* AG Mem. at 2. That is not,
7 however, the kind of "independent [constitutional] bar to the conditional grant of federal funds"
8 that the Supreme Court contemplated in *Dole*. 483 U.S. at 207-08. Plaintiff alleges that the
9 Executive Order will "require County law enforcement officers to comply with federal directives
10 regarding detainer actions" in violation of the Fourth Amendment to the Constitution (Doc. 1
11 ¶ 131(iii)), but the AG Memorandum says nothing about immigration detainer requests, and, in
12 any event, state or local law enforcement's decision to exercise their authority to cooperate with
13 such requests is fully consistent with the Fourth Amendment. Moreover, the AG Memorandum
14 states affirmatively that the grant eligibility provision "does not call for the imposition of grant
15 conditions that would violate any applicable constitutional or statutory limitation." AG Mem. at
16 1-2. Thus, Santa Clara County cannot show that the grant eligibility provision will require the
17 County to "undertake actions that are themselves unconstitutional" in all circumstances. *Cf.*
18 *Salerno*, 481 U.S. at 745.

19 Fourth and finally, plaintiff alleges that the grant eligibility provision imposes conditions
20 that are "profoundly coercive to the County" (Doc. 1 ¶ 131(iv)). As the Court of Appeals has
21 observed, however, the Supreme Court in *Dole* concluded that it would find a violation of this
22 potential limitation, "if ever, [only] in the most extraordinary circumstances." *State of Cal. v.*
23 *United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (citing *Dole*, 483 U.S. at 210-11). Thus, for
24 example, the Court in *Dole* found no constitutional violation where a State risked losing 5% of its
25 highway funds for refusing to implement a federal minimum drinking age. *Dole*, 483 U.S. at 211.
26 Conversely, the Court held more recently that Congress violated anti-coercion principles by
27 subjecting States to a risk of losing "all federal Medicaid funding," which constituted "over 10
28 percent of a State's overall budget," if they declined to adopt certain Medicaid expansion actions.

1 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2664 (2012) (hereinafter *NFIB*). In
2 that case, “the sheer size of this federal spending program in relation to state expenditures”
3 rendered the condition coercive. *Id.* at 2663. As the Court held, however, “courts should not
4 conclude that [an enactment] is unconstitutional on this ground unless the coercive nature of an
5 offer is unmistakably clear.” *Id.* at 2662.

6 Under this precedent, plaintiff’s “coerciveness” claim must fail, especially in light of the
7 AG Memorandum. As noted already, the grant eligibility provision of the Executive Order “will
8 be applied solely to [certain] federal grants administered by the Department of Justice or the
9 Department of Homeland Security, and not to other sources of federal funding.” AG Mem. at 1.
10 Moreover, DOJ has so far identified only three grant programs whose eligibility will be condi-
11 tioned on compliance with Section 1373. See Tr. of Oral Arg. at 35:2-9. According to its
12 complaint, Santa Clara County previously received funds under two of those programs, but has
13 decided not to “apply for or accept future” funds under either program, in order to “retain its
14 discretion” regarding the sharing of immigration status information (Doc. 1 at 14 n.3). In these
15 circumstances, the plaintiff has fallen far short of stating a viable claim that the “coercive nature”
16 of the grant eligibility provision is “unmistakably clear.” See *NFIB*, 132 S. Ct. at 2662.

17 In short, particularly as elucidated by the AG Memorandum, the grant eligibility provision
18 in the Executive Order is only a “relatively mild encouragement” to comply with Section 1373.
19 483 U.S. at 211.

20 C. Plaintiff Fails to State a Viable Claim that Section 9(a)
21 Is Unconstitutionally Vague

22 Plaintiff’s next claim, in Count 2 of the Complaint, is that Section 9(a) is unconstitu-
23 tionally vague in violation of the Due Process Clause (Doc. 1 ¶¶ 138-141). An enactment may be
24 unconstitutionally vague if it “fails to provide a reasonable opportunity to know what conduct is
25 prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement.” *Tucson*
26 *Woman’s Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004) (citation omitted). The Supreme
27 Court, however, has cautioned against engaging in a vagueness analysis in the pre-enforcement
28 context, particularly in matters that do not involve First Amendment rights. See *Wash. State*

1 *Grange v. Wash. State Republican Party*, 552 U.S. 442, 50 (2008) (noting that facial vagueness
2 challenges are “disfavored for several reasons,” including because such claims often “rest on
3 speculation”). “Outside the First Amendment context, a plaintiff alleging facial vagueness must
4 show that the enactment is impermissibly vague in all its applications.” *Humanitarian Law*
5 *Project v. U.S. Treasury Dep’t*, 578 F.3d 1133, 1146 (9th Cir. 2009) (internal quotation marks
6 omitted). This is consistent with the rule that a party challenging an enactment on its face must
7 show that “no set of circumstances exists under which the [enactment] would be valid.” *Salerno*,
8 481 U.S. at 745. Moreover, courts will consider whether a provision is fairly “amenable to a
9 limiting construction” before striking it down as vague. *Skilling v. United States*, 561 U.S. 358,
10 405 (2010). Thus, a plaintiff bringing a pre-enforcement facial vagueness challenge “bears a
11 heavy burden.” *SEIU, Local 82 v. D.C.*, 608 F. Supp. 1434, 1446-47 (D.D.C. 1985).

12 In this case, the County argues that “Section 9(a) of the Executive Order fails to define
13 key terms, such as ‘sanctuary jurisdiction,’ ‘Federal grants,’ ‘law enforcement purposes,’
14 ‘appropriate enforcement action,’ and ‘entity,’ as well as . . . ‘statute, policy, or practice that
15 prevents or hinders the enforcement of Federal law’” (Doc. 1 ¶ 139). As discussed above,
16 however, the Order is an internal directive to Executive Branch officials and does not have any
17 direct effect on the plaintiff. Therefore, there can be no legitimate question as to whether the
18 Order provides “reasonable” notice to the plaintiff. *See Tucson Woman’s Clinic*, 379 F.3d at 554.
19 In any event, the AG Memorandum authoritatively clarifies the meaning of Section 9(a),
20 specifying, for example, that the “the term ‘sanctuary jurisdiction’ will refer only to jurisdictions
21 that “willfully refuse to comply with 8 U.S.C. 1373.” AG Mem. at 2. Additionally, the Memo-
22 randum makes clear that the “Federal grants” to which Section 9(a) will apply are only those
23 “grants administered by the Department of Justice or the Department of Homeland Security” as to
24 which the agency is “statutorily authorized” to impose the condition of compliance with 8 U.S.C.
25 § 1373. *Id.* at 1-2.

26 Other aspects of plaintiff’s vagueness challenge “rest [entirely] on speculation.” *See*
27 *Wash. State Grange*, 552 U.S. at 50. Undeniably and uncontroversially, the Attorney General is
28 authorized to take certain “enforcement actions” against a State and local jurisdiction whose

1 “statute, policy, or practice . . . prevents or hinders the enforcement of Federal law.” *See Arizona*
2 *v. United States*, 567 U.S. 387, 132 S. Ct. 2492 (2012) (asserting that certain state laws regarding
3 non-citizens are preempted by federal law); *United States v. South Carolina*, 720 F.3d 518 (4th
4 Cir. 2013) (same); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (same). There is no
5 indication that the Attorney General will take any unauthorized or inappropriate actions pursuant
6 to this provision in Section 9(a). Thus, the County cannot show that President’s instruction to
7 take “appropriate” action against such statutes, policies, or practices is “impermissibly vague in
8 all its applications.” *See Humanitarian Law Project*, 578 F.3d at 1146.⁶

9 Accordingly, plaintiff’s Fifth Amendment vagueness claim must be dismissed for failure
10 to state a claim on which relief can be granted.

11 D. Plaintiff Fails to State a Viable Claim Regarding Procedural Due Process

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

23
24 ⁶ The same is true of plaintiff’s allegation (Doc. 1 ¶ 141) that vagueness principles are
25 violated by Section 6 of the Executive Order, which instructs the Secretary of Homeland Security
26 to “ensure the assessment and collection of all fines and penalties that the Secretary is *authorized*
27 *under the law* to assess and collect from aliens unlawfully present in the United States and from
28 those who facilitate their presence in the United States” (emphasis added). The INA provides for
several such fines and penalties. *See, e.g.*, 8 U.S.C. §§ 1324 (penalties for bringing in and
harboring certain aliens), 1324a (penalties for unlawful employment of aliens), 1325 (civil
penalties for improper entry).

1 In light of the AG Memorandum, however, Section 9(a) does not apply to funding in
2 which the County might have a constitutionally protectable interest, and, in any event, the
3 applicable procedures will be provided. As discussed earlier, the grant eligibility provision of
4 Section 9(a) will be applied only to certain grants administered by DOJ and DHS, *see* AG Mem.
5 at 1, and DOJ has so far identified only three programs in which eligibility will depend on
6 compliance with Section 1373. *See* Tr. of Oral Arg. at 35:2-9. The County does not allege – and
7 cannot show – that these programs provide “federal funds it relies on to provide essential services
8 to 1.9 million residents” (Doc. 1 ¶ 146). Moreover, the AG Memorandum indicates that
9 compliance with Section 1373 will be included as a grant condition only where the agency “is
10 statutorily authorized to impose such a condition,” and that “[a]ll grantees will receive notice of
11 their obligation to comply with section 1373.” AG Mem. at 2. Additionally, by specifying that
12 this condition be exercised “to the extent consistent with law,” Section 9(a) incorporates the
13 governing legal limitations, such as the procedural requirements for making or revoking federal
14 grants. *See, e.g.*, 2 C.F.R. § 200.341 (hearings and appeals in federal grant-making); 28 C.F.R. pt.
15 18 (DOJ Office of Justice Programs Hearing and Appeal Procedures).

16 Therefore, plaintiff has not stated a claim on which relief can be granted regarding
17 procedural due process.

18 IV. Plaintiff’s Claim that the “Appropriate Enforcement Action” Provision
19 of Section 9(a) Violates the Tenth Amendment Is Non-Justiciable

20 Plaintiff’s last claim, in Count 4 of the Complaint, is that the Tenth Amendment is
21 violated by the provision in Section 9(a) that instructs the Attorney General to “take appropriate
22 enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute,
23 policy, or practice that prevents or hinders the enforcement of Federal law” (Doc. 1 ¶¶ 149-152).
24 The County characterizes various statements by public officials as meaning that defendants
25 “interpret[] the Executive Order to require County law enforcement officers to comply with
26 federal directives regarding detainer actions by U.S. Immigration & Customs Enforcement”
27 (Doc. 1 ¶ 131(iii)). From this, the County leaps to the conclusion that this provision in Section
28 9(a) “commandeers state and local officials” in violation of the Tenth Amendment by requiring

1 them to “imprison individuals subject to removal at the request of federal officials” and
2 “transforming [state and local officials] into federal apparatchiks” (*id.* ¶¶ 13, 88, 151). Plaintiff
3 does not allege, however, that the defendants have taken any “enforcement action” against it or
4 have indicated that any such action is imminent. Accordingly, this claim is non-justiciable and
5 must be dismissed under principles of standing and ripeness.

6 Under Article III of the Constitution, the jurisdiction of the federal courts extends only to
7 “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. Matters outside this rubric are “non-
8 justiciable.” *Ore. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc’ns, Inc.*, 288
9 F.3d 414, 416 (9th Cir. 2002). Two principles of justiciability bar jurisdiction over plaintiff’s
10 Count Three: standing and ripeness. “While standing is concerned with *who* is a proper party to
11 litigate a particular matter, the doctrines of mootness and ripeness determine *when* that litigation
12 may occur.” *Haw. Cty. Green Party v. Clinton*, 14 F. Supp. 2d 1198, 1201 (D. Haw. 1998).
13 Where a plaintiff lacks standing or its claims are unripe, the court lacks jurisdiction. *See Nat’l*
14 *Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 832 (9th Cir. 2016).

15 To satisfy the “irreducible constitutional minimum” of standing, a plaintiff must
16 demonstrate an “injury in fact,” a “fairly traceable” causal connection between the injury and
17 defendant’s conduct, and redressability. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
18 102-03 (1998). The injury needed for constitutional standing must be “concrete,” “objective,”
19 and “palpable,” not merely “abstract” or “subjective.” *See Whitmore v. Arkansas*, 495 U.S. 149,
20 155 (1990); *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975). Additionally, the injury must be
21 “certainly impending” rather than “speculative.” *Whitmore*, 495 U.S. at 157, 158. “[S]tanding is
22 perhaps the most important of [the jurisdictional] doctrines.” *FW/PBS, Inc. v. City of Dallas*, 493
23 U.S. 215, 231 (1990) (internal quotation marks omitted).

24 Constitutional justiciability also requires that a dispute be ripe for judicial consideration –
25 that is, that the challenged action “has been formalized and its effects felt in a concrete way by the
26 challenging parties.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In other words, “[a]
27 claim is not ripe for adjudication [under the Constitution] if it rests upon contingent future events
28

1 that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523
2 U.S. 296, 300 (1998) (internal quotation marks omitted).

3 In assessing constitutional ripeness in the context of a “pre-enforcement challenge” to a
4 statutory or administrative enactment, the courts consider “both the fitness of the issues for
5 judicial decision and the hardship to the parties of withholding court consideration.” *Abbott*
6 *Labs.*, 387 U.S. at 149. “A claim is fit for decision if the issues raised are primarily legal, do not
7 require further factual development, and the challenged action is final.” *Standard Alaska Prod.*
8 *Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). In other words, a court considers whether the
9 court and the parties would “benefit from deferring review until the agency’s policies have
10 crystallized and the question arises in some more concrete, and final form.” *Eagle-Picher Indus.*,
11 *Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985) (internal quotation marks omitted); *see U.S. W.*
12 *Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1119 (9th Cir. 1999) (finding that claim was not
13 fit for decision where administrative proceedings had not concluded and court would “benefit”
14 from outcome of those proceedings). Finally, “[t]o meet the hardship requirement, a litigant must
15 show that withholding review would result in direct and immediate hardship and would entail
16 more than possible financial loss.” *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325
17 (9th Cir. 1989) (internal quotation marks omitted).

18 Applying these standards here, the plaintiff cannot show the “injury in fact” needed for
19 constitutional standing to challenge the “appropriate enforcement action” provision, *Steel Co.*,
20 523 U.S. at 102-03, and this claim is not constitutionally ripe for judicial review, *Abbott Labs.*,
21 387 U.S. at 148-49. The defendants have taken no enforcement action against Santa Clara
22 County under Section 9(a) of the Executive Order, and there is no indication that any such action
23 is imminent. Thus, the plaintiff has not suffered any “concrete” injury due to this provision, and
24 no such injury is “certainly impending.” *See Whitmore*, 495 U.S. at 155, 158. Similarly, since the
25 federal government might never take enforcement action against the County under Section 9(a),
26 this claim rests on “contingent future events that . . . may not occur at all,” *see Texas*, 523 U.S. at
27 300, and the County cannot show any “direct and immediate hardship” from withholding review,
28 *see Winter*, 900 F.2d at 1325.

1 Nor could the plaintiff allege that the mere possibility of enforcement action has inflicted
2 any cognizable injury. Indeed, there is always a possibility that the Federal Government may sue
3 a State or local government alleging that the defendant's laws or policies are constitutionally
4 preempted. See *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492 (2012); *United States v.*
5 *South Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th
6 Cir. 2012). This authority exists entirely independent of the Executive Order. *Id.* Further, if
7 such action were to occur, the County would have an opportunity at that time to challenge its
8 propriety and merits.

9 Accordingly, Count 4 of the Complaint should be dismissed for lack of subject matter
10 jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

11 CONCLUSION

12 For the reasons discussed above, all of plaintiff's claims should be dismissed with
13 prejudice.

14 Dated: June 7, 2017

15 Respectfully submitted,

16 CHAD A. READLER
Acting Assistant Attorney General

17 BRIAN STRETCH
United States Attorney

18 JOHN R. TYLER
Assistant Director

19 /s/ W. Scott Simpson

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COUNSEL FOR DEFENDANTS
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Budget

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

Defendants' Motion to Dismiss

Attachment 1

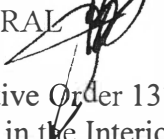
Memorandum from the Attorney General
for All Department Grant-Making
Components (May 22, 2017)



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

May 22, 2017

MEMORANDUM FOR ALL DEPARTMENT GRANT-MAKING COMPONENTS

FROM: THE ATTORNEY GENERAL 

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

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

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

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

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

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

Memorandum for All Department Grant-Making Components
Subject: Implementation of Executive Order 13768,
“Enhancing Public Safety in the Interior of the United States”

Page 2

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

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

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

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

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

Defendants' Motion to Dismiss

Attachment 2

Proposed Order

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

COUNTY OF SANTA CLARA,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 3:17-cv-00574-WHO
ORDER

Defendants having filed a motion to dismiss and the Court having considered all materials submitted in relation thereto, defendants’ motion to dismiss [ECF No. 115] is hereby GRANTED and plaintiff’s Complaint [ECF No. 1] is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: _____, 2017

William H. Orrick
United States District Judge