

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, EX REL.
XAVIER BECERRA, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS,
et al.,

Defendants.

Case No. [17-cv-04701-WHO](#)

**ORDER DENYING AMENDED
MOTION FOR PRELIMINARY
INJUNCTION**

INTRODUCTION

The State of California has sued United States Attorney General Jefferson Beauregard Sessions, Acting Assistant Attorney General Alan B. Hanson, and the United States Department of Justice (“DOJ”) (collectively, the federal government), seeking a declaration that Section 1373 of the Immigration and Nationalization Act (as interpreted by the federal government) violates the Constitution and an injunction enjoining the federal government from withholding, terminating, disbaring, or making any state entity or local jurisdiction ineligible for certain law enforcement grants. The State then moved for a preliminary injunction.

At some later date, this case may help define the contours of the State’s broad constitutional police powers under the Tenth Amendment and the federal government’s “broad, undoubted power over the subject of immigration and the status of aliens.” *U.S. v Arizona*, 567 U.S. 387, 394 (2012). The Trump administration’s immigration enforcement policy is clearly at odds with the State’s determination of the most effective methods to implement criminal law enforcement. But for today, the question I decide is narrow: is the State entitled to a preliminary injunction to require the federal government to fund a \$1 million law enforcement grant that it has

1 held up because it appears likely to decide that the State is not complying with 8 U.S.C. § 1373
 2 (Section 1373) by restricting its officials from providing personal information and release dates of
 3 certain people detained in jails across the state.

4 The injury threatened is not irreparable. The amount of money at stake is small compared
 5 to the State’s budget. Payment is delayed, for the moment. The DOJ appears to be using its
 6 regular administrative process to decide whether it will follow its initial inclinations. Given the
 7 number of open questions concerning the federal government’s positions concerning the
 8 provisions of the statutes in question, the relatively minimal injury its delay has caused thus far,
 9 and the extraordinary nature of the relief sought, I deny the State’s motion without prejudice.
 10 These issues will be better addressed on a more complete record after discovery on a motion for
 11 summary judgment.

12 **BACKGROUND**

13 **I. CALIFORNIA’S “SANCTUARY CITY” STATUTES**

14 The State has enacted several laws affecting local and state criminal law enforcement
 15 concerning immigrants. Mot. at 5 (Dkt. No. 26). These statutes fit into two categories: (1) laws
 16 regarding how and in what manner local law enforcement can communicate and assist federal
 17 immigration officers (the TRUTH, TRUST, and Values Acts); and (2) statutes related to
 18 individuals’ confidential information (Penal Code sections 422.93, 679.10, and 679.11, Welfare
 19 and Institutions Code sections 827 and 831, and Code of Civil Procedure section 155).

20 **A. The TRUST, TRUTH and Values Acts**

21 In 2013, the State enacted the TRUST Act, Cal. Gov’t Code § 7282 et seq., which explains
 22 when local law enforcement officers may abide by a Department of Homeland Security (“DHS”)
 23 civil detainer request. *See id.* §§ 7282(c), 7282.5. Per the TRUST Act, local law enforcement
 24 may only comply with a DHS civil detainer if the detainer does not “violate any federal, state, or
 25 local law, or any local policy,” and (1) the detainee’s criminal background includes one of a
 26 delineated list of crimes, (2) the detainee was on the California Sex and Arson Registry, or (3) the
 27 detainee was held after a magistrate’s finding of probable cause for a serious or violent felony.
 28 *See id.* § 7282.5(a).

1 In 2016, the State enacted the TRUTH Act. Cal. Gov't Code § 7283 *et seq.* The TRUTH
2 Act requires that if a federal immigration agent requests an interview with a detainee, the jail must
3 notify the detainee that such interviews are voluntary and that he has the right to seek counsel. *Id.*
4 § 7283.1(a). Further, when a jail receives a DHS request, local law enforcement must provide the
5 implicated detainee with a copy of the request and inform him whether the jail intends to comply
6 with the request. *Id.* § 7283.1(b).

7 Most recently, on October 5, 2017, the State passed the California Values Act (the “Values
8 Act”), Cal. Gov't Code § 7284 *et seq.*, “to ensure effective policing, to protect the safety, well-
9 being, and constitutional rights of the people of California, and to direct the state’s limited
10 resources to matters of greatest concern to state and local governments.” *Id.* § 7284.2(f). The
11 Values Act prohibits compliance with warrantless detainer requests. *See id.* §§ 7284.2(e),
12 7284.6(a)(1)(B). It also forbids a local law enforcement officer from asking any individual his
13 immigration status for immigration enforcement purposes. *See id.* § 7284.6(a)(1)(A). Further, the
14 use of local law enforcement funds or personnel to “provid[e] personal information” about an
15 individual “for immigration enforcement purposes” is disallowed unless that information is
16 “available to the public.” *Id.* § 7284.6(a)(1)(D).

17 The Values Act also amends the TRUST Act to clarify when local law enforcement
18 officers have discretion to respond to DHS notification requests. *See id.* §§ 7282.5(a), 7283(f),
19 7284.6(a)(1)(C). Local law enforcement officers may only comply with notification requests
20 when the relevant individual has a prior criminal conviction included on a long list of specified
21 crimes or if the information that DHS seeks is already available to the public. *See id.* §
22 7284.6(a)(1)(C).

23 The Values Act explicitly purports to comply with section 1373 through a savings clause.
24 Section 7284(e) reads:

25
26 This section does not prohibit or restrict any government entity or
27 official from sending to, or receiving from, federal immigration
28 authorities, information regarding the citizenship or immigration
status, lawful or unlawful, of an individual, or from requesting from
federal immigration authorities immigration status information,
lawful or unlawful, of any individual, or maintaining or exchanging

1 that information with any other federal, state, or local government
2 entity, pursuant to Sections 1373 and 1644 of title 8 of the United
3 States Code.

4 On October 17, 2017, the CalDOJ received a request for a proposed statewide voter
5 referendum regarding the Values Act. On January 17, 2018, the California secretary of state's
6 office announced that the initiative failed to make the ballot. Supplemental RJN, Ex. A (Dkt. No.
7 79).

8 **B. Confidentiality Statutes**

9 The State's confidentiality statutes purport to protect (1) the confidential information of
10 victims and witnesses of crime, Cal. Penal Code §§ 422.93, 679.10, 679.11, and (2) confidential
11 information of youth in its juvenile court system, Cal. Welf. & Inst. Code §§ 827, 831; Cal. Civ.
12 Proc. Code § 155. Relevant to this lawsuit, California Penal Code sections 679.10 and 679.11
13 prohibit any state entity that certifies information for the sake of the U-visa and T-visa application
14 process from disclosing the immigration status of individuals requesting certification "except to
15 comply with federal law or legal process, or if authorized by the victim or person requesting
16 [certification]." *Id.* §§ 679.10(k), 679.11(k).

17 California Penal Code section 422.93 also focuses on the confidential information of
18 victims and witnesses of crime. It prohibits detainment of an individual who is a hate crime
19 victim or witness in instances where the sole reason for the detainment is an "actual or suspected"
20 immigration violation. Cal. Penal Code § 422.93(b). Law enforcement also cannot report or turn
21 over the individual to federal immigration authorities. *Id.*

22 The State's laws regarding confidential information of juveniles dictate that juvenile court
23 records and any information that the records contain are confidential except to statutorily
24 designated parties. Cal. Welf. & Inst. Code § 827. Additionally, in the Special Immigrant
25 Juvenile process, the State's laws require that information regarding a juvenile's immigration
26 status remain confidential. *See id.* § 831(e). Accordingly, any information about a child's
27 immigration status that is apparent during any juvenile court proceeding remains confidential and
28 is only available for inspection "by the court, the child who is the subject of the proceeding, the
parties, the attorneys for the parties, the child's counsel, and the child's guardian." Cal. Civ. Proc.

1 Code § 155(c).

2 **II. THE GRANTS IN QUESTION**

3 The State has been a recipient of both the Byrne JAG and COPS grants, but its future receipt
4 of the grants is threatened by the federal government's interpretation of Section 1373.

5 **A. The Byrne JAG Program**

6 The Office of Justice Programs ("OJP") administers the Edward Byrne Memorial Justice
7 Assistance Grant Program ("Byrne JAG" Program). *See* 34 U.S.C. §§ 10151-10158. The Byrne
8 JAG Program is a mandatory formula grant, meaning that funds from the grant program are
9 awarded based on a statutorily defined formula and the federal government must disburse the grant
10 if an applicant meets the requirements set forth in the authorizing statutes. *See id.* § 10156. The
11 Byrne JAG Program supports state and local law enforcement efforts by providing additional
12 funds for personnel, equipment, training, and other criminal justice needs. *See id.* § 10151. For
13 the 2017 fiscal year ("FY2017"), Congress has appropriated \$396 million for the Byrne JAG
14 Program. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135, 203.

15 The current Byrne JAG Program is the result of the merging of two earlier programs: the
16 Edward Byrne Memorial State and Local Law Enforcement Assistance Program grants; and Local
17 Law Enforcement Block Grants. *See* Pub. L. No. 109-162, 119 Stat. 2960, 3094 (2006).
18 Following the merger of the two programs, Congress enumerated eight type of programs that the
19 grant was meant to encompass: (1) law enforcement programs; (2) prosecution and court
20 programs; (3) prevention and education programs; (4) corrections and community corrections
21 programs; (5) drug treatment and enforcement programs; (6) planning, evaluation, and technology
22 improvement programs; (7) crime victim and witness programs; and (8) mental health programs.
23 34 U.S.C. § 10152(a)(1)(A)-(H).

24 **B. The Office of Community Oriented Policing Services**

25 The federal government also announced that grants issued by the Office of Community
26 Oriented Policing Services ("COPS") would also have a Section 1373 certification condition.
27 Office of Community Oriented Policing Services' 2017 COPS Anti-Methamphetamine
28 Program Application Guide, RJN, Ex. C at 2, Appx. D (Dkt. No. 27-1); Office of Community

1 Oriented Policing Services’ 2017 COPS Office Anti-Heroin Task Force Program Application
 2 Guide, RJN, Ex. D at 1-2, Appx. D (Dkt. No. 27-1). In FY 2017, access to COPS funds will have
 3 threshold eligibility requirement of certified compliance with Section 1373. COPS currently
 4 administers six programs, including the COPS Anti-Methamphetamine Program (“CAMP”) and
 5 the Anti-Heroin-Task Force Program (“AHTF”). State law enforcement agencies use CAMP
 6 funds to investigate unlawful activities related to the manufacture and distribution of
 7 methamphetamine. COPS Fact Sheet, FY2017 COPS Anti-Methamphetamine Program, *available*
 8 *at* https://cops.usdoj.gov/pdf/2017AwardDocs/camp/Fact_Sheet.pdf. AHTF funds are used to
 9 investigate illegal activities “related to the distribution of heroin or unlawful distribution of
 10 prescriptive opioids, or unlawful heroin and prescription opioid traffickers[.]” COPS Fact Sheet,
 11 FY2017 COPS Anti-Heroin Task Force Program, *available at* [https://cops.usdoj.gov/pdf/2017](https://cops.usdoj.gov/pdf/2017AwardDocs/ahtf/Fact_Sheet.pdf)
 12 *AwardDocs/ahtf/Fact_Sheet.pdf*. CAMP and AHTF are each authorized by the Consolidated
 13 Appropriations Act, 2017. H.R. 244, Pub. L. 115–31.

14 **III. CALIFORNIA’S USE OF “JAG” AND “COPS” FUNDS**

15 The State’s Byrne JAG Program grants are distributed to its Board of State and
 16 Community Corrections (“BSCC”). BSCC has received \$252.7 million from the Byrne JAG
 17 program since 2006. See Declaration of Mary Jolls (“Jolls Decl.”) ¶7. For FY2017, the State
 18 expects approximately \$28.3 million in JAG funding, with \$17.7 million going to BSCC. *Id.*, ¶5.
 19 BSCC uses the funding to issue subgrants to local jurisdictions; these jurisdictions then use them
 20 for education and crime prevention programs, law enforcement programs, and court programs. *Id.*
 21 ¶¶8, 10, Ex. A. BSCC currently funds programs for 32 local jurisdictions and the CalDOJ; the
 22 funds benefit task forces focused on criminal drug enforcement, violent crime, and gang activity.
 23 Jolls Decl. ¶10; Caligiuri Decl. ¶¶19-21.

24 CalDOJ has received over \$11 million in COPS funding to support law enforcement efforts
 25 around the State since it began. Caligiuri Decl. ¶4. For FY2017, CalDOJ applied for
 26 approximately \$2.8 million in CAMP and AHTF grants. The CAMP grant would cover salaries,
 27 benefits, and other costs for a task force targeting enforcement against large-scale
 28 methamphetamine drug trafficking organizations. *See id.*, ¶¶6-8, 10. The AHTF grant covers

1 equipment, consultants, and other costs for support of task forces that conduct large scale heroin
 2 investigations, share data and intelligence among law enforcement throughout the State, and hold
 3 education sessions in the community about drug abuse awareness. *See id.*, ¶¶s 12-14, 16.

4 **IV. SECTION 1373**

5 Through the Immigration and Nationalization Act (“INA”), 8 U.S.C. §§ 1101 et seq.,
 6 Congress granted the executive branch near plenary power over the regulation and enforcement of
 7 immigration laws in the U.S. *See Arizona v. United States*, 567 U.S. 387, 396 (2012). Most
 8 pertinent to this lawsuit, Section 1373 of the INA, which was passed in 1996, prohibits local
 9 governments from restricting government officials or entities from communicating information
 10 regarding immigration status to the U.S. Immigration and Customs Enforcement (“ICE”). It states
 11 in relevant part:

12 (a) In General. Notwithstanding any other provision of Federal,
 13 State, or local law, a Federal, State, or local government entity or
 14 official may not prohibit, or in any way restrict, any government
 15 entity or official from sending to, or receiving from, the Immigration
 and Naturalization Service information regarding the citizenship or
 immigration status, lawful or unlawful, of any individual.

16 (b) Additional Authority of Government Entities. Notwithstanding
 17 any other provision of Federal, State, or local law, no person or
 18 agency may prohibit, or in any way restrict, a Federal, State, or local
 government entity from doing any of the following with respect to
 information regarding the immigration status, lawful or unlawful, of
 any individual:

- 19 (1) Sending such information to, or requesting or receiving
 20 such information from, the Immigration and Naturalization
 21 Service.
 22 (2) Maintaining such information.
 23 (3) Exchanging such information with any other Federal,
 State, or local government entity.

24 U.S.C. 1373.

25 In the 2016 fiscal year (“FY16”), OJP identified Section 1373 as an applicable federal law
 26 for the Byrne JAG Program for the first time since the program’s inception. *See Decl. of Alan R.*
 27 *Hanson (Hanson Decl.) ¶ 3 (Dkt. No. 42-1)*. In receiving the award, the State accepted the Section
 28 1373 compliance condition as it relates to the FY 2016 Byrne JAG Program grant. *See*

1 California’s FY 2016 Byrne JAG Program Award Document, Hanson Decl., Ex. A (Dkt. No. 42-
2 1). In July 2017, OJP sought applications for the FY 2017 Byrne JAG Program. *See* Edward
3 Byrne Memorial Justice Assistance Grant Program FY 2017 State Solicitation, Request for
4 Judicial Notice (“RJN”), Ex. A (Dkt. No. 27-1). This solicitation informed prospective applicants
5 that the FY 2017 award would be conditioned on all grantees certifying compliance with Section
6 1373. *Id.* at 31. The State’s Attorney General must sign a standard affidavit, under penalty of
7 perjury, affirming compliance with Section 1373 on behalf of the State and “any entity, agency, or
8 official” as applicable to the “program or activity to be funded.” *Id.* at Appx. II. Governor
9 Edmund G. Brown must also adopt that certification under penalty of perjury. *Id.* at Appx. I.

10 California Department of Justice (“CalDOJ”) submitted its applications with the executed
11 certifications for AHTF and CAMP on July 7 and 10, respectively. Decl. of Christopher Caligiuri
12 (“Caligiuri Decl.”) ¶¶ 9, 15 (Dkt. No. 30). As part of their applications, CalDOJ included a
13 supplemental statement with its COPS Section 1373 certifications. *Id.* It clarified that its
14 certifications were made “as [Section 1373] is lawfully interpreted,” and reserved its rights to
15 challenge “any unconstitutional enforcement of Section 1373.” *Id.* The federal government has
16 yet to respond to CalDOJ’s applications. *See id.* ¶¶ 11, 17.

17 **V. THE DISPUTE IN CALIFORNIA**

18 On April 21, 2017, the federal government sent letters to nine jurisdictions that received
19 the JAG award in 2016, including the State, demanding an official legal opinion that explained the
20 jurisdictions’ compliance with Section 1373. Department of Justice, Letter to Kathleen Howard,
21 Executive Director of the California Board of State and Community Corrections from Alan R.
22 Hanson, Acting Assistant Attorney General for the Office of Justice Programs (April 21, 2017),
23 RJN, Ex. I (Dkt. No. 27-2); Press Release, U.S. Dep’t of Justice, Department of Justice Sends
24 Letter to Nine Jurisdictions Requiring Proof of Compliance with 8 U.S.C. § 1373 (Apr. 21, 2017),
25 RJN, Ex. M (Dkt. No. 27-3). On June 29, BSCC submitted the requested legal opinion explaining
26 the State’s laws do not violate Section 1373. *See* Jolls Decl., Ex. C (Dkt. No. 20-1). Having not
27 received a response when other jurisdictions had received guidance on Section 1373 compliance,
28 on October 31, the State filed a Motion for Preliminary Injunction to prevent enforcement of the

1 Section 1373 conditions as to the TRUTH Act and its Confidentiality Statutes.

2 On November 1, 2017, the federal government sent a preliminary compliance assessment
3 letter to California and alerted the State that three provisions of the Values Act may violate
4 Section 1373. Department of Justice, Letter to Kathleen Howard, Executive Director of the
5 California Board of State and Community Corrections from Alan R. Hanson, Acting Assistant
6 Attorney General for the Office of Justice Programs (November 1, 2017), RJN, Ex. P (Dkt. No.
7 27-3). The highlighted provisions related to: (i) inquiries into an individual’s immigration status,
8 Cal. Gov’t Code, § 7284.6(a)(1)(A), (ii) responses to notification requests, *id.* § 7284.6(a)(1)(C),
9 and (iii) the sharing of “personal information,” *id.* § 7284.6(a)(1)(D)). RJN, Ex. P at 1-2. To
10 comply with Section 1373, the federal government stated that the State must certify that: (1) it
11 does “not restrict California officers and employees from requesting information regarding
12 immigration status from federal immigration officers”, and (2) it “interprets and applies [the
13 notification request and personal information] provisions to not restrict California officers from
14 sharing information regarding immigration status with federal immigration officers, including
15 information regarding release date[s] and home address[es].” *Id.* at 1-2. The federal government
16 interprets the State’s laws as violating Section 1373 if it cannot make those certifications.

17 On November 13, the State replied to the federal government’s assessment letter. Hanson
18 Decl. ¶ 14. OJP has not responded. *Id.* ¶ 15. The federal government claims that OJP is not
19 issuing FY 2017 Byrne JAG award documents to any applicants while awaiting developments in
20 the other relevant litigation. *Id.* ¶ 10.

21 **VI. OTHER RELATED LITIGATION**

22 There have been two other lawsuits challenging the federal government’s imposition of
23 new conditions on the Byrne JAG Program grants. In addition to the Section 1373 certification
24 condition, these lawsuits addressed the federal government’s imposition of conditions requiring
25 that local authorities provide federal agents advance notice of the scheduled release from state or
26 local correctional facilities of certain individuals suspected of immigration violations (the “notice
27 condition”) and that local authorities provide immigration agents with access to local detention
28 facilities (the “access condition”).

1 In *City of Chicago v. Sessions*, 264 F.Supp.3d 933, 951 (N.D. Ill. 2017), the court granted
 2 the City of Chicago’s motion for a nationwide preliminary injunction against the imposition of the
 3 notice and access conditions and denied the City of Chicago’s motion to enjoin the condition
 4 requiring compliance with Section 1373.¹ *Id.* at 951. With respect to the certification condition,
 5 the court found that a provision of the Byrne JAG Program authorizing statute, 34 U.S.C. §
 6 10153(a)(5)(D) that requires certification that an applicant for Byrne JAG Program funds “will
 7 comply with all provisions of this part and all other applicable Federal laws” gave the federal
 8 government the statutory authority to impose the Section 1373 certification condition. *Id.* at 944-
 9 46. In the court’s view, “[t]he most natural reading of the statute authorizes the Attorney General
 10 to require a certification of compliance with all other applicable federal laws, which by the
 11 plainest definition includes Section 1373.” *Id.* at 945-46. Accordingly, the court found that the
 12 City of Chicago could not demonstrate success on the merits as to the certification condition. The
 13 court’s order is on appeal. *See City of Chicago v. Sessions*, No. 17-02991 (7th Cir. Sept 26, 2017)
 14 (case heard and taken under advisement by panel on January 19, 2018).

15 In *City of Philadelphia v. Sessions*, No. 17–3894, — F.Supp.3d —, 2017 WL 5489476,
 16 at *61-62 (E.D. Pa. Nov. 15, 2017), the court granted the City of Philadelphia’s motion for
 17 preliminary injunction against the imposition of each of the challenged conditions for the Byrne
 18 JAG Program grants. The court found that the federal government’s imposition of the notice and
 19 access conditions was without appropriate statutory authority under the APA because it was clear
 20 that Section 10102(a)(6), which the federal government argues grants it authority to impose the
 21 conditions, did not authorize any of the challenged conditions. *Id.* at *25-27. As to the
 22 certification condition, the court found that Section 10153(a)(5)(D) may act as a separate grant of
 23 authority allowing the federal government’s imposition of the certification condition. *Id.* But the
 24 court held that imposition of the certification condition is arbitrary and capricious under the APA
 25 because the federal government “failed to give adequate reasons for its decisions examining the
 26 relevant data and articulating a satisfactory explanation for its action including rational connection
 27

28 ¹ As a result of the nationwide injunction, this Order focuses on the certification condition, which has not been enjoined.

1 between the facts found and the choice made.” *Id.* at *33 (citing *Encino Motorcars, LLC v.*
 2 *Navarro*, 136 S.Ct. 2117, 2125 (2016); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*
 3 *Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted)). Further, the court found that the
 4 federal government failed to consider important aspects of the problems it sought to solve and its
 5 justifications could not “be ascribed to a difference in view or the product of agency expertise.”
 6 *Id.* Accordingly, it determined that the City of Philadelphia could demonstrate success on the
 7 merits as to challenged conditions.

8 The court did not rest its decision on this likely success on the merits however. It found
 9 that Philadelphia’s laws substantially complied with the Byrne JAG Program conditions. Further,
 10 it held that the City of Philadelphia was able to demonstrate irreparable harm and that the balance
 11 of equities and the public interest weighed in its favor. Accordingly, it enjoined the federal
 12 government from denying the City of Philadelphia’s Byrne JAG Program grant for FY 2017. The
 13 court’s order is also on appeal. *See City of Philadelphia v. Attorney General U.S.*, No. 18-01103
 14 (3d Cir. Jan. 16, 2018)

15 LEGAL STANDARD

16 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
 17 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 18 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
 19 *Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This has been interpreted as a four-part
 20 conjunctive test, not a four-factor balancing test. However, the Ninth Circuit has held that a
 21 plaintiff may also obtain an injunction if he has demonstrated “serious questions going to the
 22 merits” that the balance of hardships “tips sharply” in his favor, that he is likely to suffer
 23 irreparable harm, and that an injunction is in the public interest. *See Alliance for the Wild Rockies*
 24 *v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011).

25 DISCUSSION

26 I. JUSTICIABILITY

27 The federal government argues that the State’s claims are not justiciable because the State
 28 cannot demonstrate the injury-in-fact necessary to establish standing and because its claims are not

1 ripe for review. These principles of standing and ripeness go to whether this court has jurisdiction
 2 to hear the State’s claims. I conclude that the State has demonstrated Article III standing to
 3 challenge the Section 1373 certification condition and that its claims are ripe for review.

4 The federal government challenges the justiciability of the State’s claims on standing and
 5 ripeness grounds. It contends that because it has not withheld or threatened to withhold grant
 6 funding on any state statute except for the Values Act, the State lacks standing to seek a ruling on
 7 any other state statute. It also asserts that there is not a ripe controversy because the federal
 8 government has not made a final decision as to whether the Values Act violates Section 1373. (Its
 9 argument that the Values Act is not currently in effect and may never be in effect due to a
 10 proposed voter referendum is moot because the referendum failed due to lack of signatures on
 11 January 17, 2017.) I address standing and ripeness in turn.

12 **A. Standing**

13 Article III, section 2 of the Constitution limits the jurisdiction of the federal courts to
 14 “Cases” and “Controversies.” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *see* U.S. Const.
 15 art. III, §, cl. 1. “Standing is an essential and unchanging part of the case-or-controversy
 16 requirement.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing a
 17 plaintiff must demonstrate “that it has suffered a concrete and particularized injury that is either
 18 actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a
 19 favorable decision will redress that injury.” *Massachusetts*, 549 U.S. at 517 (citing *Lujan*, 504
 20 U.S. at 560-61). An entity facing enforcement action may establish standing by demonstrating a
 21 well-founded fear of enforcement and a threatened injury that is “sufficiently real and imminent”
 22 or that the well-founded fear is itself causing the present injury. *Cty. of Santa Clara v. Trump*, 250
 23 F. Supp. 3d 497, 519 (N.D. Cal. 2017) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1976)).

24 The State claims that it has standing to seek relief concerning the amended TRUST Act,
 25 TRUTH Act, and state confidentiality statutes because it has a well-founded fear of enforcement
 26 against its statutes and the requisite injury-in-fact. It contends that (1) the federal government has
 27 repeatedly highlighted the State’s laws as generally not in compliance with Section 1373; (2) the
 28 federal government has sought to enforce Section 1373 against laws and policies similar to its

1 confidentiality statutes; and (3) the federal government expressly states that potentially
 2 noncompliant laws “may not be limited to” the Values Act and “reserv[es] the right to identify
 3 additional bases of potential violations of Section 1373.” RJN, Ex. P.

4 The State asserts that, because the federal government’s interpretation of Section 1373 and
 5 its certification requirement undermine the “exercise of its sovereign power to create and enforce a
 6 legal code,” it suffers the requisite injury-in-fact to satisfy the standing requirement. It also argues
 7 that the federal government’s actions threaten the loss of Byrne JAG Program funds promised
 8 under federal law as well as already awarded COPS funds, which is also sufficient to demonstrate
 9 injury-in-fact.

10 The federal government responds that there is no “live controversy” regarding whether any
 11 statutes other than the Values Act may comply with Section 1373 and no foreseeable injury-in-fact
 12 arising out of the federal government’s view of these statutes. Additionally, it contends that any
 13 assumption that the federal government will withhold grant funds based on any statute other than
 14 the Values Act is purely speculative and therefore cannot be the basis for standing.

15 As I discuss below, the State has a well-founded fear of enforcement regarding the
 16 amended TRUST Act, TRUTH Act, and state confidentiality statutes under the federal
 17 government’s Section 1373 interpretation and certification condition. Such enforcement would
 18 deprive it of federal grants to which it is otherwise entitled. The State has demonstrated Article III
 19 standing.

20 **1. California Has Demonstrated a Well-founded Fear of Enforcement**

21 In assessing whether enforcement action is likely, courts look to the past conduct of the
 22 government, as well as the government’s statements and representations, to determine whether
 23 enforcement is likely or simply “chimerical.” *Compare Steffel v. Thompson*, 415 U.S. 452, 459
 24 (1947) (finding that petitioner who had been warned twice to stop handbilling, and whose
 25 companion had been arrested for handbilling, had well-founded fear of enforcement), *with Poe v.*
 26 *Ullman*, 367 U.S. 497, 508 (1961) (“we cannot accept, as the basis of constitutional adjudication,
 27 other than as chimerical, the fear of enforcement of provisions that have during so many years
 28 gone uniformly and without exception unenforced”). A plaintiff does not need to have been

1 specifically threatened with enforcement action to show that enforcement action is likely. *See*
2 *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988) (plaintiffs had credible threat of
3 enforcement even though newly enacted law had not become effective and no enforcement action
4 had been brought or threatened under it). But “the threat of enforcement must at least be
5 ‘credible,’ not simply ‘imaginary or speculative.’” *Thomas v. Anchorage Equal Rights Comm’n*,
6 220 F.3d 1134, 1140 (9th Cir. 2000) (en banc) (citing *Babbitt v. United Farm Workers Nat’l*
7 *Union*, 442 U.S. 289, 298 (1979)).

8 The federal government’s contention that the State’s fear of enforcement is speculative
9 bears little weight. The federal government has actively sought to enforce Section 1373 against
10 jurisdictions whose laws are undeniably similar to the State’s confidentiality statutes. For
11 example, the federal government seeks to enforce Section 1373 against Vermont’s Model Fair and
12 Impartial Policing Policy, in which officers are required to communicate that they will not report
13 immigrants or immigration status of victims or witnesses to crimes. Letter to Vermont from Alan
14 R. Hanson, Acting Assistant Attorney General for the OJP at the DOJ, Supplemental RJN, Ex. H
15 (Dkt. No. 61). The requirements of Vermont’s law closely mirror that of California’s
16 confidentiality statutes. The same is true of Philadelphia’s policy regarding victims of crimes,
17 against which the federal government has also sought to enforce Section 1373. *See* RJN, Ex. R,
18 Letter to Philadelphia from Alan R. Hanson, Acting Assistant Attorney General for the OJP at the
19 DOJ (Dkt. No. 27-3). And in its November letter to the State regarding Section 1373’s
20 relationship to the Values Act, the federal government indicated that it “reserves the right to
21 identify additional bases of potential violations of Section 1373.” RJN, Ex. P.

22 Members of the Executive Branch have made no secret of their hostility to the State’s view
23 of its obligations under Section 1373. Thomas Homan, the Acting Director of Immigration and
24 Customs Enforcement, recently threatened criminal prosecution of political leaders in sanctuary
25 jurisdictions. *See* Interview by Fox News with Thomas Homan, Acting Director, Immigration and
26 Customs Enforcement (Jan. 2, 2018) (Stating “[w]e’ve got to start charging some of these
27 politicians with crimes” in reference to leaders in “sanctuary cities”); *see also Oversight of the*
28 *United States Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*

1 (2018) (statement of Kirstjen Nielsen, United States Department of Homeland Security Director)
 2 (noting that DOJ is reviewing “what avenues might be available” to hold leaders accountable for
 3 “sanctuary city” policies). . On June 13, 2017, Acting Director Homan testified before Congress
 4 that jurisdictions that “have some sort of policy where they don’t . . . allow [ICE] access to the
 5 jails” violate Section 1373. United States. Cong. House. Appropriations Committee on Home
 6 Security. June 13, 2017 (statement of Thomas Homan, Acting Director of the Immigration and
 7 Customs Enforcement), RJN, Ex. S at 35, 47-48 (Dkt. No. 27-3). Further, Attorney General
 8 Sessions has stated that “the State of California . . . [has] enacted statutes . . . designed to
 9 specifically prohibit or hinder ICE from enforcing immigration law by . . . denying requests by
 10 ICE officers and agents to enter prisons and jails to make arrests.” Letter from Jefferson B.
 11 Sessions, Attorney General at the U.S. Dep’t of Justice and John F. Kelly, then-Secretary of the
 12 U.S. Dep’t of Homeland Security to the Honorable Tani G. Cantil-Sakauye, Chief Justice of the
 13 Supreme Court of California (March 29, 2017), RJN, Ex. T at 2 (Dkt. No. 27-3). The President
 14 himself has threatened to withdraw ICE agents from California because of the state’s sanctuary
 15 policies. CNN, *Trump Considers Pulling ICE Agents to Punish California*, Youtube (Feb. 22,
 16 2018), <https://www.youtube.com/watch?v=1C3coXw2AI0>.

17 Taken together, these facts establish that California has a well-founded fear of enforcement
 18 concerning its amended TRUST Act, TRUTH Act, and state confidentiality statutes. It has
 19 demonstrated that other states that have similar statutes and practices have faced enforcement and
 20 that the federal government has a contrary view of Section 1373’s reach that would affect its
 21 relevant statutes. And it has established that the federal government has specifically identified the
 22 State as having other policies that purportedly violate Section 1373 that were not mentioned in the
 23 preliminary assessment letter. Accordingly, the State has shown that the “threat of enforcement
 24 [is] credible, not simply imaginary or speculative.” *Thomas*, 220 F.3d at 1140.

25 2. California Has Demonstrated Injury-in-fact

26 The State asserts that because the federal government’s interpretation of Section 1373 and
 27 its certification requirement undermine the “exercise of its sovereign power to create and enforce a
 28 legal code,” it suffers the requisite injury-in-fact to satisfy the standing requirement. It also argues

1 that the federal government’s actions threaten the loss of Byrne JAG Program funds promised
2 under federal law as well as already awarded COPS funds, which is also sufficient to demonstrate
3 injury-in-fact.

4 **a. California’s claims implicate a constitutional interest**

5 The State has broad police powers reserved to it under the Constitution to determine its
6 local policies and enforcement priorities pursuant to the Tenth Amendment. *See Alfred L. Snapp*
7 *& Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (highlighting that states have
8 a sovereign interest in “the exercise of sovereign power over individuals and entities within the
9 relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and
10 criminal”); *see also New York v. United States*, 505 U.S. 144, 157-158 (1992) (“[T]he Tenth
11 Amendment confirms that the power of the Federal Government is subject to limits that may, in a
12 given instance, reserve power to the States.”). The State asserts that the relevant statutes here “are
13 designed to improve public safety of all Californians.” Mot. at 2 (Dkt. No. 26). The statutes
14 strengthen community policing efforts and improve public safety because immigrants are no more
15 likely to commit crimes than native-born Americans and because a clear distinction between local
16 law enforcement and immigration enforcement results in safer communities. *Id.* at 6.

17 These statutes reflect the State’s local judgment of what policies and practices are most
18 effective for maintaining public safety and community health. The State’s claim is that the federal
19 government’s interpretation of Section 1373 and the compliance condition conflict with its police
20 powers because the federal government seeks to compel it to change its policies in violation of the
21 Tenth Amendment. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011)
22 (“when a federal law interferes with a state’s exercise of its sovereign ‘power to create and enforce
23 a legal code’ [] it inflict[s] on the state the requisite injury-in-fact.”); *Ohio ex rel. Celebrezze v.*
24 *U.S. Dep’t of Transp.*, 766 F.2d 228, 233 (6th Cir. 1985) (Ohio had standing to litigate the
25 constitutionality of its own law where “effective enforcement of the Ohio statute” was rendered
26 “uncertain by the formal position of the [U.S. Department of Transportation] that the Ohio statute
27 is preempted” as “threatened injury to a State’s enforcement of its safety laws” constitutes an
28 injury-in-fact). This is sufficient to demonstrate injury-in-fact for Article III standing.

b. California is threatened with the loss of federal grants

The State claims that the federal government threatens to penalize it for failing to comply with the federal government's interpretation of Section 1373 by withholding the COPS grant and the Byrne JAG Program grant. The State previously received these grants in each year since their inception. This threatened injury meets Article III's standing requirements. A "loss of funds promised under federal law [] satisfies Article III's standing requirement." *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015).

In sum, the State has established both its well-founded fear of enforcement and a threatened injury that is "sufficiently real and imminent." It has Article III standing.

B. Ripeness

The federal government asserts that the State's claims regarding the Values Act are not ripe for three reasons: (1) the Office of Justice Programs has not yet responded to the State's letter regarding the Values Act and has not determined administratively whether the Act violates Section 1373; (2) the Values Act is not currently in effect and, due to a referendum request, may never become effective; and (3) a ruling that the Values Act does not violate Section 1373 would not free the State from legal jeopardy unless all its laws, together with policies implementing those laws, are also consistent with Section 1373.

The State points out that those arguments focus on prudential, not constitutional, ripeness. The State contends that its claims are constitutionally ripe because (1) its response to the November 1 Letter effectively "articulated a concrete plan to violate the federal government's interpretation the law in question;" (2) the federal government made a "threat of prosecution" against the State in the letter and through public statements; and (3) the federal government has repeatedly sought to enforce Section 1373 over the past two months, including against the State. As to the prudential ripeness standards, the State believes that the issues in this case are fit for decision and that it will suffer hardship from delayed review.

A dispute is ripe in the constitutional sense if it "present[s] concrete legal issues, presented in actual cases, not abstractions." *Colwell v. HHS*, 558 F.3d 1112, 1123 (9th Cir.2009) (internal quotation marks omitted). In the context of a declaratory judgment suit, the inquiry "depends

1 upon ‘whether the facts alleged, under all the circumstances, show that there is a substantial
2 controversy, between parties having adverse legal interests, of sufficient immediacy and reality to
3 warrant the issuance of a declaratory judgment.’ ” *United States v. Braren*, 338 F.3d 971, 975 (9th
4 Cir.2 003) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

5 Ripeness and standing are closely related because they “originate from the same Article III
6 limitation.” *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 n. 5 (2014) (internal
7 quotation marks omitted) (“[T]he Article III standing and ripeness issues in this case boil down to
8 the same question.” (internal quotation marks omitted)). As a result, the Ninth Circuit has
9 recognized that “in many cases, ripeness coincides squarely with standing’s injury in fact prong.”
10 *Thomas*, 220 F.3d at 1138 (“The constitutional component of the ripeness inquiry is often treated
11 under the rubric of standing Indeed, because the focus of our ripeness inquiry is primarily
12 temporal in scope, ripeness can be characterized as standing on a timeline.”).

13 In order to be constitutionally ripe, the State must demonstrate that the injury is
14 “imminent.” An injury is imminent “if the threatened injury is ‘certainly impending,’ or there is a
15 “ ‘substantial risk’ that the harm will occur.’ ” *Susan B. Anthony List*, 134 S.Ct. at 2341 (quoting
16 *Clapper v. Amnesty Int’l USA*, 133 S.Ct. at 1147, 1150 n. 5 (2013)). The State asserts that it will
17 be harmed by the federal government’s interpretation of Section 1373 because the State’s laws
18 violate the federal government’s broad interpretation of Section 1373, open up the State to
19 prosecution and endanger its future grant funds. Through the federal government’s November
20 letter to the State, it showed that it intends to prosecute any entities that do not comply with its
21 interpretation of Section 1373. The federal government has also sought to enforce the compliance
22 condition with respect to other laws that mirror those of the State. And finally, the federal
23 government has explicitly stated that receipt of both the Byrne JAG Program and COPS funds are
24 conditioned on the Section 1373 certification. Accordingly, the State has demonstrated both that
25 the threatened injury is “certainly impending” and that there is a “substantial risk” that harm will
26 occur. *See id.* This is sufficient to establish constitutional ripeness.

27 The Ninth Circuit has previously declined to reach prudential ripeness when constitutional
28 ripeness is satisfied. *See Susan B. Anthony List*, 134 S.Ct. at 2347 (refusing to “resolve the

1 continuing vitality of the prudential ripeness doctrine”). I follow its direction. The State has
 2 demonstrated that its claims are ripe for review. I now move to the merits of its motion for
 3 preliminary injunction.

4 **II. LIKELIHOOD OF SUCCESS ON THE MERITS**

5 The State challenges the Section 1373 certification condition on four grounds: (1) the
 6 imposition of the condition is arbitrary and capricious in violation of the Administrative Procedure
 7 Act (“APA”); (2) the condition violates the Spending Clause because it is unrelated to the purpose
 8 of the JAG Byrne Program; (3) the State’s statutes do not violate Section 1373; and (4) the Tenth
 9 Amendment does not allow for Section 1373 to “commandeer” the State’s control over
 10 governmental employees and its residents’ confidential personal information. The federal
 11 government responds that the Section 1373 condition is consistent with the APA and the spending
 12 clause; the State cannot demonstrate that none of its laws would violate the Section 1373
 13 compliance condition; and the State cannot show that the Section 1373 compliance condition
 14 violates the Tenth Amendment.

15 **A. APA Claim**

16 The State argues that the Section 1373 certification condition is “arbitrary and capricious”
 17 under the APA. The federal government contends that the APA claim cannot go forward because
 18 it does not challenge “final agency action” given that the federal government has not made a final
 19 determination that the State violates the certification condition. 5 U.S.C. § 704. The federal
 20 government also asserts that even if APA review is available at this point in time, the challenged
 21 condition is well supported by a reasoned explanation. I address each argument in turn.

22 **1. Imposition of the Certifying Condition Is Final Agency Action**

23 For agency action to be final, the action must (1) “mark the consummation of the agency’s
 24 decisionmaking process,” meaning not “tentative or interlocutory” and (2) “be one by which rights
 25 or obligations have been determined, or from which legal consequences will flow.” *Bennett v.*
 26 *Spear*, 520 U.S. 154, 177-78 (1997) (quotations omitted). To satisfy the first prong of the *Bennett*
 27 test, an agency must have “rendered its last word on the matter.” *Whitman v. Am. Trucking Ass’n*,
 28 531 U.S. 457, 478 (2001) (quotation omitted).

1 The imposition of the certification condition on the Byrne JAG program meets this
2 requirement. By imposing the certification condition, the federal government has articulated that
3 certain funds, namely the COPS grants and the Byrne JAG Program grants, will require adherence
4 to the certification condition. It has rendered its final word, satisfying the first prong of the
5 *Bennett* test.

6 As to the second prong of the *Bennett* test, legal consequences clearly flow from the
7 imposition of the certification condition. Receipt of the grants is conditioned on certifying
8 compliance with the federal government's interpretation of Section 1373. *See Appalachiam*
9 *Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding that a EPA guidance document
10 gives "marching orders" to be final agency action despite explicit language disclaiming that
11 information provided was merely guidance). Further, the State must certify compliance to the
12 federal government's interpretation of Section 1373 under penalty of perjury. Given the parties'
13 diverging interpretation of the breadth of Section 1373, the certifying condition clearly opens up
14 the State to potential legal consequences.

15 **2. It Is Too Soon To Determine Whether the Federal Government's**
16 **Imposition of the Certifying Condition Is Arbitrary and Capricious**

17 The APA requires that courts "hold unlawful and set aside agency action, findings, and
18 conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in
19 accordance with law." 5 U.S.C. § 706(2)(A). The justification for an agency's final action is
20 typically apparent as the result of formal rulemaking, notice-and-comment requirements, and
21 associated hearings. But because the State's challenge is to grant conditions, these administrative
22 procedures were not required prior to the federal government's decision to impose the certification
23 condition. *See id.* § 553(a)(2) (exempting "matter(s) relating to agency management or personnel
24 or to public property, loans, grants, benefits, or contracts" from rulemaking requirements).

25 The State argues that the identification of Section 1373 as an "applicable law" for the
26 Byrne JAG Program grant is arbitrary and capricious in violation of the APA. It contends that the
27 federal government has failed to identify a good reason for the policy change as required by the
28 APA. The federal government responds that it has met its burden to demonstrate that its reasons

1 for imposing the condition were rational.

2 In order to demonstrate these “rational” reasons, the federal government points only to a
3 press release that it issued on July 25, 2017. See Press Release, U.S. Dep’t of Justice,
4 Backgrounder on Grant Requirements (“Backgrounder”) (July 25, 2017), available at
5 <https://www.justice.gov/opa/press-release/file/984346/download>. The Backgrounder highlights
6 three of the federal government’s concerns as they pertain to Section 1373 compliance condition:
7 (1) jurisdictions that refuse to cooperate with federal immigration authorities in information
8 sharing about undocumented immigrants who commit crimes; (2) the use of federal funds for
9 policies that frustrate federal immigration enforcement; and (3) jurisdictions that jeopardize the
10 safety of their residents and undermine the Department’s ability to protect the public and reduce
11 crime and violence. *City of Philadelphia v. Sessions*, --- F.Supp.3d ---, 2017 WL 5489476, at *31
12 (E.D. Pa. Nov. 15, 2017). The federal government could place conditions on grants with these
13 goals in mind if there is a “rational connection between the facts found and the choice made” to
14 achieve these goals. *Motor Vehicle Mfrs Ass’n v. State Farm Mut. Auto Ins. Co*, 463 U.S. 29, 43
15 (1983).

16 It is not clear, however, that the certifying condition has the requisite rational connection to
17 the facts articulated in the Backgrounder. As the court in *City of Philadelphia* explains, the plain
18 language of Section 1373 is too broad to achieve the information sharing goal listed in the first
19 concern. 2017 WL 5489476, at *3. The immigration information implicated by Section 1373
20 captures the immigration status of all people in the United States, not merely those who are
21 present unlawfully. See 8 U.S.C. §1372. Its language does not limit its mandate to merely
22 immigrants who have committed crimes. *Id.* Section 1373’s language captures so broad a
23 category of individuals that requiring compliance cannot further the goal of better information-
24 sharing between the federal government and local law enforcement regarding illegal immigrants
25 who commit crimes.

26 As to the federal government’s second concern, the funds from the Byrne JAG Program
27 are used for purposes unrelated to immigration enforcement, such as funding task forces focused
28 on criminal drug enforcement, violent crime, and gang activity. Jolls Decl. ¶ 10. Consequently,

1 withholding the grant funds because of the certification condition does not further the federal
2 government's goal of prohibiting "use of federal funds for policies that frustrate federal
3 immigration enforcement." Instead, the certification condition amounts to a way to target
4 jurisdictions that do not comply with the federal government's interpretation of Section 1373.

5 Its third concern—jurisdictions that jeopardize the safety of their residents and undermine
6 the Department's ability to protect the public and reduce crime and violence—is unsupported.
7 The federal government presents no evidence that there is any link between increases in crime and
8 violence and imposing the certification condition, especially given that Section 1373's language
9 captures the immigration status of both criminal and non-criminal immigrants.

10 The State points to evidence that keeping the immigration status of undocumented
11 immigrants confidential in certain circumstances improves the community's relationship with law
12 enforcement, making immigrants, both documented and undocumented, more likely to report
13 crimes. California Assembly Committee on Public Safety's analysis of AB 2792 ("the TRUTH
14 Act"), RJN, Ex. F at 5 (Dkt. No. 27-2). It also highlights studies that concluded that first
15 generation immigrants, including undocumented immigrants, were considerably less likely to
16 commit violent acts than third-generation Americans. This study also revealed that living in
17 neighborhoods of concentrated immigration was associated with lower violence. California
18 Senate Committee on Public Safety's analysis of AB 4 ("the TRUST Act"), RJN, Ex. G at 8.
19 Given the State's evidence that immigration status is not linked to pervasive criminal activity and
20 violence and the federal government's lack of evidence supporting such an assertion, there does
21 not appear to be rational connection between imposing the certification condition and "the
22 Department's ability to protect the public and reduce crime and violence."

23 All that said, criminal law impacts the INA in a variety of ways, and, as discussed below,
24 the relationship the government needs to add conditions to the receipt of grants does not need to be
25 close. While the federal government fails to identify any goal set out in the Backgrounder that is
26 furthered by the imposition of the certification condition, I am not prepared at the moment to find
27 that the certification condition is arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A).
28 The change in policy might "be ascribed to a difference in view," *Motor Vehicle*, 463 U.S. at 43.

1 An issue that needs to be tied down is whether the federal government’s interpretation of Section
 2 1373 is unconstitutional because it is so broad that it violates the State’s police powers under the
 3 Tenth Amendment.

4 **B. Spending Clause**

5 In authorizing the Byrne JAG Program, Congress indicated its intent to require
 6 “applicant[s]” to “comply with . . . all other applicable Federal laws.” *See* 34 U.S.C. §
 7 10153(a)(5)(D). The federal government contends that there is a clear relationship between the
 8 Section 1373 condition and the Byrne JAG Program goals. Relying on *Mayweathers v. Newland*,
 9 314 F.3d 1062, 1067 (9th Cir. 2002), it argues that the condition “satisfies the ‘low-threshold’
 10 relatedness inquiry.”

11 The State responds that, even at a low bar, the condition requiring compliance with Section
 12 1373, an immigration statute, is unrelated to the funding of local “criminal justice” programs that
 13 JAG is intended to support. The State argues that Section 1373 has no nexus to the purpose of the
 14 implicated funds. To bolster its position, it points to *City of Philadelphia*, where the court found
 15 that “federal interest in enforcing immigration laws falls outside of the scope of the Byrne JAG
 16 program.” 2017 WL 5489476, at *48.

17 The State’s reliance on the statement from *City of Philadelphia* ignores that the court also
 18 declared that “the Certification Condition appears to have some relationship with the JAG
 19 Program” and that “the ‘relatedness issue’ is a close call.” *Id.* at *50. In *New York v. United*
 20 *States*, 505 U.S. 144, 167 (1992), the U.S. Supreme Court stated that “[s]uch conditions must
 21 . . . bear *some relationship* to the purpose of the federal spending.” (emphasis added). This
 22 language does not support a demanding reading of the relatedness requirement. Rather, it appears
 23 to enforce a rather low-threshold relatedness test. Given this, the Section 1373 certification
 24 condition may have a sufficient nexus to the purpose of the implicated funds, depending on the
 25 breadth of the federal government’s interpretation of Section 1373.

26 **C. Tenth Amendment and Section 1373**

27 The State contends that the federal government’s enforcement of Section 1373 against its
 28 statutes constitutes commandeering of the State’s oversight of governmental employees and

1 handling of its residents' confidential personal information. In its view, the relevant question is
2 whether Section 1373 can be enforced against the state's statutes under the Tenth Amendment of
3 the Constitution.

4 The federal government argues that it is not violating the Tenth Amendment by arguing
5 that the Values Act does not comply with Section 1373. It provides three justifications for its
6 position: (1) the dispute here does not involve a federal statutory mandate that directly regulates
7 the State, but rather a condition on receipt of federal funds that the State and its subdivisions are
8 free to accept or reject; (2) the purpose and effect of Section 1373 and the challenged grant
9 conditions are to further the express goals of the INA, not to "commandeer" state officials; and (3)
10 a mere requirement not to prohibit individuals from providing information would not violate the
11 Tenth Amendment.

12 "The Federal Government may not compel the States to enact or administer a federal
13 regulatory program." *New York*, 505 U.S. at 188. "The Federal Government may neither issue
14 directives requiring the States to address particular problems, nor command the States' officers, or
15 those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*
16 *v. United States*, 521 U.S. 898, 935 (1997). "That is true whether Congress directly commands a
17 State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."
18 *NFIB*, 132 S.Ct. at 2602.

19 I agree with the courts in *City of Philadelphia*, 2017 WL 5489476, at *48, and *City of*
20 *Chicago*, 264 F. Supp. 3d at 949, that whether the certification condition violates the Tenth
21 Amendment is "a unique and novel constitutional question." No cited authority holds that the
22 scope of state sovereignty includes the power to forbid state or local employees from voluntarily
23 complying with a federal program. Section 1373 "does not require" that the State "enact any laws
24 or regulations. And it does not require state officials to assist in the enforcement of federal
25 statutes regulating private individuals." *See Reno v. Condon*, 528 U.S. 141, 151 (2000). It does
26 prohibit the State from restricting its officials from assisting a federal program.

27 There is an interpretation of Section 1373 that is consistent with the constitutional
28 principles discussed in *New York* and *Printz*. *See Printz*, 521 U.S. at 935; *New York*, 505 U.S. at

1 161–63. Section 1373 can be interpreted not to import an affirmative duty at all. But it is not
2 clear that the federal government has adopted such an interpretation. The question is whether the
3 federal government’s interpretation exceeds the constitutional reach of Section 1373.

4 Section 1373 requires the sharing of information with the federal government “regarding
5 immigration status.” The meaning of that phrase is ambiguous. The federal government has not
6 tried to define that phrase, and has not settled on a definition now, even though some of its
7 officials are threatening criminal prosecution against political leaders whose understanding of the
8 constitutional reach of Section 1373 differs from theirs. Under the INA, almost every bit of
9 information about an individual could be relevant to status, particularly with respect to the right to
10 asylum or as a defense to removal. The State reads the phrase narrowly, as requiring only
11 information whether a person is a citizen of the US, present here in some other capacity, or
12 undocumented, which is literally what “status” is. *See Steinle v. City & Cnty. of San Francisco*,
13 230 F.Supp.3d 994, 1015-16 (N.D. Cal. 2017) (finding that city policy would only violate Section
14 1373 by “restricting the provision of inmates’ citizenship and immigration status to ICE”).

15 At this time, only the State’s obligation to communicate “personal information” and
16 release dates of detainees is in dispute with respect to the Values Act. There is a nationwide
17 injunction against the federal government regarding the effect of Section 1373 on other aspects of
18 the Byrne grants. *City of Chicago*, 264 F. Supp. 3d at 952. The personal information and dates of
19 release from jail of undocumented detainees are of obvious interest to the federal government for
20 purposes of immigration enforcement, but not so obviously for immigration status. It is valuable
21 to ICE to cross-check names and addresses of detainees to insure that it only targets persons
22 eligible for removal, and to pick them up from local jails before their release. But ICE’s
23 enforcement interest conflicts with the reason the State passed the Values Act, which was to
24 encourage cooperation between law enforcement and immigrant communities.

25 As I understand it, the disagreement here involves a subset of detained, undocumented
26 people. The State’s statutes do not impact the free flow of this information regarding those
27 accused of hundreds of the most serious state crimes; it exempts those arrested or convicted of less
28 serious, largely non-violent, offenses. The State’s law enforcement strategy depends on keeping

1 the trust of immigrant communities so that, among other things, they will report crimes and rely
2 on law enforcement, not criminal gangs, for protection. The state statutes also explicitly keep
3 confidential information in juvenile records and regarding those people federal law also protects
4 who are eligible for “U” and “T” visas. The government has not articulated its position regarding
5 the confidentiality statutes in this litigation.

6 DOJ is apparently processing the COPS grant according to its usual administrative
7 procedure and has yet to make a final pronouncement, although all indications are that it will find
8 the State out of compliance with Section 1373 because of the personal information and release
9 date provisions. The federal government has authority to set immigration policy. But where that
10 policy collides with the State’s constitutional police powers, it is important to understand the
11 parameters of the federal government’s interpretation of Section 1373. Does DOJ assert that the
12 State’s confidentiality statutes should not be respected? How does it square that with the INA
13 statutes requiring confidentiality concerning the same subject matter? If personal information and
14 release dates of detainees are encompassed within Section 1373’s sweep as “regarding
15 immigration status,” what are the contours of DOJ’s definition; does it include every fact about a
16 detainee’s life, or something else? How does that square with the language and intent regarding
17 Section 1373? The State has been transparent about the purpose of its statutes, but the Values Act
18 has just been implemented. What is the burden on a local enforcement agency to provide personal
19 information and release dates for persons the agency knows are undocumented (recognizing the
20 Values Act precludes officers from requesting information on status for less serious offenses, so
21 this information may not be readily available unless it is determined that Section 1373 requires the
22 agency to maintain and disclose status information)? How does the State comply with Section
23 1373 in providing information regarding immigration status?

24 Those are a few of the issues that should be clarified. I find that the record is not sufficient
25 at this stage to determine that State has shown a likelihood of success on the merits.

26 **III. IRREPARABLE HARM**

27 The State asserts two ways in which it will suffer imminent and irreparable harm if I deny
28 its motion for a preliminary injunction: (1) it will suffer a constitutional injury to its sovereignty if

1 the fellow government follows its interpretation of Section 1373 and requires certification of such
2 interpretation from applicants of the Byrne JAG Program funds; and (2) construing Section 1373
3 to invalidate its statutes would either cause harm to its communities, eroding trust between law
4 enforcement and immigrant communities, or force the State to lose the Byrne JAG Program
5 funding, which would leave law enforcement programs detrimentally impacted. The federal
6 government argues that the State has failed to demonstrate immediate and irreparable harm
7 because (1) the amount of potential funding at stake is not coercively high; and (2) the State's
8 claim is belied because its long delay in bringing a legal challenge despite the certification
9 requirement was required for FY 2016.

10 At the moment, the merits of the State's constitutional claim are uncertain and its injury is
11 the delay of a \$1 million grant. While delay in funding is potentially injurious, the amount is not
12 so great that the State could not cover it while the litigation continues. At this point, the injury is
13 not irreparable.

14 **IV. PUBLIC INTEREST AND BALANCE OF EQUITIES**

15 The remaining two factors in the preliminary injunction calculus are considered together in
16 litigation in where the federal government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).
17 The State's evidence demonstrates how its statutes related to the confidentiality of and release of
18 immigration status information are consistent with the exercise of its police powers. It also shows
19 the important criminal law enforcement measures for which it intends to use the grant funds. The
20 federal government does not address how declining to enforce the certification condition against
21 the State would affect it.

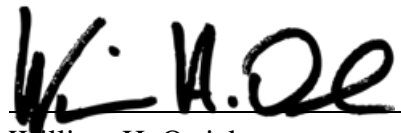
22 On this record, the public interest would appear to be better served if the State did not have
23 to choose between the Byrne JAG Program grant funds to assist its criminal law enforcement
24 efforts and the health of its relationship with the immigrant community. But in light of the
25 uncertainty of the merits and the current lack of irreparability of the injury, these factors do not tip
26 the scale sufficiently to require injunctive relief.

CONCLUSION

The issues in this case will benefit from further development. It is unclear to me whether the State’s or federal government’s interpretation of Section 1373 and the Tenth Amendment will prevail on the personal information and release date issues; moreover, this lawsuit addresses a plethora of other issues besides those discrete ones. While the State to date has suffered an injury, it is only in the delay of \$1 million of a federal grant that it previously received, not in the refusal to pay. I find that the State has not demonstrated that I should issue a preliminary injunction at this time. Its motion is DENIED.²

IT IS SO ORDERED.

Dated: March 5, 2018



William H. Orrick
United States District Judge

United States District Court
Northern District of California

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² To the extent that I rely on the documents in this docket of which California requests judicial notice, its requests for judicial notice are GRANTED. See Dkt. Nos. 27, 61, 79. All other requests for judicial notice are DENIED AS MOOT.