

PLAINTIFF'S EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

CITY AND COUNTY OF SAN)
FRANCISCO,)

Plaintiff,)

VS.)

NO. C 17-04642 WHO

JEFFERSON B. SESSIONS III,)
Attorney General of the United)
States, et al.,)

Defendants.)

STATE OF CALIFORNIA, ex rel.)
XAVIER BECERRA, Attorney)
General of the State of)
California,)

Plaintiff,)

VS.)

NO. C 17-04701 WHO

JEFFERSON B. SESSIONS III,)
Attorney General of the United)
States, et al.,)

Defendants.)

San Francisco, California
Wednesday, February 28, 2018

TRANSCRIPT OF PROCEEDINGS

Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

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1 Wednesday - February 28, 2018

2:00 p.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** We're calling the combined Cases 17-4642,
5 City and County of San Francisco versus Sessions, *et al.*, and
6 17-4701, State of California versus Sessions, *et al.*

7 Counsel, if you would please come forward and state your
8 appearance for the record. Here, to the podiums.

9 **THE COURT:** Let's start with the State.

10 **MS. EHRLICH:** Lisa Ehrlich, for the State of
11 California.

12 **MS. BELTON:** Sarah Belton, for the State of
13 California.

14 **MR. SHERMAN:** Lee Sherman, for the State of
15 California.

16 **THE COURT:** All right. How about for the City?

17 **MS. MC GRATH:** Good afternoon, Your Honor.
18 Aileen McGrath, for the City and County of San Francisco.

19 **MS. EISENBERG:** Sara Eisenberg, for the City and
20 County of San Francisco.

21 **MS. LEE:** Mollie Lee, also for the City and County of
22 San Francisco.

23 **THE COURT:** Welcome.

24 **MR. READLER:** Good afternoon, Your Honor.
25 Chad Readler, on behalf the United States.

1 **THE COURT:** Mr. Readler, welcome back to
2 San Francisco.

3 **MR. READLER:** Thank you.

4 **MR. FLENTJE:** August Flentje, on behalf of the
5 United States.

6 **THE COURT:** Mr. Flentje, what a pleasure to see you.

7 **MR. SALTIEL:** Good afternoon, Your Honor.
8 Steven Saltiel, from the U.S. Attorney's Office.

9 **THE COURT:** Welcome.

10 All right. So let's start. We'll do this one at a time.
11 And let's start with the State's motion. So Mr. Readler.

12 **MR. READLER:** Well, good afternoon again, Your Honor.
13 Chad Readler, on behalf of the United States.

14 For our presentation I'm happy to sort of talk about the
15 joint issues together, so maybe we can save a little bit of
16 time. There are some differences when it gets to specific
17 aspects of the State and local laws that are at issue, but even
18 there, there's quite a bit of overlap. So I will --

19 **THE COURT:** But --

20 **MR. READLER:** -- try to address the issues together,
21 if that makes sense.

22 **THE COURT:** That sounds great.

23 **MR. READLER:** And there are two key substantive
24 issues I'd like to address regarding -- in support of our
25 motion to dismiss.

1 The first is that for a cooperative federal law
2 enforcement grant, certainly the United States is authorized to
3 require the sharing of information regarding criminal aliens
4 that are being held by the grantees. And so we think that any
5 claim regarding a lack of authorization should be dismissed.
6 There's clear statutory authority for that.

7 And, second, both the City and the State, based upon the
8 face of their ordinances and State laws, appear to be not in
9 compliance with 1373. And so any claim that seeks a
10 declaration that they are in compliance, we think, should be
11 dismissed, as well.

12 There are a couple of threshold ripeness issues that I
13 think we can sort of dispense with right away. One is that the
14 State has cited a number of statutes that it's asked for
15 declaratory judgment on, and asked for a judgment on in this
16 case. And there was only one, as we discussed at the last
17 hearing -- the Values Act -- where the Government has contended
18 that the State may not be in compliance with 1373. So we think
19 the Court should dismiss claims as to any other statute,
20 because the Government's not contended that the State might not
21 be in compliance with 1373.

22 Also, both the State and the City have suggested that
23 there should be a ruling that, on its face, there's facial
24 compliance with 1373 with respect to the local ordinance and
25 the State law at issue. And we think that's not the right

1 test. It's certainly possible that the -- and we think that
2 the plaintiffs are not in compliance on their face; but even if
3 the face of the ordinance suggests they might be, we also need
4 to look at the actual conduct, and how the policies are being
5 implemented and followed. So we also don't think there would
6 be a basis to sort of grant judgment on the facial issue.

7 And, third, I just want to remind the Court there's still
8 an administrative process going on with respect to the 1373
9 compliance. The Department has written to both of the
10 plaintiffs. The plaintiffs have provided information. And
11 they're still in the process of, at the administrative level,
12 assessing whether there is compliance. So again, we think that
13 this case has really sort of gotten out in front of that
14 administrative process, and that there is no final agency
15 determination yet on 1373 compliance.

16 **THE COURT:** So with respect to the standing issues
17 and justiciability issues, what impact do you think I should
18 consider from the statements of the President last week,
19 threatening to take ICE enforcement out of the State, or the
20 Acting ICE Director's threat to prosecute criminally public
21 officials whose view about Section 1373 differs from his?

22 **MR. READLER:** Well, I'm familiar with the statements.
23 I really don't think those have anything to do with the grants
24 that are at issue.

25 We're really talking about a narrow issue here, which is

1 one federal grant administered by the Department of Justice
2 that places conditions that the City -- City and State can
3 voluntarily agree to, or they don't have to accept. And I
4 think those are really sort of separate issues.

5 But I would acknowledge that immigration issues have been
6 in the news a lot recently locally, nationally. And there's
7 certainly been a lot of debate.

8 But I think it's worth keeping in mind that historically
9 the immigration system has really been built on cooperation
10 between the Federal Government and the State Government. And
11 that's true, I think, from the perspective of the Federal
12 Government, of every branch of Government.

13 Of course, the Congress puts in lots of schemes in lots of
14 areas -- not just immigration; but health care, education --
15 where it requires information sharing back and forth between
16 the State and Federal Government to administer programs. And
17 the Congress has done that here with respect to immigration.

18 Perhaps the most significant area is with respect to the
19 holding of criminal aliens, where it allows aliens who are
20 sentenced by a local government to serve their time before
21 they're then turned over to the Federal Government to be
22 removed. And that's a cooperative procedure.

23 The Executive, of course, embraces the cooperative
24 aspects, too, because it's certainly less expensive for the
25 Federal Government to detain a criminal alien when they're

1 released from prison, as opposed to having to find them out in
2 the community. And it's also much safer.

3 And I think the courts also have embraced the idea of a
4 cooperative immigration system, that the Court, of course, is
5 very familiar with the *Arizona* decision from the Supreme Court.
6 And Justice Kennedy wrote that consultation between federal and
7 state officials is an important feature of the immigration
8 system.

9 And what we're talking about here is a cooperative
10 law-enforcement grant, where the Federal Government provides
11 money to the State and local governments for law-enforcement
12 issues. And the Federal Government is authorized to determine
13 what priority purposes it would like to include in those
14 grants, and to place conditions on those grants. And it's
15 placed conditions regarding information sharing; information
16 sharing about criminal aliens held by the grantees.

17 And we think that's both authorized by statute, and
18 constitutional. And I'd like to take that issue up first,
19 which is the statutory authorization for the grant
20 conditions --

21 **THE COURT:** Okay.

22 **MR. READLER:** -- in the Byrne JAG grant.

23 In 2006 when the grant was created, the Congress
24 authorized the Assistant Attorney General who oversees this
25 grant program to do two things. Authorized him or her to place

1 special conditions on these grants. And every year there are
2 dozens of conditions; 40 or 50 conditions on grants.

3 And, second, the Assistant Attorney General is also able
4 to determine the priority purposes for formula grants like the
5 Byrne JAG grant. And that's a really key aspect that the
6 plaintiffs have not addressed much in their papers; but what
7 the Congress said is that for a formula grant like this, the
8 Assistant Attorney General still has the discretion to
9 determine the priority purpose for that grant, and further that
10 priority purpose by placing conditions, among other things, to
11 encourage certain kind of behavior.

12 For non-formula or discretionary grants, that's an
13 inherent ability that the grant maker has, to use their
14 discretion. And Congress said here that for this formula
15 grant, it also wants the grantors to have the ability to
16 determine priority purposes each year, annually.

17 So certainly these conditions are very consistent with the
18 statutory authority granted by Congress. And I think it's no
19 surprise that they would authorize the Attorney General and the
20 Assistant Attorney General to utilize these types of
21 conditions. They're both Senate-confirmed officials. The
22 Attorney General is the chief law-enforcement officer
23 responsible for law enforcement around the country. And the
24 Assistant Attorney General has the express duty to maintain
25 liaison with local governments on law-enforcement issues. And

1 so certainly through these cooperative, information-sharing
2 grant conditions, that's one way the Assistant Attorney General
3 can honor that obligation.

4 And I think it's worth noting that of the, you know,
5 dozens of conditions that fall under these grants each year,
6 many of those are about information sharing. So it's very
7 common not only in the immigration area, but whether it's DNA
8 evidence or certain purchases made by a grantee with money,
9 there are a whole host of information-sharing conditions that
10 go back and forth. So in that sense, this is not unusual at
11 all.

12 And these conditions, of course, further the Federal
13 Government's interests in a lawful immigration system,
14 specifically with respect to criminal aliens in custody by the
15 grantees.

16 Two problems with the plaintiffs' interpretation of this
17 provision. You know, they say this doesn't authorize the
18 Department to place these conditions, but there are two
19 significant problems with their reading. The first is that
20 what they say is when it says "special conditions and priority
21 purposes," that's just superfluous language, because you
22 actually have to find that power somewhere else in the statute,
23 which doesn't make a lot of sense, because if that's the case,
24 there's no reason to list these powers, to begin with, if you
25 actually sort of have to find them somewhere else.

1 And if that's also their view, then these are sort of
2 meaningless powers, because they tell you that you actually
3 have to look somewhere else for these authorizations, but they
4 don't point to anywhere else in the statute where it authorizes
5 the special-condition and priority-purpose power. So they have
6 made these terms both superfluous and meaningless in their
7 reading of them.

8 And so we think by far the better interpretation is to
9 give them their natural effect, and that they would authorize
10 conditions like those imposed on the Byrne JAG grant.

11 **THE COURT:** So, Mr. Readler, don't you think -- or do
12 you think that there is a bona fide dispute at the moment
13 between the Federal Government, and the State and local
14 jurisdictions, that is formed by the Government -- on the one
15 hand, the Federal Government's undoubted powers with respect to
16 immigration, and the states' and local jurisdictions'
17 constitutional rights under the Tenth Amendment to have the
18 police powers?

19 Don't you think that the clash is going to be what the
20 Federal Government actually interprets 1373 to be;
21 specifically, what does "regarding" mean?

22 **MR. READLER:** Sure.

23 **THE COURT:** And isn't that the entire guts of the
24 issue that we're going to have to deal with in this case?

25 And if that's the case, isn't this the wrong time to be

1 dealing with that? Shouldn't we be dealing with the merits of
2 the case with a record?

3 **MR. READLER:** Well, certainly at the
4 motion-to-dismiss level, the Court is naturally limited in what
5 it can do.

6 The argument I gave was with respect to the authorization,
7 particularly to the Notice and Access Conditions which the
8 plaintiffs have challenged; and we think there's authority for
9 those.

10 There's also authority for the 1373 condition. And the
11 plaintiffs have not really challenged the authority to impose
12 it, as opposed to -- I think they've made the arguments you
13 suggest: A Tenth Amendment argument, and some other concerns.

14 With respect to the 1373 provision, as a matter of law the
15 governing analysis here is the Spending Clause line of cases;
16 not the Tenth Amendment line of cases.

17 In other words, this is not direct regulation by the
18 Federal Government. This is a voluntary grant program that the
19 plaintiffs are able to enter into. And if they opt to do that,
20 then there are conditions they have to comply with, including
21 1373.

22 So the analysis here is really governed by the *Dole* case,
23 and that line of cases. And these conditions clearly satisfy
24 all the requirements of *Dole*. They're not requiring
25 unconstitutional conduct.

1 Certainly, whether we could directly force the City to
2 give us information -- they can certainly agree to policies
3 where they don't restrict information.

4 This is not coercive in the sense that the dollar amount
5 here is significant. A few million dollars, but -- but not so
6 significant that it would be anywhere near the sort of the
7 coercion line.

8 So I think -- and germaneness. I think there's a natural
9 tie between law enforcement, criminal justice, criminal aliens
10 being held by the City. So the germaneness requirements are
11 met here, too. So I think all of the constitutional questions
12 are answered in that respect.

13 With respect to the Tenth Amendment analysis, to the
14 extent the Court takes that up, of course, the Second Circuit
15 has already held that -- in the *City of New York* case, that
16 1337 does satisfy any Tenth Amendment concern.

17 **THE COURT:** Not any Tenth Amendment concern,
18 Mr. Readler.

19 **MR. READLER:** Well, certainly -- well, I suppose
20 hypothetically there could be some interpretation of it; but
21 certainly there are ways in which 1337 is interpreted that it
22 would satisfy the Tenth Amendment. And so if it is a facial
23 challenge, certainly there are applications of the statute that
24 would apply.

25 And the Northern District of Illinois, of course, also

1 revisited -- visited this issue, and upheld the application of
2 1373.

3 So it's not an instance where the cities are being
4 compelled to perform background checks to help employ the
5 regulatory scheme, and are sort of a critical part, in terms of
6 affirmative obligations to go out and perform duties that would
7 further the federal scheme.

8 What they're doing voluntarily, because they agreed to the
9 condition, is to not restrict certain information.

10 And I'd be happy to talk about, then, our interpretation
11 of 1373, and what we think it requires. We discussed a little
12 bit of this in December. So -- and I think maybe one before --

13 **THE COURT:** Well, I'm happy to hear it. I'm not sure
14 that it's going to be useful in the analysis on the motion to
15 dismiss; but I'm very interested in knowing what the Government
16 thinks with respect to the term "regarding"; how far the
17 definition is stretching; and whether the Department's sort of
18 come to ground on that.

19 **MR. READLER:** Well, I think the Court is correct to
20 focus on the word "regarding," because in the plaintiffs'
21 papers they talk about immigration status, but that's not the
22 test. The test is information regarding immigration status;
23 obviously, a broader term.

24 1373, in another place in Section C, uses the more narrow
25 phrase "immigration status"; but in the key provision here,

1 1373(a), it talks about "information regarding," so beyond just
2 information that would be the course of immigration status.

3 And in our view, what the Congress had in mind here was
4 that the cities would not be foreclosed from providing
5 information to the Federal Government -- to DHS -- that lets it
6 do its job. They're not on a fishing expeditions where they're
7 trying to get all kinds of information, but what they're trying
8 to get is the core information they need to do their jobs.

9 And the two areas that we've identified -- very narrow,
10 but the two areas we've identified are, one, personal
11 information, which would be name and address, primarily; and
12 also the release date when the individual's released from
13 incarceration, so the Federal Government and DHS can detain
14 those individuals and deport them, as appropriate. So --

15 **THE COURT:** And so if I -- when I look at 1373, I can
16 just focus on those two things; and the Federal Government is
17 not asserting that 1373 requires anything else, besides those
18 two pieces of information?

19 **MR. READLER:** In this case, no. I'm not going to
20 foreclose us from some future opportunity. If there's a
21 statute at issue that we think might run afoul of 1373,
22 somebody would raise that to a locality that we think might be
23 in violation.

24 But with respect to the California and San Francisco
25 statutes and ordinance at issue, the issues that we've

1 identified -- and we've written to them in the administrative
2 process -- as violating 1373 are the personal information, and
3 the release date. And my friends on the other side have not
4 identified anything that they think "information regarding
5 immigration status" means, other than immigration status. And
6 it obviously can't be that narrow.

7 We've identified two things that we think naturally fall
8 within the definition. And I'm happy just to talk about those
9 briefly.

10 Personal information helps DHS further the immigration
11 regulatory scheme in a couple of ways. Sometimes your
12 immigration status includes a residency requirement. So for
13 certain statuses -- and I think the B-2 nonimmigrant visitor
14 status is one -- you're required to have a permanent address
15 outside of the United States, because that's a temporary
16 visitation period in the country. And if you have established
17 a permanent address in the United States, that could be
18 evidence that you've violated the status of your immigration;
19 of your permission to be in the country. So your place of
20 residence might qualify an alien as a nonresident visitor under
21 certain aspects of the immigration laws.

22 Second, obviously, address is critical information for the
23 Federal Government to find a criminal alien. If they have been
24 already released from incarceration by a local or state
25 government, and they weren't detained at that time, then the

1 address is obviously the best possible way for the Federal
2 Government to find those individuals. So in that sense, the
3 address is critical to your immigration status, because if
4 you're removable, the Federal Government has an obligation to
5 do that. They obviously can only do that if they can locate
6 you.

7 **THE COURT:** That's enforcement -- that's not
8 status -- isn't it?

9 **MR. READLER:** The definition of "status" includes
10 presence. And whether your presence is legal or illegal, I
11 think, is bound up in the question of your immigration status.
12 And your presence is partially determined by the address that
13 you're staying at, and that you've disclosed to the Government.
14 So I think all of those issues are closely tied, in terms of
15 the immigration system, and appropriate notice, and execution
16 of the system by the United States.

17 And second is release dates. And release dates, I think,
18 is a natural component of information regarding your
19 immigration status, for a couple of reasons.

20 One, historically, cities have shared that information.
21 And I think I mentioned this point when I was here last time;
22 but the *City of New York* case was not about -- was not about
23 the City not complying with disclosing information regarding
24 criminal aliens. Their ordinance made it clear that the City
25 should disclose that information.

1 It was other information that they were not disclosing
2 that helped prompt 1373 and led to the litigation there; but
3 historically this information has been shared by localities.
4 This is more sort of a recent trend of some communities not
5 sharing that information; but the INA, I think, pretty clearly
6 contemplates that information would be shared, for a couple of
7 reasons.

8 One, it defines your immigration status of any individual
9 to include that an alien is not lawfully present in the
10 United States.

11 And certainly 1373 then covers information regarding
12 presence, as I said earlier. And your presence and your
13 removability is determined by -- partly determined by if you're
14 incarcerated, because, as we discussed a bit before and as I
15 mentioned earlier, it's a cooperative system, where oftentimes
16 the Federal Government will detain someone, but then will
17 voluntarily turn them over to a local government so that they
18 can further their prosecutorial interests and prosecute someone
19 if they've violated a local or state law.

20 And the other part of that bargain is that when the
21 individual is released, that the federal would expects
22 notification, so that they can detain that person and deport
23 them, if appropriate, because they can't do -- under federal
24 law, they can't do it while they're incarcerated. And their
25 90-day removal period starts once they've been released.

1 And the Ninth Circuit has addressed this issue in sort of
2 a related context, and has made the point that that 90-day
3 period starts immediately upon release or very soon thereafter.
4 So the release date is a critical component of the information
5 regarding immigration status, because your status is
6 significantly impacted by whether you're incarcerated or if
7 you've been released by the local government.

8 And so in that respect both -- and unless the Court wants
9 me to, I won't walk through all of the specific aspects of the
10 California and San Francisco law, but each of them have
11 components that restrict that kind of information, especially
12 with respect to San Francisco.

13 They also have a number of other requirements that suggest
14 that the City may be violating 1373, in that City employees are
15 not being properly instructed on what 1373 means; and they're
16 strongly encouraged, up to -- by reporting requirements and
17 other potential disciplinary actions that could be taken when
18 they don't follow their local law.

19 So we have the concern, which -- I think you're right --
20 we will develop more on the record, about whether City
21 employees are actually understanding the obligations under
22 1373, and how those work in conjunction with local
23 requirements.

24 But we do think the Court can dismiss aspects of the claim
25 regarding authorization for these -- for those conditions. And

1 we're happy to develop more of a record on whether the City and
2 State are complying with them at a future time.

3 **THE COURT:** All right. Thank you.

4 So let's start with the State.

5 **MR. SHERMAN:** Sure. Good afternoon. Lee Sherman,
6 for the State of California.

7 **THE COURT:** Mr. Sherman.

8 **MR. SHERMAN:** This case is fundamentally about
9 defendants' attempt to legislate from the Executive Branch.
10 These are not conditions that were imposed by Congress. And
11 here -- and in three different respects -- defendants have
12 attempted to insert their own immigration-enforcement
13 preferences into federal statute.

14 The first is that although the JAG authorizing statute
15 does not provide a basis for defendants to add
16 immigration-enforcement conditions, they seek to use a narrow
17 administrative statute to justify adding the Notification and
18 Access conditions -- what they call "special conditions" -- to
19 basically justify imposing any condition that they want.

20 Second, they seek to inject into the criminal justice
21 purpose area of JAG civil immigration enforcement, although
22 that has never been a contemplated purpose area for JAG.

23 And, third, they take 8 U.S.C. 1373, where Congress has
24 used precise terminology of "regarding immigration or
25 citizenship status," to transform it into a massive prohibition

1 against jurisdictions restricting exchange of any information
2 which touches upon their identity, which here Mr. Readler
3 described as "personal information."

4 Since this is a motion to dismiss, all the State has to do
5 is show that it has alleged facts to support a cognizable legal
6 theory.

7 The State's done much more than that. In fact, two
8 Federal Courts have already determined that the Notification
9 and Access Conditions are likely to be unconstitutional, under
10 the separation of powers.

11 And with respect to the condition regarding compliance
12 with 1373, as you know, Your Honor, the Northern District Court
13 has already determined that defendants' interpretation of 1373
14 is too broad. So the State therefore has alleged viable
15 claims, and defendants' motion should be denied.

16 Let me start off with the separation-of-powers argument.
17 There are four reasons why the conditions cannot be supported
18 by the JAG authorizing statute, taking aside for a moment this
19 special-condition statute the defendants rely on.

20 First, the text of the statute circumscribes what
21 conditions defendants may impose. This is a formula grant, so
22 the formula grant sets out who gets the funds. And then within
23 the confines of that formula, defendants can impose conditions
24 on what the grants can be used for. And those conditions are
25 set out in 34 U.S.C. 10153. And in that statute it sets out

1 that defendants can impose conditions to comply with
2 requirements of this part; programmatic and financial reporting
3 requirements, and the requirement to comply with applicable
4 law. So that is what are the conditions that the authorizing
5 statute allows.

6 Second, the purpose of JAG --

7 And, by the way, those -- none of those conditions
8 contemplate a -- the Notification and Access Conditions, which
9 are not tied to the use of the funds. They are tied on to --
10 imposed on all of the jurisdictions, regardless of how they use
11 the funds.

12 Second, the purpose of JAG is to provide more flexibility
13 to jurisdictions. Throughout the legislative history -- in
14 2006 when JAG was reorganized, Congress said that this was --
15 these grants are to provide jurisdictions so they don't have to
16 do a one-size-fits-all strategy to local law enforcement.

17 And in fact, at the same time the legislative history
18 shows that in order to achieve more flexibility, when JAG was
19 reorganized, Congress repealed the only condition that had ever
20 existed in the decades' history of JAG that was related to
21 immigration enforcement, and that was a condition that required
22 the Chief Executive Officer of the State to provide certified
23 criminal records to the Federal Government.

24 So the fact that that condition was repealed -- the
25 defendants are seeking to revive that condition, and more --

1 suggests that they are acting contrary to congressional intent.

2 And, fourth, since the reorganization of JAG, Congress has
3 specifically and repeatedly rejected attempts to add
4 immigration enforcement to JAG. They've rejected conditions
5 requiring compliance with 1373 in JAG. So right now defendants
6 are acting at the lowest ebb of their power.

7 So that leads to this special-condition statute, 34 U.S.C.
8 10102. Defendants read that statute as if they can impose any
9 conditions they want, so long as it complies with the Spending
10 Clause; but they are instead -- they are, in fact, using the
11 word "special," and imagining that "any" is in the statute.

12 And, in fact, they cite one case: *DKT Memorial Fund v.*
13 *Agency for International Development*. And that case involved a
14 challenge to the President's authority to add conditions on
15 foreign assistance grants; but there Congress authorized the
16 President to furnish assistance on such terms and conditions as
17 he may determine, so that it gives very broad authority; while
18 here congress limited it to special conditions. So that
19 "special conditions" has to mean something.

20 So we do not -- defendants suggest that we say that
21 "special conditions" -- that the statute is superfluous.

22 That is not the argument which we are making. What we are
23 saying, though, is that "special conditions" is a term of art.
24 At the same time that JAG was reorganized in 2006, USDOJ had a
25 regulation that identified special conditions: 28 C.F.R.

1 66.12. And that regulation identified special conditions as
2 pertaining to high-risk and low-performing grantees.

3 So here you have a statute which is about USDOJ's ability
4 to impose conditions. You have a regulation that was in
5 existence at the same time about USDOJ's ability to impose
6 conditions. So those should be looked at in the same context
7 as each other -- as each other.

8 And the case that they cite, *U.S. v. Yeats*, supports that
9 view, because it says -- it warns that -- to avoid ascribing to
10 one word a meaning so broad that it is inconsistent with its
11 accompanying words.

12 So what that case instructs is to look at the terms in the
13 statute in the same -- and look at other statutes where that
14 term is used in the same context.

15 In addition, the special-conditions statutes cannot be
16 interpreted to mean -- give this broad authority, for two other
17 reasons; that it is an ancillary provision that is not found in
18 the -- in the JAG authorizing grant.

19 And in *Whitman v. American Trucking Associations*, the
20 Supreme Court has said that Congress does not hide elephants in
21 mouseholes. And here, to interpret this special-condition
22 statute as giving it untrammelled authority to add any
23 conditions would be doing just that.

24 **THE COURT:** Don't you agree, though, that the
25 threshold to add a condition is a pretty low bar for the

1 Department to get over?

2 And the relationship between immigration enforcement --

3 Well, there is a relationship between criminal law and
4 immigration throughout the INA. It's stated throughout the
5 INA. So can't they get over that low bar, and say you just --
6 when you have to comply with all applicable laws, that's one
7 that clearly applies?

8 **MR. SHERMAN:** Right. So that is a Spending Clause
9 argument.

10 So we're focusing on the separation of powers. And the
11 State is not alleging or has not brought a cause of action
12 with respect to the applicable laws language. And I know
13 San Francisco will discuss that. There are good arguments
14 regarding that.

15 But focusing on the Notification and Access Condition,
16 this -- this --

17 **THE COURT:** I don't have much trouble with the
18 Notification and Access Conditions.

19 **MR. SHERMAN:** You have no trouble with them?

20 **THE COURT:** I think those claims will survive the
21 motion to dismiss.

22 **MR. SHERMAN:** Okay. Sure, sure.

23 So then to shift the focus away from that, then, so going
24 to the Spending Clause -- and I would like to take our
25 arguments with respect to the Spending Clause and the APA

1 together, because there's a lot of overlap there.

2 And under the Spending Clause, the standard is that
3 there has to be a sufficient nexus between the purpose of the
4 federal interest in the grant, and the -- and condition at
5 issue. And again, this is not a grant that is found in the
6 INA. This is a grant that is for local criminal-justice
7 purposes.

8 So, like you pointed out last time, Your Honor, in the
9 *Philadelphia* case it talks about the relationship between
10 criminal justice and immigration enforcement. While there are
11 in some instances a relationship between criminal justice and
12 immigration enforcement to determine whether certain
13 individuals -- their status has changed, there's not any
14 relationship between immigration enforcement and local criminal
15 justice.

16 In fact, the conditions the defendants are imposing here
17 seek to place requirements on State and local jurisdictions of
18 individuals that have no intersection with the criminal justice
19 system. The 1373 condition, as defendants have interpreted it,
20 applies to every person in the United States; so that includes
21 in it people who have not been at all convicted or even
22 suspected of a criminal offense. So in that, there's no
23 intersection between criminal justice and immigration
24 enforcement, in addition to which the definition for criminal
25 justice that is used talks about the apprehension of criminals.

1 And here defendants are seeking to impose this condition on
2 State and local jurisdictions that are for people who are just
3 even suspected of criminal offenses. And that also is
4 antithetical to our notion of criminal justice here in the
5 United States that people have a presumption of innocence; but
6 that is not what these conditions contemplate.

7 So I hope that answers your question, Your Honor.

8 But -- so that's our Spending Clause argument.

9 With respect to the APA, first of all, this is a
10 straightforward case of final agency action under *Bennett v.*
11 *Spear*. The standard is --

12 (Reporter requests clarification.)

13 **MR. SHERMAN:** -- final agency action under *Bennett v.*
14 *Spear*, in which there is a consummation of the decision-making
15 process, and that rights and obligations flow from that.

16 And here you have -- they have imposed these conditions in
17 the solicitation. They've included these conditions in awards
18 to other jurisdictions. And they've represented to this Court
19 that the State will receive a substantively identical
20 condition. So -- and because of that, that impacts the State's
21 ability to receive these grant funds. So you have clear agency
22 action here.

23 And then under the arbitrary and capricious standard is
24 that a defendant's action has to do all three of these things.
25 It must -- sorry -- that it must not consider factors that

1 Congress did not intend. It must -- it must -- it must
2 consider -- it cannot fail to consider important aspects of the
3 problem. And it cannot offer an explanation for its decision
4 that runs counter to the evidence before this -- before it.
5 And here, they failed to do all three.

6 With respect to the first, for what we just discussed,
7 that Congress did not anticipate or contemplate that this grant
8 would include immigration-enforcement conditions, because it
9 repealed immigration-enforcement conditions. It has never, in
10 the history -- in the decades-long history of this grant,
11 identified immigration enforcement as a purpose area of this
12 grant, and it has repeatedly rejected attempts to do that.

13 And with respect to the failure to consider important
14 aspects of the problem, the agency -- the State is not saying
15 that the defendants have to agree with the State that these
16 sorts of policies and laws are beneficial to the public safety;
17 but in the agency record it must show that they are
18 contemplated; that they considered this important aspect of the
19 problem. And so far, defendants have not identified any
20 documents in the agency record that shows that they considered
21 this to be -- as -- when they were imposing these conditions.

22 So we should look at that record to see if they considered
23 this to be an aspect of the problem as of the time they imposed
24 these conditions. And for that reason, alone, this should
25 survive a motion to dismiss.

1 **THE COURT:** And what's the status today of the DOJ's
2 consideration of the State and the COPS grant?

3 **MR. SHERMAN:** Sure. So since the motion for
4 preliminary injunction, defendants and the State agreed that
5 the clock on states -- the State having to accept the COPS
6 grant would be stayed until a decision was reached on the
7 motion for preliminary injunction. So we were able to reach an
8 agreement on that.

9 However, the State faces some very serious programmatic
10 concerns, which I've been informed by our Bureau of
11 Investigations in our office that if they are not able to draw
12 down on the funds soon, that they may have to remove the agents
13 that they've put towards this task force, which, again, has
14 seized \$60 million of drugs over the past two years. So it
15 does really important public-safety work for the State. And in
16 one instance, they may have to terminate someone who -- an
17 employee. And they will have to be facing that decision rather
18 soon, in April or May.

19 So that is a current -- so the State still cannot draw
20 down on the COPS funds, to answer your question.

21 **THE COURT:** And -- but there's no sort of final
22 determination on what the Department's perspective is with
23 respect to the grant? Everything's just in stasis?

24 **MR. SHERMAN:** So that's inquiry into the State's
25 compliance. And right now the defendants have -- defendants,

1 in their original letter to the State, said that if you
2 interpret 1373 or you interpret the Values Act as not allowing
3 the sharing of release dates or addresses, that they have
4 determined that this is a violation of 1373.

5 And the State responded that it does interpret the Values
6 Act as restricting sharing of information.

7 And then defendants responded to the Board of State and
8 Community Corrections, which is a State entity that gets JAG
9 funds, that they want more documents from the BSCC regarding
10 its practices. The BSCC's not a law-enforcement agency.

11 So it made that production of documents last week. It
12 didn't have many documents to produce; but we anticipate that
13 the Bureau of Investigations in the California Department of
14 Justice, which is the only entity -- the State entity that --
15 State law-enforcement entity that receives JAG funds -- will be
16 making a production of documents. And that, incidentally, is
17 the same entity; that COPS grant is frozen right now.

18 **THE COURT:** Okay.

19 **MR. SHERMAN:** So that goes to the 1373 issues
20 regarding issues of standing and ripeness.

21 With respect to standing and the other statutes, as we
22 discussed in your motion for preliminary injunction, that even
23 before the Values Act, defendants had made statements about the
24 State's compliance with 1373. And so I won't rehash through
25 all of that, but that has raised a credible fear that the State

1 would face enforcement under -- from that.

2 With respect to the Values Act, the defendants concede
3 that the State does have standing to challenge that. They have
4 concerns about ripeness, but ripeness and standing are often
5 looked at in the same vein. And here, the State -- all the
6 State has to show is the constitutional standard for ripeness,
7 which is that there has -- that the State has articulated a
8 concrete plan to violate the statute at issue; that there's
9 been a threat of prosecution; and that there -- and that the
10 defendants have sought to enforce the statute in the past.

11 And here we have all three. As I just mentioned, the
12 State has articulated a plan to not comply with defendants'
13 interpretation of 1373 in its original response letter to
14 defendants.

15 Defendants have said that they will withhold funds as a
16 result of that.

17 And they have now enforced 1373 35 times against
18 jurisdictions all across the country, including us in
19 San Francisco, over the past several months. So this clearly
20 meets the constitutional-standard test.

21 Prudential ripeness is something that -- the Supreme Court
22 has questioned its vitality; but the State meets that, too.
23 That's a question of balancing hardship and fitness. And here
24 the State has shown a hardness -- a hardship because of the
25 fact that its COPS grant has been frozen. It has to certify

1 under -- as defendants have represented before, under
2 defendants' interpretation of 1373, under penalty of perjury.

3 And that -- and if this goes through an administrative
4 process, the regulation governing that, 28 C.F.R. 18.5(i) --
5 that would allow defendants to suspend the State's JAG funds
6 for the -- for the duration of that.

7 So there is a hardship that January 24th letter only
8 illustrates, because now, although they have determined that
9 the State's law on its face does not comply with 1373, they are
10 prolonging this administrative process to indefinite length.

11 And I think we all know here that -- based on how we've
12 stated our positions, where this is going to turn out. And the
13 Ninth Circuit has found, under the firm prediction rule, that
14 the -- that having a firm prediction that a jurisdiction or
15 entity or person will apply for benefits, and that will be
16 denied to them -- that is enough to satisfy ripeness.

17 **THE COURT:** All right. So would you take on the --

18 I understood Mr. Readler to tell me that I should not be
19 looking at this case with any sort of Tenth Amendment lens. So
20 tell me what the State's position is with respect to that.

21 **MR. SHERMAN:** Yeah. We absolutely disagree with
22 that.

23 The defendants' -- if this was a matter of Congress adding
24 a grant condition, and then attaching, saying, *Jurisdictions*
25 *must comply with not restricting assuring of immigration status*

1 *or citizenship status*, that would be a different question.

2 That's not what we have here. Defendants are relying on
3 the fact that 1373 is an independent statutory obligation, as
4 applicable law, as they refer to it. So from there, all
5 defendants can do is ask the jurisdictions to comply with the
6 law; no more -- and nothing more than that.

7 So this should look -- so what we should be looking at is:
8 What does 1373 allow defendants to require State and local
9 jurisdictions, both on its plain text, and as the Constitution
10 allows?

11 And, in fact, if you look at their proposed conditions,
12 Condition 53 of the grant -- it refers to the definitions in
13 13. It refers to immigration status, as defined in 1373. So
14 they are referring to the independent statutory authority all
15 over -- all over the condition. So that is what you should be
16 looking at; not the Spending Clause analysis with respect to
17 that -- the compliance piece.

18 And the State's -- and as we -- I'm happy to go through
19 again our argument for preliminary injunction, but the State's
20 position is that the Values Act complies with 1373 --

21 **THE COURT:** I see.

22 **MR. SHERMAN:** -- and -- and that -- because 1373
23 covers what is squarely immigration or citizenship status
24 information.

25 And the fact that "regarding" is in 1373(a) does not mean

1 that it encompassed all of these other pieces of information
2 that is not unmistakably clear on the face of the statute.
3 And, in fact, in numerous other cases within the same
4 legislative act that allowed -- that spawned 1373, Congress was
5 clear. In 8 U.S.C. 1367 they refer to the information
6 contained in there as any information relating to an immigrant,
7 which would have been the language that defendants would have
8 wanted them to put into 1373.

9 And in 8 U.S.C. it says permitting immigration officers to
10 ask applicants, quote, "about any information regarding the
11 purposes and intentions of the applicant."

12 8 U.S.C. 1231 requires an immigrant to give information
13 about the alien's nationality, circumstances, habits,
14 associations, and activities, and other information the
15 Attorney General considers appropriate.

16 And 8 U.S.C. 1360(c)(2) requires the Social Security
17 Commissioner to provide information regarding the name and
18 address of the -- of the alien.

19 So these are Congress -- when Congress wants to be clear
20 about something, it is.

21 And the fact that it doesn't include immigration and
22 citizenship status is very telling. And the fact that the
23 information -- addresses, and immigration -- I'm sorry --
24 addresses and release dates is not -- is information that may
25 be useful for federal immigration authorities, that is not

1 relevant to what is in 8 U.S.C. 1373, because the -- as -- the
2 Court in *Steinle* looked at this. And it looked at the fact
3 that the legislative -- what -- the legislative intent does not
4 matter; that what is important is looking at the plain text of
5 the statute. I'm sorry.

6 **THE COURT:** No. The word "regarding" means
7 something.

8 **MR. SHERMAN:** Sure.

9 **THE COURT:** And I don't know what it means, but
10 Mr. Readler has just defined it in a very narrow way, which I'm
11 sure will be more expansive as -- when it's necessary, but he's
12 only carrying it with respect to this lawsuit these two --

13 **MR. SHERMAN:** Right.

14 **THE COURT:** -- relatively small issues.

15 **MR. SHERMAN:** Well, let me posit an alternative
16 definition of "regarding" -- is that "regarding" -- that in
17 18 -- in 8 U.S.C. 1373(c), "regarding" is about the information
18 that immigration authorities have; and presumably, that they
19 have definitive information about someone's immigration status.
20 And that's not information -- the State or local law
21 enforcement may have additional information, but they don't
22 have what is the official record of a person's immigration
23 status.

24 So there was no need in 8 U.S.C. 1373(c) to put the word
25 "regarding"; whereas in (a), it was necessary, because State

1 and local governments don't have the official record of a
2 person's immigration status, but it does allow them to have
3 information that it does have that would, on its face, show
4 immigration or citizenship status. And that could happen in a
5 couple of instances.

6 First of all, the Federal Government does not have
7 information of every person that is in -- every person who's
8 currently in the United States in their databases. So it is --
9 it is conceivable, and it happens -- the State cites one case
10 to it -- where State and local law enforcement may have
11 information about a person that's not in the hands of the
12 Federal Government.

13 And the information in the Federal Government's database
14 may not be correct. And there are other cases that are on
15 that -- on that topic, but -- so it is not --

16 But the State's -- State's definition of "regarding
17 immigration or citizenship status" does not mean that the
18 provision is meaningless; that there is information that the
19 states and localities would have in its possession that could
20 be useful to federal immigration authorities.

21 **THE COURT:** Okay.

22 **MR. SHERMAN:** And then I do want to touch upon the
23 substance of the Tenth Amendment claim.

24 **THE COURT:** Okay.

25 **MR. SHERMAN:** This is information that --

1 And here *Printz* is most informative; that *Printz* governed
2 the information that was in the custody and control of law
3 enforcement, and only in the custody and control of law
4 enforcement.

5 So applied here to the Values Act -- that is what we're
6 dealing with here. This case is not like the *City of New York*.
7 The *City of New York* was about an Executive Order that only
8 limited the sharing of information to immigration authorities.

9 Here, the information, both with respect to the
10 personal-information provision in the Values Act, and with
11 respect to the release dates information -- the information is
12 only being restricted to any immigration authority if the
13 information is not available to the public. So it's treating
14 immigration authorities in the same manner as it would be
15 treating entities or individuals in similar-situated
16 circumstances.

17 And *Reno* -- and *Reno*, which I'm sure the defendants will
18 point to, does not cover this point, because that is a -- that
19 only applied to generally applicable statutes.

20 Well, here, this is a statute that's directed at the
21 State, that is saying that State and local jurisdictions have
22 to -- have to comply with this provision. And because the
23 defendants have had such a broad reach of 1373, then that --
24 then that only exacerbates the Tenth Amendment problem that we
25 have here.

1 **THE COURT:** All right. Great.

2 **MR. SHERMAN:** And one other thing, too, about release
3 dates is that, regarding connecting it to immigration-status
4 information, just because someone -- again, defendants say that
5 this is an important purpose, but just because someone is
6 released from custody does not make them more -- unlawfully
7 present in the United States. And they use this definition of
8 "presence." And that is not the right definition to use.

9 In 8 U.S.C. 1182, this is defined as unlawful presence;
10 and that is whether you're present outside the authorization
11 of -- that was granted by the Federal Government. And that
12 should be what we're looking at. Not present anywhere in the
13 United States. The question is just whether the person is
14 present -- is present in the United States, outside the
15 authorization period. And that does not go into release dates.
16 And addresses are also not relevant in that regard.

17 Thank you, Your Honor.

18 **THE COURT:** Thank you, Mr. Sherman.

19 All right. For the City.

20 **MS. MC GRATH:** Good afternoon, Your Honor.

21 Aileen McGrath, for the City and County of San Francisco. I'm
22 here with my colleague, Sara Eisenberg. And, with the Court's
23 permission, Ms. Eisenberg and I would like to divide the City's
24 argument time. I don't think either of us has an enormous
25 amount to add to what Mr. Sherman has already said. I plan to

1 address the separation of powers statutory authorization issues
2 about all three conditions. And Ms. Eisenberg will discuss any
3 questions the Court has about the City's claim for declaratory
4 relief.

5 **THE COURT:** All right.

6 **MS. MC GRATH:** The only thing I would like to add to
7 what Mr. Sherman has already said concerns a small area where
8 the City and the State differ somewhat, and it relates to an
9 earlier point that Mr. Readler made about the claims that are
10 at issue in this case. The City does contend that the Federal
11 Government lacks the statutory authority to impose all three of
12 these conditions, including the Section 1373 condition.

13 The only source of authority that the Federal Government
14 invoked in their motion to dismiss was 34 U.S.C. 10102(a)(6),
15 the same special-conditions priority-purposes language that
16 we've already been discussing. It may be that at some future
17 point we will need to discuss other potential sources of
18 statutory authority, but for purposes of this motion that's the
19 only statute that's at issue.

20 I don't have anything to add to Mr. Sherman's description
21 of why that statute doesn't provide the Federal Government the
22 authority that it needs, and certainly why it doesn't provide a
23 basis for dismissing the City's claims here.

24 Other than that, I'm happy to answer any questions that
25 the Court might have.

1 **THE COURT:** I don't think I need any. Thank you.

2 **MS. MC GRATH:** Thank you, Your Honor.

3 **MS. EISENBERG:** Good afternoon, Your Honor.

4 I think I can be as brief as my colleague.

5 **THE COURT:** Excellent.

6 **MS. EISENBERG:** I think there seems to be very little
7 question that there is a live controversy over whether or not
8 San Francisco complies with Section 1373, as Your Honor
9 indicated before. Unless you have questions for us in that
10 regard, I'm happy to leave that be.

11 **THE COURT:** That seems quite obvious to me,
12 Ms. Eisenberg.

13 **MS. EISENBERG:** Okay. Thank you.

14 And similarly, this is a motion to dismiss. There have
15 been some comments today and in the briefs that we haven't
16 established our right to a judgment on our compliance with
17 1373, but we're not here on a motion for summary judgment.
18 It's a motion to dismiss. And there seems to actually be very
19 little disagreement even from defendants at this point that
20 dismissal is not the appropriate result on this claim at this
21 time.

22 So although I have a page of notes prepared to talk to you
23 about the proper interpretation of "regarding immigration
24 status," I'm happy to save that for another day, unless
25 Your Honor has specific questions.

1 **THE COURT:** No. I do think there will another day
2 when we come to the merits.

3 **MS. EISENBERG:** I welcome that day.

4 **THE COURT:** Thank you.

5 **MS. EISENBERG:** Thank you, Your Honor.

6 **THE COURT:** Mr. Readler.

7 **MR. READLER:** Just a couple of points. First of all,
8 on the ripeness question, I think my friend from California
9 confirmed that the administrative process is not yet complete.
10 And that's one of the reasons why we say this dispute is
11 actually not ripe. And I think he confirmed that there are
12 still negotiations going on with respect to that issue. So we
13 agree, and we would dismiss the case on that ground.

14 But we'd also, again, dismiss the authorization claims;
15 that we weren't authorized to administer these conditions.

16 And I know the Court suggested that maybe it doesn't agree
17 with our position, but one thing I'd certainly like to
18 highlight. In my presentation I spent a fair amount of time
19 talking about the priority-purpose aspect of the Government's
20 powers to impose restrictions and limitations on grants to
21 identify a priority purpose, which they did -- immigration --
22 and impose those.

23 And my friend said nothing about that provision this
24 morning. I don't think they have an answer to that aspect.

25 We heard a lot about the special conditions, which we

1 agree about; but these are justified also by the
2 priority-purpose language.

3 With respect to the conditions, just a couple of
4 additional points. My friend said that this is a criminal
5 justice grant, and so that somehow would preclude the
6 restrictions at issue here; but 34 U.S.C. 10251 defines
7 "criminal justice" to include activities of corrections. And
8 what these conditions go directly to is the activities of
9 correctional facilities by the grantees, and whether they're
10 sharing information about their inmates. So it's clearly
11 covered by statute.

12 My friends invoked the reg. that the DOJ has issued about
13 high-risk grantees. And it is true that there's a reg. that
14 addresses conditions that can be imposed on high-risk grantees;
15 but there's nothing in the statute that suggests that Congress
16 meant that the Assistant Attorney General was limited by that
17 reg. In fact, it would be sort of odd for the Congress to even
18 say that the AG has the power to follow the reg. Of course, it
19 does. So the Congress obviously meant something else when it
20 said "special conditions."

21 And I just want to point out again that there are dozens
22 and dozens of conditions imposed every year. Many of those
23 don't come from statute. They come from places like Executive
24 Orders.

25 President Obama signed an Executive Order regarding

1 prohibited and controlled expenditures. For example,
2 President Obama's Executive Order prohibited the use of federal
3 dollars to purchase military-style equipment. And so that
4 condition was included in the Byrne JAG grant in prior years.
5 Again, that's a condition that comes straight from the
6 Executive Branch, we think, appropriate with the authority
7 granted to the Department to impose; but their argument would
8 knock out that condition and a whole host of other conditions,
9 including some conditions about body armor which -- the
10 Department had included the conditions regarding body-armor
11 standards if you buy body armor, and a requirement that you
12 wear it if you purchase it. They started doing that in 2012.

13 And in 2016, Congress actually included those conditions,
14 itself. So it liked the idea so much that it made it
15 mandatory, rather than leaving it to the discretion of the
16 Department, which just confirms that they were obviously -- had
17 no problem with the Department doing it, and wanted to make it
18 actually a formal requirement rather than a discretionary one.
19 So there's no doubt that the Department has broad authority
20 here, and these conditions are clearly authorized. And that
21 part of the case should be dismissed.

22 I just want to address my friend's point from
23 San Francisco. We certainly do think -- and we contested in
24 every single case -- that 1373 is an applicable law. It's a
25 law that applies to cities and states. And it's certainly a

1 law that would then be applicable to a grant to cities and
2 states.

3 And if we didn't mention it, it's only because they did
4 not expressly argue in their motion that the condition was not
5 justified. They certainly argued that they think they comply
6 with it, but we did not read their motion to suggest that we
7 didn't have the authority to impose the 1373. So if they do,
8 we obviously contest that. And we've contested that in a whole
9 host of cases.

10 And I'll just close with a couple of points about 1373
11 compliance. One of the main points I made during my
12 presentation was that "information regarding" must mean more
13 than just immigration status.

14 And my friends from California said they at first didn't
15 agree; but I think they then did agree, and said this covers
16 information that the grantees may have that the Federal
17 Government doesn't have. And that's exactly what we're talking
18 about. We're talking about the address, which the Federal
19 Government might not have --

20 **THE COURT:** Regarding status, I mean, the whole --

21 **MR. READLER:** -- and release date.

22 **THE COURT:** The whole issue is going to boil down, it
23 seems to me, here, on the difference between what "regarding
24 status" and "regarding enforcement" is, and how far you take
25 the definition of what "regarding status" is, because there is

1 a point at 1373 where it runs directly, it seems to me, into
2 the Tenth Amendment. And so that's part of what I'm looking
3 forward to sorting out --

4 **MR. READLER:** Sure.

5 **THE COURT:** -- with the parties on a motion for
6 summary judgment.

7 **MR. READLER:** Right. A couple of thoughts.

8 First of all, it has to be more than just immigration
9 status. And I think, as proven this morning, it's difficult
10 for my friends on the other side to tell you what they think it
11 means. And it obviously means more than that. And we have
12 articulated exactly what this we think it means.

13 **THE COURT:** Those two things?

14 **MR. READLER:** Yes. And there's no Tenth Amendment
15 problem here, for a couple of reasons.

16 (Reporter requests clarification.)

17 **MR. READLER:** Yes. There's no Tenth Amendment
18 problem here, for a couple of reasons. One is that, again,
19 this is a grant that they're entering into. They're not
20 compelled to do that. This is not directly regulation.

21 And, two, this is not compelling conduct. This is a
22 prohibition on barring information sharing. And again,
23 information sharing is done throughout the Government. And the
24 Second Circuit already recognized that information sharing
25 doesn't run into Tenth Amendment problems. So I think those --

1 those issues are answered.

2 And I'll just close. With respect to the Tenth Amendment,
3 we cited the *Richardson* case in our papers from the
4 Ninth Circuit. That was a case that addressed a limitation on
5 grants regarding SORNA; that the State must share sex-offender
6 information with the Government, or they risk losing 10 percent
7 of their grant funds. And the Ninth Circuit said expressly
8 there, *That didn't create a Tenth Amendment problem, because*
9 *it's part of a grant; and if they don't want to share the*
10 *information, they just don't accept the grant.*

11 So we appreciate Your Honor's time, and we look forward to
12 our next opportunity.

13 **THE COURT:** Well, I'm looking forward to it, as well,
14 Mr. Readler. And you always bring a fine team with you; at
15 least, half of them.

16 **MR. READLER:** Happy to be here today. Thank you.

17 **THE COURT:** So what I want to do is I'll get an Order
18 out pretty quickly. And I'll get an Order -- I've got the --
19 I'd decided to hold on to the preliminary injunction until I
20 heard this argument; but what I will do is set and what I will
21 do is a case-management conference on March 27th.

22 And between now and then, I would like the parties to
23 discuss what discovery they need to complete a record in this
24 case, and what a good briefing schedule then would be for what
25 I assume will be cross-motions for summary judgment. And the

1 time frame that I'm thinking about for hearing there is in the
2 sort of six-months-from-now range.

3 That may be too fast. It may be too long from now. You
4 can tell me on March 27th. I'll ask you to give me a joint
5 status statement on the 20th. If you've agreed on what the
6 schedule is, then we don't need to have the case-management
7 conference, unless somebody has an issue that they want to
8 raise with me. And we'll proceed that way. And I'll get an
9 Order out promptly.

10 All right. Good to see you all.

11 **MR. SHERMAN:** Thank you, Your Honor.

12 **MS. BELTON:** Thank you, Your Honor.

13 (At 3:08 p.m. the proceedings were adjourned.)

14 I certify that the foregoing is a correct transcript from the
15 record of proceedings in the above-entitled matter.

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March 2, 2018

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Signature of Court Reporter/Transcriber Date

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Lydia Zinn

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