XAVIER BECERRA
Attorney General of California
THOMAS PATTERSON
Senior Assistant Attorney General
MICHAEL NEWMAN
SATOSHI YANAI
Supervising Deputy Attorneys General
CHRISTINE CHUANG
ANTHONY HAKL
CHEROKEE DM MELTON
LEE I. SHERMAN
Deputy Attorneys General
State Bar No. 272271
300 S. Spring Street
Los Angeles, CA 90013
Telephone: (213) 269-6404
Fax: (213) 897-7605
E-mail: Lee.Sherman@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his official capacity; and XAVIER BECERRA, Attorney General of California, in his official capacity,

Defendants.

Case No. 2:18-cv-00490-JAM-KJN

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' REPLY BRIEF ON THE MOTION TO TRANSFER VENUE

Judge: Honorable John A. Mendez
Action Filed: March 6, 2018

Defendants the State of California, Edmund Gerald Brown Jr., Governor of California, in his official capacity, and Xavier Becerra, Attorney General of California, in his official capacity (collectively, "Defendants"), hereby request, pursuant to Rule 201 of the Federal Rules of Evidence, that the Court take judicial notice of the following items in connection with the Reply in Support of Defendants' Motion to Transfer Venue to the Northern District of California:

1. Exhibit A: Transcript of Proceedings (Motion for Preliminary Injunction), December 13, 2017, *California v. Sessions, et al*., Case No. 17-cv-4701 (N.D. Cal.) (hereinafter "*California v. Sessions*").
2. Exhibit B: Defendants' Opposition to Plaintiff's Amended Motion for Preliminary Injunction, *California v. Sessions*, Dkt. No. 42.
3. Exhibit C: Defendants' Notice of Motion and Motion to Dismiss, *California v. Sessions*, Dkt. No. 77.
4. Exhibit D: Defendants' Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss, *California v. Sessions*, Dkt. No. 83

Facts subject to judicial notice include those that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). Courts regularly take judicial notice of "undisputed matters of public record, including documents on file in federal or state courts." Harris v. Cty. of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (internal citations omitted); Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); Kurtz v. Intelius, Inc., No. 11-cv-1009, 2011 WL 4048645, at *3-*4 (E.D.Cal. Sept. 9, 2011). Exhibits A through D are court records from California v. Sessions, a pending action in the Northern District of California.

In sum, the above items meet the requirements of Rule 201(b)(2) of the Federal Rules of Evidence, and therefore, the Court must take judicial notice of them pursuant to Rule 201(c)(2) of the Federal Rules of Evidence.

Dated: March 23, 2018

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California

/s/*Lee I. Sherman*
Lee I. Sherman
Deputy Attorney General
Attorneys for Defendants

EXHIBIT A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK, JUDGE

STATE OF CALIFORNIA, ex rel, XAVIER BECERRA, in his official capacity as Attorney General of the State of California, Plaintiff, vs. JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Principal Deputy Acting Assistant Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and DOES 1-100, Defendants.	**NO. C 17-4701 WHO** San Francisco, California Wednesday, December 13, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For the Plaintiff:

State of California
Department of Justice
Office of the Attorney General
Civil Rights Enforcement Section
300 South Spring Street
Los Angeles, California 90013

By: Lee I. Sherman
Deputy Attorney General

(Appearances continued on next page)

Reported By: Katherine Powell Sullivan, CSR #5812, RPR, CRR
Official Reporter - U.S. District Court

APPEARANCES (CONTINUED):

For the Plaintiff:

State of California
Department of Justice
Office of the Attorney General
1515 Clay Street, 21st Floor
Okaland, California 94612-1492

By: Lisa Ehrlich
Sarah E. Belton
Deputy Attorneys General

For Defendants:

United States Department of Justice
Civil Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

By: **Chad A. Readler**
Acting Assistant Attorney General

United States Department of Justice
Federal Programs Branch
901 E Street, N.W., Room 986
Washington, D.C. 20530

By: W. Scott Simpson
Senior Counsel

United States Department of Justice
United States Attorney's Office
450 Golden Gate Avenue, 9th Floor
San Francisco, California 94102

By: Steven J. Saltiel
Assistant United States Attorney

Wednesday - December 13, 2017 **2:04 p.m.**

P R O C E E D I N G S

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THE CLERK: Calling civil matter 17-4701, State of California versus Sessions, et al.

Counsel, please come forward and state your appearance.

MR. SHERMAN: My name is Lee Sherman, representing the State of California.

THE COURT: Good afternoon.

MS. EHRLICH: Lisa Ehrlich representing the State of California.

MS. BELTON: Sarah Belton on behalf of the State of California.

THE COURT: Welcome.

MR. SALTIEL: Good afternoon, Your Honor. Steven Saltiel for the U.S. Attorney's Office, for the defendants.

MR. SIMPSON: Good afternoon, Your Honor. Scott Simpson for DOJ for the defendant.

THE COURT: Mr. Simpson, good to see you.

MR. READLER: Good afternoon, Your Honor. Chad Readler on behalf of the defendants.

THE COURT: Mr. Readler, welcome back also.

All right. So I find this to be a very close case on almost every issue.

So, Mr. Sherman, why don't you come up here if you're

doing the argument.

MR. SHERMAN: Sure.

Thank you, Your Honor.

THE COURT: All right. So let me start with you just a little bit.

MR. SHERMAN: Absolutely.

THE COURT: When I'm looking at the spending clause analysis, should I be looking at the same analysis for both the Byrne and the COPS grants?

MR. SHERMAN: So, Your Honor, we are not challenging the COPS grant condition on spending clause grounds.

THE COURT: Okay.

MR. SHERMAN: We are challenging the JAG 1373 condition on spending clause grounds and that it's a violation of the Administrative Procedure Act for being arbitrary and capricious.

But the COPS grant, we are not challenging the condition itself. What we are asking for, Your Honor -- and this is extremely timely because defendants have frozen the State's awarded COPS grant, million-dollar COPS grant that the State uses for a task force to combat anti-methamphetamine trafficking, pending the inquiry into 1373.

So because we are not -- we are not challenging the condition, we do ask Your Honor to determine the State's compliance with 1373 as part of this motion.

THE COURT: All right. So Judge Baylson, in *Philadelphia vs. Sessions*, said something that I agree with. And I want you to tell me whether you also agree with it. And if you do, tell me where it leads.

MR. SHERMAN: Sure.

THE COURT: Okay. He said that criminal law is integral to immigration law; but immigration law has nothing to do with local criminal laws.

And so what conclusion do you think I ought to draw from that?

MR. SHERMAN: We would agree that immigration law does not have any bearing on local criminal law enforcement.

THE COURT: All right. And would you also agree that it's integral to immigration law?

MR. SHERMAN: It is. But these grants are for local law enforcement to engage in criminal -- criminal justice purposes.

And the intention that Congress had for these grants is not to make these grants conditioned on any immigration enforcement-related matters in which these grants had -- originally they had 29 purpose areas. And then eventually Congress then collapsed the purpose areas into eight. None of these purpose areas --

THE COURT: Now we're just talking about the Byrne grants.

MR. SHERMAN: Right. Exactly. And in addition to which there used to be a condition requiring jurisdictions to certify -- required jurisdictions to provide information regarding criminal convictions of foreign-born individuals or -- individuals or immigrants.

And the -- and the Congress, when it repackaged that, they eliminated that condition, indicating that that was not a condition that they viewed as being related to the purpose of JAG in their -- when it was reauthorized.

And, then, in addition to which, Congress has repeatedly refused to condition JAG on compliance with 1373, and in very -- in which there has been various pieces of legislation which is not adopted that would require compliance with 1373 for JAG.

THE COURT: Why wouldn't -- if criminal law is integral to immigration law, why wouldn't it at least be an applicable federal law?

MR. SHERMAN: Well, we have not challenged whether it is an applicable federal law here. Our challenge is regarding whether it has a sufficient nexus to the purpose of the JAG grant, the federal interest in the JAG grant.

So we understand that there is -- that, indeed, a JAG-authorizing statute that allows the federal government to identify or -- applicable laws. And we are not contesting one way or the other regarding their ability to do that.

What we are contesting, though, is that it violates the nexus clause under the spending clause, and that it is -- the decision in making it an applicable law is arbitrary and capricious.

THE COURT: What's the best case that you have for why 1373 shouldn't be an applicable federal law in light of -- in light of this situation?

MR. SHERMAN: Well, again, we would point to this -- as far as the spending clause issue, we would -- the issue, this has not come up very much in the cases.

There is the case in Texas in which -- in relation to the ACA. They tied Medicaid funding to compliance with the conditions in the ACA. And the Court there determined that that was a separate program.

And this is what we -- this is what we posit for the JAG, is that this is for criminal justice programs. This is intended and Congress intended for this to increase flexibility for local jurisdictions to produce innovative solutions to criminal justice issues.

And that is unrelated to immigration enforcement. And immigration enforcement also, Your Honor, is civil in nature. And this is for -- and these grants are for criminal justice programs.

THE COURT: So can you explain to me what the State's position is with respect to this question?

MR. SHERMAN: Sure.

THE COURT: If the local enforcement agency knows the status of an individual, immigration status, and that information is not protected by the confidentiality statutes --

MR. SHERMAN: Sure.

THE COURT: -- is a local enforcement agency official prohibited from providing the status information -- just the information about status -- to the federal government?

MR. SHERMAN: No, because of the savings -- you're asking about the Values Act, Your Honor; correct?

THE COURT: Yes.

MR. SHERMAN: So, yes, so the Values Act includes a savings clause that permits compliance with all aspects of 1373. So it does permit local law enforcement and state law enforcement to provide an individual's immigration status if -- if it's requested or if the law enforcement deemed it necessary to do so.

THE COURT: And your definition of status information is just that? Status means status.

MR. SHERMAN: Information that squarely establishes an individual's immigration status or citizenship status.

THE COURT: And so what is that information?

MR. SHERMAN: It could be a visa status. It could be a statement about an individual's immigration status from the individual him or herself or another individual.

THE COURT: But it's cabined. It's just -- and your view is that it is just is the person a citizen or not, or does that person have a specific visa, I guess, from what you just said.

MR. SHERMAN: Right. And we would point -- and as we discussed in our reply brief, in page 11, is that because the definition of immigration status would dramatically alter the federal and state relationship, that the definition -- that "immigration status" needs to be unmistakably clear.

And the statute particularly because Congress in other parts of that same act, the illegal immigration act of 1996, when it wanted additional information to be a part of the provision, they said so.

And, in fact, in one provision, where it prohibited disclosure of information, it said a prohibited disclosure -- and this is 8 U.S.C. 1367 -- a prohibited disclosure of any information relating to an immigrant.

And here Congress was very specific and used precise terms of "citizenship" and "immigration status." It didn't include nationality or individual's address. So when Congress -- if Congress wanted to include those pieces of information, it would have included such in 1373.

THE COURT: So if I found that 1373 was related or was inapplicable federal law, wouldn't the ongoing administrative process, with respect to the grants, clarify what specific

parts of the state law the federal government now thinks is -- violates 1373?

And wouldn't that be a benefit to the Court and to the State to know exactly what it is that you're shooting at? And to the Government for that matter.

MR. SHERMAN: Sure. Well, positions have been clear through the -- through the letter exchanges in which the federal government has interpreted 1373 in such a manner to include any -- any information regarding an individual's identity and their presence in the United States. And also in other -- in the Philadelphia proceeding represented that it applies to every individual in the United States. Any information about every individual in the United States.

And the State, in the response to the inquiry to the BSCC, said -- said in response that, We interpret the Values Act to not -- not allow the disclosure of release dates and home addresses.

And the positions have been clear. The lines have been drawn. And so that this case is ripe for adjudication. And there's no real factual development that is necessary regarding defendants' interpretation of 1373 and the State's interpretation of the Values Act.

THE COURT: At least as to a couple of the items, that may well be right. But I suspect that the federal government may find other things that they're not happy with the State

statute about.

Mr. Readler may tell me about that.

MR. SHERMAN: Sure. And -- but basically, though, the fact is that it is not -- all this other information that they would -- are going to be seeking is not -- it's not unmistakably clear on the face of the statute that it's immigration or citizenship status.

And, in the meantime, U.S. -- there is harm that is being placed to the State that the State -- that the State does not have to exhaust its administrative remedies if you look at *McCarthy v. Madigan*, if -- if there is injury that's occurring during the process or if -- or if there is a constitutional issue that's at play, in which it's not within the jurisdiction of the agency, or if there is -- or if there's a foregone conclusion.

And here we have all three, in which the State case is an injury in which -- which defendants are not only making a determination about the State's JAG funding, it's also now, as we've seen, preventing the State from having -- from drawing down on the COPS grant.

And they also during the administrative process can -- under 28 C.F.R. 18.5(i), can -- can suspend the State's JAG funding during the administrative process. So this is causing very real harm to the State as we speak.

THE COURT: So right now it's holding up a $1 million

grant; right? The COPS grant is a $1 million grant.

MR. SHERMAN: Sure.

THE COURT: The Byrne grant is already held up because of what's going on in the Seventh Circuit. Right?

MR. SHERMAN: Sure. Currently, right now.

But once the Seventh Circuit rules on it, then at some point -- these are formula grants, and these are grants that were appropriated by Congress. And defendants have already awarded two of these grants to other jurisdictions.

So these are grants that have to be awarded to the state and the other -- and other -- and local jurisdictions and other jurisdictions across the country in the manner that Congress appropriated these funds because of the effect of the formula grants.

THE COURT: So tell me how the savings clause works in the Values Act.

MR. SHERMAN: Sure.

THE COURT: You have an interpretation of 1373. And you say, We'll comply with that.

What if I have a different interpretation? Does that mean that the State will comply with that and that then the Values Act -- or that the savings clause will sort of conform to 1373?

MR. SHERMAN: The savings clause would defer to the Court's determinations regarding 1373. So -- and that's an important point, that the Values Act is, on its face -- it

complies with 1373 for that reason.

THE COURT: So do you know -- and this may be a better question for Mr. Readler, but the timeline with respect to the Byrne grant, with respect to the Seventh Circuit litigation and when that's going to come up, and any other sort of administrative issues that should be of interest to me?

MR. SHERMAN: Well, there is -- I think the briefing completes in the middle -- January 11th or January 12th, and there's a hearing on January 18th.

THE COURT: And so from the State's perspective, besides the constitutional injury and the holding up of a million-dollar grant -- which I don't belittle, but in a $15 billion budget it's a relatively small amount of money -- what is the urgency for the State right now?

MR. SHERMAN: Well, with all due respect, with respect to the million-dollar grant that you speak to, the State has to determine the placement of the staff that are part of these task force.

And so long as these are -- that this grant is being held up, they cannot make these decisions and commit to having the State's leadership as part of this task force that it uses to -- to combat anti-methamphetamine -- to combat methamphetamine, to combat heroin, to combat cocaine, in which the State has seized, as part of this task force, $60 million worth of these illicit drugs.

So with all due respect, this is an important -- the million-dollar grant is a -- is something that is causing harm and is impacting the State's ability to implement that grant.

The -- right here, as you mentioned, we have the constitutional harm. There is also the community harm. And the prospect, too, that the State will have to certify compliance with 1373 under penalty of perjury.

THE COURT: So that argument is one that I really don't understand very well. Maybe you can explain it to me.

You have a good-faith belief that you're in compliance with 1373. That belief is different than the interpretation, perhaps, that the attorney general of the United States has. But why can't the State certify that it's in compliance with 1373? This is why you're litigating.

MR. SHERMAN: Sure. But, I mean, though, the State then would subject itself to enforcement proceedings. As defendants have said in the JAG solicitation itself and in numerous statements they've said that these certifications are subject to penalty of perjury, and that they are subject to civil and criminal penalties if they are false or misleading.

THE WITNESS: So you're right, the State has -- the State's interpretation of 1373 is that it complies with 1373. But if you follow *Susan B. Anthony*, the Supreme Court decision there, if you follow the Ohio *ex rel Celebrezze* case, these are all cases in which the State need not wait for the federal

government to -- to -- to initiate an enforcement action before the State can seek relief. This is what the Declaratory Judgment Act, the whole purpose of it is.

THE COURT: So from your perspective -- this is my last question, and then I'm going to let you say the things you wanted to say when you got up here.

MR. SHERMAN: Sure.

THE COURT: But these were the things that were on my mind.

MR. SHERMAN: Sure.

THE COURT: Is there any particular date by which you think you just have to have a decision?

MR. SHERMAN: Well, we ask as soon as possible, Your Honor.

THE COURT: Okay. So I'm in the middle of a long trial.

MR. SHERMAN: Understood.

THE COURT: Is there some impending event that -- besides the issues that you've already raised for me, is there some sort of time that I really need to focus on getting this order out?

MR. SHERMAN: We would respectfully request an order sometime by the beginning of January.

THE COURT: And just because of the reasons that you've described?

MR. SHERMAN: Right. Because the State will have to -- is -- the California Department of Justice is in the process of planning for the -- for CAMP.

And, also, there is the 90-day clock, which defendants have represented started on November 16th, in which the State has to decide whether it's going to comply -- will accept the COPS condition, which is, of course, conditioned on 8 U.S.C. 1373. So that clock would end on February 14th.

So that -- so because of those pending deadlines that are coming up, we do believe that a decision within that time frame is necessary to stay.

THE COURT: All right. Now, is there anything else that you wanted to be sure to tell me before Mr. Readler gets up?

MR. SHERMAN: Sure. So I do -- because you asked the question regarding applicable law, and we talked a little bit about the spending clause, we do want you to be aware that we also have a claim that the 1373 condition is a violation of the Administrative Procedure Act, in which -- and it's -- first of all, defendants claim that the condition is not final agency action.

The State disagrees with that, that in -- in *Bennett* the standard is that -- that there is a consummation of the decision process and that there is legal obligations that flow from it.

Here, clearly, the defendants have identified 1373 as a condition of compliance for JAG in FY2016. They have done it again for 2017. It's a consummation of their decision-making. And now the State has to certify compliance under penalty of perjury for 1373.

And it's arbitrary and capricious, if you look at *State Farm*, that there are three ways in which an agency action would be arbitrary and capricious, that the agency did consider factors that Congress did not intend, which we have here for the reasons we discussed earlier.

And for that I would point you to a case that's on point, is *Cape May v. Warren*, which we discussed on page 17 of our opening brief. And in that case a condition was struck down that -- because the agency there did not -- did not interpret the -- did not act consistent with Congress's intent.

And, also, the other -- other is that the defendants have entirely failed to consider an important aspect of the problem, and they failed to offer an explanation that it's -- that is consistent with the evidence before it.

And here the State's -- and this is an essential part of what -- of this case, is that the State has the discretion to determine what is best for its public safety and for the maintenance of its public order.

And here the State and other jurisdictions, both within the State and across the country, have determined that policies

that build trust within communities, and policies that -- that -- that limit entanglement between local law enforcement and federal immigration enforcement is -- is something that -- that would benefit public safety.

And there is no evidence that defendants have considered that important aspect of the problem.

THE COURT: Oh, but I am confident that they have considered that, because that is a matter of great disagreement within law enforcement across the country. There are a number of people -- a number of states and local agencies that take the view that California takes. And there are a number of them that take the exact opposite.

And, certainly, if you read the -- if you read anything in the media, you know that this has been a concern of the attorney generals historically.

MR. SHERMAN: Sure.

THE COURT: So they've thought about it. They're taking a different view about this and how the statute ought to be enforced. And so the question is, at some point do they run afoul of the police powers? But it's not because they haven't thought about it.

MR. SHERMAN: Well, we haven't seen that in the solicitation or any -- any sort of recognition that it is something that they have considered within the documents that have been publicly available, because the defendants have not

produced the administrative record yet. So we have not seen any evidence that that was part of the decision-making here.

Your Honor, we also want to -- we talked about the Values Act. We also brought claims regarding the State's compliance with 1373 as to its confidentiality statutes and the TRUTH Act.

And here the State believes that it does have standing to -- to bring these claims here. Which if you look at -- in the executive order litigation, Your Honor, you determined that counties had standing based on a well-founded fear of enforcement against the counties and against -- against the State of California.

And here the record is even more acute that the State has a well-founded fear of enforcement of 1373 against the State statutes even before the Values Act, in which -- in which on March 29th the attorney general sent a letter to the California Chief Justice, saying that the State -- state's laws, presumably the TRUTH Act, denied access to ICE, to detention facilities. Which the TRUTH Act does not.

And, in addition, that ICE Directer Holman, on June 13th, said that jurisdictions that do not allow ICE access to detention facilities are in violation of 1373. Which we disagree with both of those claims. But that has brought a credible fear with respect to the TRUTH Act.

THE COURT: So do you think that I ought to be looking at the notice and access provisions of these state statutes in

addition to the compliance aspect?

MR. SHERMAN: Well, the notification and access conditions are different than the 1373 condition. Which those conditions require an affirmative policy to -- for the -- that the jurisdictions must -- must adopt in order to comply with those conditions. Which we are challenging, but is subject to the nationwide injunction.

But here -- and this is an important point, Your Honor, that defendants have tried to cram everything that they want -- all of the immigration enforcement agenda that they have, that they have failed to do in the executive order, that they failed to do with respect to the notification and access conditions, in which they're attempting to cram that into 8 U.S.C. 1373, in which they are proceeding -- which based on their -- based on their conduct, it appears that they are also trying to say that 1373 restricts state and local law enforcement from -- from providing access to -- to immigration authorities. And the state statute does not do that. It just provides transparency requirements. But it does not deny access.

In addition, with respect to the state's confidentiality statutes, on April 21st, both Defendant Sessions and USDOJ said that California was potentially in violation of 1373 at that time, which obviously was before the Values Act.

And then, also, October 12th, defendant sent a letter to Philadelphia saying that its statute, which protected

disclosure of information for victims and witnesses of crime, that they had determined that that was potentially in violation of 1373. And then November 15th they sent a letter to Vermont saying essentially the same thing.

And the state statutes do regulate the sharing of immigration status information for certain victims and witnesses of crime, in the U-visa statute and the California hate crime statute, and also regulates -- and also the state's juvenile statute protects, generally speaking, information regarding information that's in a juvenile's case file, including immigration status information.

So the State has a credible fear that those provision -- that the defendants will enforce 1373 against those state statutes.

And those -- those state statutes, though, from the State's position, do not violate 1373 because they protect the similar classes of individuals that --

THE COURT: I understand that.

MR. SHERMAN: And we also want to make sure that we discuss our -- that if -- if 1373 were to encompass -- were to encompass the information that defendants -- if Your Honor were to interpret 1373 to encompass this expansive amount of information that defendants seek, and encompass the State's confidentiality statutes, then we do have a serious Tenth Amendment issue here in which the -- in which defendants would

be commandeering the state to allow its local law enforcement -- to -- to assist immigration authorities.

And this really speaks to what is at issue in ***Printz***, in which ***Printz*** the Supreme Court determined that background, mandated background checks, that the chief law enforcement officers were obligated to do was -- was commandeering.

So here there's a specific -- based on defendants' interpretation of 1373, there is a specific direction on chief law enforcement officers throughout the state to -- to allow their -- their information and information that's only within their capacity as state -- as state or local officials to -- to allow -- to allow that information and the resources to be used for immigration matters.

THE COURT: All right. That's the issue of what "regarding" means; right?

MR. SHERMAN: In what way, Your Honor?

THE COURT: The whole -- the issue of what "regarding status" --

MR. SHERMAN: Sure.

THE COURT: -- means is, does "status" mean status or does it mean -- I'm going to ask Mr. Readler this question --

MR. SHERMAN: Sure.

THE COURT: -- what the Government's current view about this is.

MR. SHERMAN: Right.

THE COURT: But immigration -- "regarding immigration status" could mean everything in a person's life.

MR. SHERMAN: Right.

THE COURT: Which seems quite broad to me. But it might be that there's a different definition that I'm going to hear. So why --

MR. SHERMAN: Sure. Sure.

To that point, Your Honor, because the statute is not unmistakably clear, as the Supreme Court said in *Gregory* and in *Bond*, then that -- that 1373 should be narrowly read to encompass the information that this Congress said, and which is immigration and citizenship status information.

THE COURT: All right. All right. I think I'm about ready to hear Mr. Readler.

MR. SHERMAN: Sure. Thank you.

THE COURT: Thank you, Mr. Sherman.

MR. READLER: Hi. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. READLER: If it please the Court.

THE COURT: It's a pleasure to see you.

Now, I want to ask you a few questions before you launch into the things that you want to make sure that I know.

And so start with Judge Baylson's observation that criminal law is integral to immigration law; but immigration law has nothing to do with local criminal laws.

Do you agree with that?

MR. READLER: I certainly disagree with the second half of that for a couple of reasons.

One, as 1373 and the INA reflect, they reflect cooperation between the federal government and local governments on matters of local crime.

For example, under the INA, if an individual's removable and even in the custody of the United States, if they're also being subject to punishment by a local government, the INA requires that the government, the federal government, turn that individual over to the state or locality so they can be punished for that local crime. And then they should be returned back to the federal government.

So there the INA expressly recognizes the tie between local criminal matters and federal immigration matters. And it respects a cooperative relationship. In other words, Congress would not have expected that the government should have to turn over these individuals, who are removable, to serve their local or state sentences, but then the state or local government would never let the federal government know when those individuals were going to be released, so they can be removed. So that's clearly quite at odds with historical background and understanding of the statute.

Second, the Congress, when it passed Section 1373, expressly recognized this tie. In the ***New York vs.***

United States case, that's very instructive on a number of issues, the Court there quotes a House Report where the House said that with respect to 1373, immigration law enforcement is as high a priority as other aspects of federal law enforcement.

So immigration law is clearly part of law enforcement issues, whether it's state or local. And law enforcement is not limited just to criminal law. Law enforcement is civil and criminal. And so this phrase "law enforcement" should not be read just to mean criminal violations. And, of course, those local violations of local law can make someone removable.

So there are a number of ties between law enforcement, immigration, local prerogatives, federal prerogatives. And I think that's actually a quite easy question for us and clearly shows the nexus here.

THE COURT: So how do you distinguish this case from the Philadelphia case? Or do you just think that Judge Baylson wrongly decided that case?

MR. READLER: Most of that case was about the actual policies at issue, as the way that Philadelphia was carrying out certain immigration policies and law enforcement policies and whether that satisfied 1373.

And the judge found that there was substantial compliance. I think he recognized there were some areas that there was not compliance; but he thought these were insignificant. And I think he thought that on critical criminal convictions, that

those individuals were being -- being -- about those individuals, the federal government was being notified about them.

But I think to the extent the Court found that there was a lack of a nexus here or germaneness here, that the Court was clearly wrong about that.

My friends here, of course, have already told you that they dispute the fact that 1373 is an applicable law. So that there, by itself, I think, gets us a long ways in terms of the germaneness that a law enforcement grant that requires -- that promotes cooperation between local and state governments includes, as an applicable law, Section 1373. I think that satisfies all the germaneness and nexus concerns that the Court should be worried about.

THE COURT: So is it the case that the Department of Justice is contending that the State should not follow the confidentiality -- what they call the confidentiality statutes, information regarding U- and T-visas and juvenile records, when providing information to the government? Is the Government contending that that violates 1373?

MR. READLER: We haven't taken a position on that. And I think the Government should be commended for being very upfront with the State of California. We've had a number of exchanges with the State this year, both sort of initial announcements about these conditions. And, of course, these

conditions go back to 2016 as well.

But we've had a number of exchanges with the State. The State has put forward, sort of, its interpretation of all of its laws. We wrote back to them and identified one law, the Values Act, that we think is not consistent with 1373.

The State has now given us their response to our analysis. And we're considering that response and, sort of, what we're going to do with respect to the Byrne JAG grant.

We have not identified any of the other laws as currently being a violation of 1373. We've given them notice of the laws that we think are in violation of 1373.

And we would not finalize the bid on the contract and award them money before they fully understand our interpretation.

So I don't think the Court -- those issues really are not ripe for the Court to rule upon. And I would encourage the Court to only rule with respect to the Values Act, because that's the only statute that's really been implicated by the federal government.

THE COURT: Can you tell me what the -- do you have any insight into the timing of relevant determinations within the Department?

MR. READLER: Absolutely.

Your Honor was right to focus on the Chicago case. That case is up before the Seventh Circuit. We have filed our

initial brief. And the case is set to be argued either in January or February. I now forget the date. I think in mid-January.

THE COURT: Are you doing all these cases?

MR. READLER: I am, yes, Your Honor.

Chicago is a little closer than San Francisco. But I'm happy to do all of them.

It's likely that no Byrne JAG grant would go out before that case is decided, because, of course, one of the issues there was a nationwide injunction that tied our hands with respect to all of the grants. So we're waiting to see what the Seventh Circuit does there.

With respect to the $1 million COPS grant that's at issue here, I think we explained in our supplemental submission this week to the Court that the COPS Office is willing to work with the State on that grant.

They've obviously invoked the findings on the Byrne JAG grant that -- the lack of compliance with respect to 1373, with respect to the Values Act.

So the clock is not going to run out on that grant. The COPS Office, the State, OJP, they fully understand the positions of the State and of the Department of Justice. And they've already said that they're willing to, sort of, work out a time period so there's no -- the clock doesn't run out. There may be other reasons why they don't get the grant, but it

won't be because the clock runs out.

THE COURT: Does the State have a legitimate concern that this Justice Department is going to go after them because they signed, in good faith, a certification that they're in compliance with 1373?

MR. READLER: Well, I'm not aware of any perjury, you know, prosecutions or some of the criminal aspects that the Court referred to earlier. But, certainly, we're being very upfront about our reading of 1373.

Of course, last year the Department put the 1373 requirement into these grants. And at that point it said that for this year we won't be imposing any penalties; but we're giving you a year, essentially, to get your house in order. And then there have been a number of follow-up communications up until this point.

So this year the Government is expecting that the State, if they certify compliance, will be agreeing to the Government's interpretation on the issues that we've raised to them.

There's the two issues, the release date and the address. Those are the two specific issues that we have -- we have raised to the State. And we have been going back and forth on our interpretation of those issues.

THE COURT: So what is the Government's interpretation of "information regarding status"? Because it seems totally

amorphous to me.

MR. READLER: Sure. Well, obviously, Congress chose a broad phrase. It could have said "just immigration status."

THE COURT: Or maybe an ambiguous phrase.

MR. READLER: Well, it certainly includes more than just immigration status, because they said that in part C, I think of 1373. And part A says "information regarding."

What I think that means, at bottom, is that the Congress expected that ICE would have the information that allows it to do its job.

And one of the key aspects of ICE is that when an individual is being held by a state or local government, that person is only removable once their sentence ends and they're released.

So, surely, Congress had in mind that a release date would be the kind of information that a state or city could not exclusively bar -- not to require, but to exclusively bar from sharing with the federal government. Because, otherwise, that completely frustrates the removable system in ICE's job, which is a significant preference to take someone into custody when they're leaving their state or local penitentiary as opposed to then going out on the streets and finding them later.

And I think the history lesson here is important because this law, of course, was passed in 1996. And it's clear to me that at that time there was no doubt that Congress thought that

release date information would be shared with the federal government.

And I point you back to, again, the *City of New York* decision, which I said is instructive in a number of areas.

But 1373 came, in part, in response to local practices, including in the city of New York, where the City was limiting the kind of immigration information that it would share. But that was not criminal information.

It was clear that the cities at that time were sharing criminal information. And that's clear from Footnote 1 in the opinion, which cites the local ordinance at issue. And it says that:

> "No city officer shall transmit information unless such alien is suspected by such agencies of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents."

Later on the ordinance says that:

> "Enforcement agencies, including the police department, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity."

So when Congress wrote this statute, it was against the backdrop of a clear cooperation by the local governments with criminal aliens. The only change is with respect to the states

and cities, because for years and years and years they were sharing this information. And maybe starting with Chicago, I think, with San Francisco and California and other localities have changed their policies. But it's not a change by the federal government. It's a change by the local governments in terms of their approach. I think the federal government has been consistent on this over time.

THE COURT: There's been very little judicial -- very few decisions on 1373, besides *City of New York*. And so that's your explanation, is that everybody was doing it just the way the government wanted, and then the localities started changing --

MR. READLER: I think that's right. That's right. And that was clearly the backdrop against which Congress was writing 1373. The policy was clear. And it's only been the last, sort of, five or ten years that these policies have started to shift.

THE COURT: There is 1357(g), where the Government was encouraging localities to act as immigration officers, which is something that clearly doesn't run afoul of the Tenth Amendment because people could volunteer in or out.

So does that have any -- does that have any relevance to my analysis about either what happened in the past or what's happening now?

MR. READLER: Well, a couple of responses.

I'm not sure about the exact statute. But, again, one, the INA clearly contemplates cooperation. That's part of the inherent aspects of the INA. And I think that's best reflected in 1373. But it's also reflected by the example I gave earlier, where the federal government agrees to hand someone back over to the state or locality on the assumption they will give that person back over to the federal government so they can institute their immigration prerogatives.

That's actually exactly what happened in the *Steinle* case, is the federal government had Mr. Lopez Sanchez in custody and then turned him over to San Francisco because he had some marijuana charges against him. And the City then did not provide release date information back to the federal government, even though asked to. And that, unfortunately, led to the result in that case.

THE COURT: Don't go too far there.

The *Steinle* case IS also interesting for another reason; right? Which is, Judge Spero found "status" means status. It doesn't mean all of the other information that the government -- and I don't know how -- you've only given me a couple of examples, but the other information that you seem to be interested -- that the government seems to be interested in getting from the localities.

MR. READLER: Right. Well, of course, it has to be more than immigration status because it says "information

regarding." So we know that.

I'm not sure, with all due respect, that in that case any of these arguments were raised. I don't think the Court was presented with the INA regulatory scheme and the fact that information sharing is quite common between the handoff of individuals between the state and federal government.

So I don't think that these arguments were presented to the Court in that context. And, of course, it was in a different context where that was being the basis, I think, of a tort claim against the City. And I don't think the Government weighed in on those issues at all, because it wasn't, sort of, directly implicated on what the statute required there.

So I just don't think that these issues were raised in that case. But I do think that, when you look at the overall information-sharing aspects of the INA, that it clearly reflects that release date is really one of the very critical pieces of information that ICE needs to perform its job.

I really think what Congress was getting at in 1373 is it wanted to make sure that states and localities weren't completely frustrating the ability of ICE to do its job.

Not that they had to go out and help. This is not a commandeering situation where they have to go out and perform background checks; but they couldn't completely frustrate that when a number of these individuals who are removable are in state or local custody.

THE COURT: So does that mean that 1373 requires the State to require its law enforcement officers to figure out about the status of the people who are in its custody?

MR. READLER: I don't -- I mean, it doesn't create affirmative obligations to go out and find information. If they have that information, then 1373 says they can't have a uniform policy that prohibits the sharing of information.

THE COURT: Okay. And what I heard Mr. Sherman saying was that with the Values Act, with the exception of the confidentiality statutes, when a -- when the government asks, "Do you know the status of this person?" they will answer that question --

MR. READLER: I don't think that's true --

THE COURT: -- if they know it.

MR. READLER: -- for all offenders.

And there's some level offender where I think they don't. I hope they do. But I think the statute clearly says that there are some level offenders where they don't, they aren't allowed to share that information. And those are some very serious offenses.

THE COURT: These are the offenses that are beyond the several hundred that are listed in the Act.

MR. READLER: That's correct. They include abandonment or neglect of a child. They include violation of a restraining order. They include a hit-and-run not involving

death. They include trespassing on school grounds and, I think, a host of others as well.

So we know that there are a range of acts where they don't share the information. We also know they disagree with our interpretation. They think that "status" doesn't mean "release date," and we think it does.

So I think they -- to receive the grant -- again, this is a voluntary grant. Of course, they are free to have their own prerogatives. That's the beauty of the federal system. But if they're going to accept the federal dollars, of course, they have to agree to the conditions put forward. Unless it's flatly unconstitutional. Of course, that's a requirement of *South Dakota vs. Dole*.

But the constitutional argument here is the Tenth Amendment. And the State can certainly waive that obligation by agreeing to the grant. If the violation was a Fourth Amendment violation, they couldn't agree and, sort of, waive their Fourth Amendment duties. But they can certainly waive their Tenth Amendment objection here by accepting the money.

THE COURT: Okay. So, Mr. Readler, tell me any other things that you are interested in making sure that I'm thinking about.

MR. READLER: Sure. Just to -- a couple of points.

First off, on the germaneness and relatedness point that

we've talked about, the authority on this point is really quite strong for the government.

I think it's a D.C. Circuit case that notes that the Supreme Court has never overturned a spending clause challenge on this grounds.

And the Ninth Circuit, in the *Mayweather* case, addressed the standard there and said that the Supreme Court likely imposed a low threshold relatedness test. So I think the test is fairly easily met. And I think it's clearly met here given the strong tie between law enforcement and immigration.

I walked through the set of statutes that directly relate to release date, and tie that to the importance of 1373, the fact that individuals aren't deportable until they are released from prison. And the fact that once they are released, the removal periods is 90 days. So the clock is moving on ICE. And that's why it's important for them to have the release date information so they can do their job.

And the Ninth Circuit has said in the *Preap* case, that the ICE must pick up the alien right away when released or they forfeit certain rights. So the Ninth Circuit has recognized the importance of that time in terms of the removal process.

The second piece of information that we think is included with respect to the "information regarding," that we haven't talked about much, is the address. And the address is important for a couple of reasons.

Again, one, that allows ICE to do its job if the individual has been released and ICE was not able to obtain or detain them before they were released from prison. The only way they are going to be able to find them is their address.

And while the state, again, is not required to share that information, I think Congress, in 1373, certainly contemplated that there would be a flat prohibition ever sharing that address information.

And, also, address is critical to a couple of different immigration categories. For example, an alien with a nonimmigrant visitor status, a V2 nonimmigrant visitor, they are required to have a permanent residence in a foreign country. And if they indicated their permanent residence was somewhere in the United States, then that would show they are not in compliance with their immigration status.

Sometimes address can confirm that someone is actually in compliance with their visa status. So address has two important pieces: one, it helps ICE to do their job; and, two, it can confirm the immigration or visa status for an individual.

Just with respect to the other statutes that have been invoked by the State, I think it would be an advisory opinion to sort of rule on those again, at this point, because the federal government has not invoked those statutes, at the moment, as being in compliance.

And if we think there is a problem, we would raise that before the grant is finalized so that the State has notice. They have to have notice of all the grant conditions. And we would give them our interpretation before that's finalized.

We haven't raised issues with those other ones. I'm not saying they never could, but those issues certainly are not ripe today for the Court to consider.

THE COURT: And when do you think the Department is going to be considering them? Are you not considering anything until you find out what happens in the Seventh Circuit?

MR. READLER: Well, with respect to 1373, of course, the issuing of the Byrne JAG will not come until that case is resolved. At least that's the current plan. But that, of course, doesn't directly raise the 1373 issue.

With respect to the interpretation of 1373, with respect to California, we have made our interpretation clear to them. And there's been a lot of exchange of documentation over the year.

They have now given us their counterinterpretation where at least I think we solved one of the issues regarding the savings clause and how that works.

We have not responded yet to them about the other issue that we have between us. So there's still some work to be done there. I'm not anticipating that we'll find other issues. That could be a possibility, but I'm not anticipating that we

will find them. But we will certainly tell them before the award is finalized.

And the other thing I think to note, of course, is that there is some chance that this Values Act would never go into law if this referendum would happen to take place. So that might, sort of, counsel the Court to wait and see happens there before it ultimately rules.

THE COURT: You don't have any urgency in my ruling, I suspect?

MR. READLER: Well, the grants -- the grants are on hold. So we think we're right about this. And we are -- we are proceeding along the same way with some other -- some other cities and states. But, certainly, we don't expect money to be released anytime soon. That's correct.

And just one final point regarding the APA challenge. I think it's important to note that there's long history here with 1373. And, again, it was enacted during the Clinton Administration. It was first put into effect during the Obama Administration. The Trump Administration is now including certain requirements with the grants, many of which were also included in the last administration.

There's been a lot of writing on that back and forth. We've put out a lot of notices this year. So, I think, in terms of putting them on notice and articulating the federal government's position, I think the Court understood that's been

well documented in this case.

And the conditions, as the Government has noted, probably one example is in a July 25th, from this year, a background on grant requirements.

We noted these requirements have the goal of increasing information sharing between federal, state, and local law enforcement.

And, again, the Byrne JAG grant is about cooperation. It's about law enforcement cooperation. It's about giving an opportunity for local governments to use that money.

But it certainly makes clear that the attorney general has the ability to determine priority purposes for the grant. It has the ability to determine applicable laws. It has the ability to determine the forum that has to be filled out by the states. And it reflects, again, a cooperative aspect between federal and state law enforcement. So I think those are all the factors I would make -- points I would make.

With respect to the PI standard, of course, there are a couple of other considerations: irreparable harm and the public interest. We've talked a lot about why we don't see irreparable harm, at this point, to the State.

And with respect to the public interest, of course, the United States has a significant interest in its grant program and how it spends its money.

It's true that Congress has made allocations to spend the

money. It's also true that the Office of Justice Programs very much tries to work with recipients. They're not trying to deny money; they're just trying to make sure there's compliance.

But it's also true that the United States has a significant interest in carrying out the grant program consistent with its prerogative and its law enforcement prerogatives. And the State here seeks to upset those. And I think public interest, for that reason, weighs in favor of the United States.

THE COURT: All right. Thank you, Mr. Readler.

MR. READLER: Thank you.

THE COURT: Mr. Sherman, would you like the last words here?

MR. SHERMAN: Sure. A few things, Your Honor.

First of all, I want to clear up a misconception about the savings clause the defendants have. The savings clause applies to immigration status information.

I believe the defendants, when they're talking about exceptions, the defendant is referring to the release date provision which provides -- which allows state and local law enforcement discretion in -- when -- when they can provide release dates if the individual meets the hundreds of criminal offenses that were identified here.

But there is no exception to the exchange of sharing of immigration status information. That is permitted under the

savings clause.

Second, regarding the claim that we are not contesting the applicable law aspect of the JAG, what we are not contesting is there is authority in the JAG operations statute for defendants to identify applicable laws. But what we are contesting is that this 1373, is it an applicable law that meets the constitutional standard.

THE COURT: No, I understood that that was your argument.

MR. SHERMAN: Sure.

And in addition to which, with respect to their -- they are seeking to use the Tenth Amendment -- they are looking at this not as a commandeering analysis but as a spending clause analysis with respect to our Tenth Amendment claim.

And here, because their authority is limited to applicable to -- to determine -- to require jurisdictions to comply with applicable law, what they can ask for state, local jurisdictions is also confined to what that applicable law requires or prohibits.

So here we believe that the Tenth Amendment commandeering analysis is the correct analysis to use, not the spending clause analysis.

THE COURT: Okay.

MR. SHERMAN: With respect to the *Steinle* decision, *Steinle* squarely decided this issue, in which Judge Spero said

that no plausible reading of 1373 would encompass release dates.

And *Steinle* considered the arguments about legislative history. And Judge Spero determined they're not persuasive because it's the authority -- the text is the authority of what the statute says.

And defendants also mentioned this distinction between subsection C and subsection A. So subsection C is -- doesn't have the "regarding" language, because to the extent one's immigration -- to the extent ICE has one's immigration status, that information is presumably definitive. So there's no reason, in subsection C, for there to be -- to input "regarding" language in there.

But they do not have information of individuals that are not within their databases. And that is information that local or state law enforcement may potentially have. And that's why the "regarding" language is in A versus subsection C.

Defendants also point out the *City of New York* case. This case is not the *City of New York* case. That case was about an executive order that broadly restricted the sharing of immigration status information and only to immigration authorities.

Here the state -- the state confidentiality statutes are very -- are narrow with respect to these certain classes of individuals that the INA also provides protections to.

And with respect to the Values Act, even though it allows in the sharing of immigration status information, the -- the release dates and personal information is only being restricted to the extent that the information is not publicly available.

So it's treating ICE no differently than it would treat members of the public. So that's a very important distinction here in looking at both the text of 1373 and the constitutional issues in which the Court, in that case, had very substantial concerns regarding the Tenth Amendment implications if it were to impact the direct -- the direct functioning of state and local law enforcement.

THE COURT: One thing that has come in and out of my mind.

MR. SHERMAN: Sure.

THE COURT: Wouldn't USCIS have the information on the U- and T-visas anyway?

MR. SHERMAN: Right. And 1367 prohibits the disclosure of that information during the pendency of the U- and T-visa process to -- so that speaks to that point.

THE COURT: I do think that's problematic -- if the Government ended up with that perspective, that might be problematic.

MR. SHERMAN: Right. And that's -- that's exactly the concern that the State has, particularly in light of defendants seeking to enforce 1373 against Philadelphia and the State of

Vermont that protects witnesses and victims of crime.

THE COURT: What I understood Mr. Readler to say is that that's still a matter that, in California, is under discussion: the applicability of confidentiality statutes vis-a-vis the Government's interpretation of 1373.

MR. SHERMAN: Right. That is -- that is their position.

But our concern, and the case law plays this out, such as in the *Susan B. Anthony* case, in which a plaintiff there, even though the -- the statute in *Susan B. Anthony* wasn't enforced against that plaintiff, the plaintiff was asserting that they were going to undertake the same speech as the other plaintiff that the statute was enforced against. And the Supreme Court determined that that -- that they had pre-enforcement standing there.

And here what we have is we have -- the State is similarly in connection with how they're enforcing 1373, against Philadelphia.

And we don't want to be back here if Your Honor were to make a ruling on the Values Act and determine that the Values Act complies with 1373. We don't want to be back here six months from now or a year from now, or however long from now, then having to go with the State's confidentiality statutes.

THE COURT: My feelings are hurt.

MR. SHERMAN: Well, I mean -- always nice to see you.

But I think that's the credible fear that the State has right now, particularly in light of -- in light of defendants' conduct with respect to the State before the Values Act was even a law.

THE COURT: Well, this case is going on regardless. And a preliminary injunction is preliminary regardless.

MR. SHERMAN: Sure.

THE COURT: So you will be back here.

MR. SHERMAN: Sure. Right.

THE COURT: And you will be considering the issues.

One of the things that I'm struggling with is how sharply defined the issues are now and whether they are going to be shifting over time. Because I don't -- I don't want to do an advisory opinion.

MR. SHERMAN: Sure.

THE COURT: I do want to say something that will be consistent over time.

So that's just one of the things that I'm worrying about. And I'm not sure that you're going to be able to convince me one way or the other.

MR. SHERMAN: Sure.

THE COURT: I think I'm just going to have to think this through.

MR. SHERMAN: Sure. I will only say that as far as the constitutional ripeness standards, which the Ninth Circuit

has used, and because of the concern that the Supreme Court has had about the viability of a prudential ripeness standard, in *Maldonado* says that plaintiff has issued a concrete plan of violating the law; that there's a threat of prosecution; and whether -- and whether the statute at issue has been previously enforced.

And here we do have all three, in which the BSCC, in its letter, effectively said that the State's interpretation of the Values Act does not square with the defendants' interpretation.

THE COURT: I'm thinking that the State has standing. I am wondering whether it could meet its burdens, at this stage, for a preliminary injunction based on the state of the record. So that's --

MR. SHERMAN: Sure.

THE COURT: That's something that I'm going to have to think about.

MR. SHERMAN: Sure.

THE COURT: Is there anything else?

MR. SHERMAN: No, Your Honor. Thank you for your time.

THE COURT: All right. Thank you, both.

As I said at the beginning, I think this is -- I think there are a lot of very interesting issues that this raises. And I will look forward to wrestling them to the ground. So thank you.

MR. SHERMAN: Thank you.

(At 4:10 p.m. the proceedings were adjourned.)

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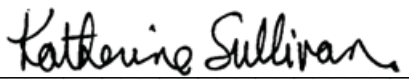
CERTIFICATE OF REPORTER

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

DATE: Friday, December 15, 2017



Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

EXHIBIT B

CHAD A. READLER
Principal Deputy Assistant Attorney General
BRIAN STRETCH
United States Attorney
JOHN R. TYLER
Assistant Director
W. SCOTT SIMPSON (Va. Bar #27487)
Senior Trial Counsel
ANTONIA KONKOLY
Trial Attorney
Department of Justice, Room 7210
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@usdoj.gov
COUNSEL FOR DEFENDANTS
JEFFERSON B. SESSIONS III, Attorney General of the United States; ALAN R. HANSON, Acting Assistant Attorney General; and U.S. DEPARTMENT OF JUSTICE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

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

Defendants.

No. 3:17-cv-04701-WHO

OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION

Date: December 13, 2017
Time: 2:00 p.m.

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INTRODUCTION

This case asks the Court to determine whether the U.S. Department of Justice ("USDOJ") can require the recipients of certain law enforcement grants to comply with federal law. Section 1373 of Title 8, U.S. Code, part of the Immigration of Nationality Act ("INA"), bars state and local governments from prohibiting or restricting the exchange of "information regarding the . . . citizenship or immigration status" of any individual with federal immigration authorities. USDOJ requires grantees in certain programs to comply with this requirement, but plaintiff argues that imposing this condition in the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG Program"), which provides funding for law enforcement, violates the Spending Clause of the U.S. Constitution and the Administrative Procedure Act ("APA"). Those claims are without merit, however, because – as the INA makes clear – immigration enforcement and law enforcement are inextricably linked.

Alternatively, plaintiff seeks an order enjoining defendants from finding that any of several state laws violate the Section 1373 compliance condition in either the Byrne JAG Program or two other programs. Specifically, plaintiff seeks an order that Section 1373 is not violated by California's "TRUST Act," Cal. Gov't Code §§ 7282-7282.5; the "TRUTH Act," Cal. Gov't Code §§ 7283-7283.2; the "California Values Act," Cal. Gov't Code §§ 7284-7284.12 ("Values Act"); California Penal Code §§ 422.93, 679.10, or 679.11; California Code of Civil Procedure § 155; or California Welfare and Institutions Code §§ 827 or 831 (Dkt. No. 26-1). USDOJ has not, however, indicated that any of those state statutes other than the Values Act might violate the Section 1373 condition, and even as to that Act, USDOJ has not yet reached a final decision. Moreover, the Values Act is not now in effect and may never take effect because of a voter referendum requested for the November 2018 election. Therefore, plaintiff lacks standing to seek an order regarding any of those statutes other than Values Act, and even plaintiff's claim regarding that Act is unripe.

In any event, even if this alternative claim were justiciable, plaintiff is unlikely to succeed on the merits of its claim that the Values Act would comply with the Section 1373 condition. The Values Act, among other things, prohibits state and local agencies from disclosing an individual's release date, personal information (including home address), or "other information," with certain

exceptions not referencing federal immigration authorities. *See* Cal. Gov't Code § 7284.6(a)(1)(C), (D). Section 1373 however, bars prohibiting or restricting the exchange of "information regarding" immigration status with federal immigration authorities, which necessarily encompasses information regarding custody status and location as needed to carry out the federal responsibilities to "interrogate any . . . person believed to be an alien as to his right to be or to remain in the United States," to take non-citizens into federal custody upon release from state or local custody, and to remove certain classes of non-citizens from the United States as ordered by the Attorney General or the Secretary of Homeland Security. 8 U.S.C. §§ 1357(a)(1), 1226(c)(1), 1227(a), 1228.

Plaintiff lastly argues that Section 1373 would violate the Tenth Amendment if defendants construe it as conflicting with any of the state statutes listed above. Finding that the Values Act – the only state statute legitimately at issue here – violates Section 1373 would not, however, "compel [California] to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf" in violation of the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 188 (1992); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 620 (2012) (hereinafter *NFIB*). This case involves a grant condition that the State is free to accept or reject, and, in any event, merely protecting the exchange of information with federal authorities does not compel state and local governments to administer a federal program.

Finally, plaintiff fails to establish that it would suffer irreparable harm absent a preliminary injunction, and the public interest and balance of equities militate against the relief sought. The State's claim of irreparable harm from implementation of the Section 1373 condition is belied by its certification – without objection or complaint – of such compliance in accepting a FY 2016 Byrne JAG award. Moreover, compliance with Section 1373 on the part of state and local governments is important to enforcement of the federal immigration laws – in particular, locating and removing aliens who are in police custody because they have committed crimes – which represents the ultimate "public interest" here.

For all these reasons, plaintiff's motion for preliminary injunction should be denied.

STATUTORY AND ADMINISTRATIVE BACKGROUND

I. The Immigration and Nationality Act

Enforcement of the immigration laws, including and especially the investigation and apprehension of criminal aliens, is quintessentially a law enforcement function. Through the INA, 8 U.S.C. §§ 1101 *et seq*., Congress granted the Executive Branch significant authority to control the entry, movement, and other conduct of foreign nationals in the United States. These responsibilities are assigned to law enforcement agencies, as the INA authorizes the Department of Homeland Security ("DHS"), USDOJ, and other Executive agencies to administer and enforce the immigration laws. The INA permits the Executive Branch to exercise considerable discretion to direct enforcement pursuant to federal policy objectives. *See Arizona v. United States*, 567 U.S. 387, 396 (2012).

The INA includes several provisions that protect the ability of federal officials to investigate the status of non-citizens in the United States and otherwise enforce the immigration laws. For example, the statute provides that a federal immigration officer "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). Separately, pursuant to Section 1373, "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *Id*. § 1373(a). The INA provides that certain classes of non-citizens shall be removed from the United States upon order of the Attorney General or Secretary of Homeland Security. *See, e.g., id.* §§ 1227(a), 1228.

II. DOJ Office of Justice Programs and the Byrne JAG Program

Title I of the Omnibus Crime Control and Safe Streets Act of 1968 established the Office of Justice Programs, and provides for OJP to be headed by an Assistant Attorney General. *See* Pub. L. No. 90-351, 82 Stat. 197 (1968), *codified as amended at* 34 U.S.C. §§ 10101 *et seq*. Congress gave the AAG certain "[s]pecific, general and delegated powers," including the power to "maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice." 34 U.S.C. § 10102(a)(2). Most notably for this case, the statute also

authorizes the AAG to "exercise such other powers and functions as may be vested in [him] pursuant to this chapter or by delegation of the Attorney General, *including placing special conditions on all grants, and determining priority purposes for formula grants*." *Id.* § 10102(a)(6) (emphasis added).

The same title of the Omnibus Crime Control Act also established the Byrne JAG Program. *See generally* 34 U.S.C. §§ 10151-58. Under this program, OJP is authorized to "make grants to States and units of local government . . . to provide additional personnel, equipment, . . . and information systems for criminal justice, including for any one or more of [certain enumerated] programs." *Id.* § 10152(a)(1). In the same chapter, "criminal justice" is defined broadly to include various activities of the police, the courts, and "related agencies." *Id.* § 10251(a)(1). Various other provisions of the same enactment also apply to OJP and the Byrne JAG Program. *See, e.g.*, *id.* § 10108 (period of availability of grant funds); §§ 10221-10238 (administrative provisions); § 10263 (audit requirements and other provisions). To request funds under the Program, applicants must, *inter alia*, "submit an application to the Attorney General . . . in such form as the Attorney General may require," *id.* § 10153(a), and provide a "certification" that "the applicant will comply with all . . . applicable Federal laws," *id.*, § 10153(a)(5)(D). Before issuing a final disapproval of any application, the Attorney General must "afford[] the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration." *Id.* § 10154.

The Byrne JAG Program provides "formula grants" – that is, grants that, when awarded, must follow a statutory formula based on population, the rate of violent crime, and other factors. *Id.* §§ 10152(a)(1), 10156. Funding under the Program is subject to annual appropriations. For FY 2017, Congress appropriated $396,000,000 for the Byrne JAG Program, with certain carve-outs from that amount obligated to specific initiatives. *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Div. B, Title II, 131 Stat. 135, 203.

The federal grant-making process, including the issuance of Byrne JAG grants, contains several steps. The awarding agency typically issues a solicitation that contains "sufficient information to help an applicant make an informed decision about whether to submit an application."

See generally Office of Management and Budget, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards ("OMB Uniform Guidance"), 2 C.F.R. § 200.203(c)(2). Applicants respond to the solicitation by submitting an application in the form specified and with the relevant information requested. *See generally* OJP Grant Process Overview, *available at* https://ojp.gov/funding/ Apply/GrantProcess.htm. The deadline for States to submit Byrne JAG applications for FY 2017 was August 25, 2017. *See* Byrne JAG Program, FY 2017 State Solicitation (Dkt. No. 27-1 at 2-45).

In past years, OJP has included a variety of conditions in Byrne JAG award documents, including, for example, conditions requiring the grantee to comply with regulations pertaining to civil rights and nondiscrimination, conditions requiring that body armor purchased with grant funding meet certain quality standards, and conditions designed to encourage grantees to adopt policies banning employees from text messaging while driving on duty. These conditions have varied over time, depending on national law enforcement necessities and USDOJ priorities.

In FY 2016, OJP included for the first time in its Byrne JAG awards an explicit recognition that Section 1373, described above, is an applicable federal law under the Program. *See* Declaration of Alan R. Hanson ¶ 3 & Ex. A (Attachment 1 hereto).[1] The State accepted the Section 1373 compliance condition (as well as 54 other conditions) for its FY 2016 grant without objection or legal challenge. *See* Hanson Decl. ¶ 3 & Ex. A. In July 2017, OJP published a solicitation seeking applications from state governments for participation in the FY 2017 Byrne JAG Program (Dkt. No. 27-1 at 2-45). As relevant to the instant motion for preliminary relief, that solicitation notified potential applicants that the award documents for FY 2017 would again include a condition that grantees certify their compliance with Section 1373 (*id.* at 31).[2]

[1] That recognition was prompted by a memorandum issued by USDOJ's Inspector General, expressing concern that several state and local governments receiving federal grants, including California, may not have been complying with Section 1373. *See* Mem. from Michael E. Horowitz, Inspector Gen., to Karol V. Mason, Assistant Att'y Gen., Office of Justice Programs, *Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients* (May 31, 2016) (Dkt. No. 27-3 at 58-74).

[2] The FY 2017 solicitation also notified potential applicants that the award documents for this Fiscal Year would contain two new special conditions, designed to ensure that grantees would permit access to correctional facilities for immigration authorities to meet with non-citizens and

III. The DOJ Office of Community Oriented Policing Services and the Anti-Methamphetamine and Anti-Heroin Task Force Programs

In addition to the Byrne JAG Program, plaintiff's motion refers to two programs administered by the Office of Community Oriented Policing Services ("COPS Office"). Pursuant to authority granted by the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"), the Attorney General created the COPS Office to administer certain community policing grants. *See* Declaration of Andrew A. Dorr ¶ 2 (Attachment 2 hereto). The Office is headed by a Director appointed by the Attorney General. *Id.*; 28 C.F.R. §§ 0.119, 0.120.

The COPS Office currently administers six programs, including the COPS Anti-Methamphetamine Program ("CAMP") and the Anti-Heroin-Task Force Program ("AHTF"). CAMP "provid[es] funds directly to state law enforcement agencies to investigate illicit activities related to the manufacture and distribution of methamphetamine." COPS Fact Sheet, FY 2017 COPS Anti-Methamphetamine Program, *available at* https://cops.usdoj.gov/pdf/2017AwardDocs/camp/Fact_Sheet.pdf. AHTF "provid[es] funds to investigate illicit activities related to the distribution of heroin or unlawful distribution of prescriptive opioids, or unlawful heroin and prescription opioid traffickers[.]" COPS Fact Sheet, FY 2017 COPS Anti-Heroin Task Force Program, *available at* https://cops.usdoj.gov/pdf/2017AwardDocs/ahtf/Fact_Sheet.pdf. Both programs are authorized by the Consolidated Appropriations Act, 2017. 131 Stat. at 207.

Like all programs administered by the COPS Office, CAMP and AHTF are discretionary programs, meaning all applicants must compete against each other for limited available funds. *See* Dorr Decl. ¶ 4. Funding under these programs is subject to annual appropriations. For FY 2017, Congress appropriated $7,000,000 "for competitive grants to State law enforcement agencies in States with high seizures of precursor chemicals, finished methamphetamine, laboratories, and laboratory dump seizures" (*i.e.*, CAMP), and $10,000,000 "for competitive state grants to statewide law enforcement agencies in States with high rates of primary treatment admissions for heroin and

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would notify federal authorities regarding the scheduled release of any non-citizen (Dkt. No. 27-1 at 273). Plaintiff challenges these conditions here, but they are not at issue in the instant motion.

other opioids" (*i.e.*, AHTF). 131 Stat. at 207.

CAMP and AHTF grantees, like all federal grantees, are required to comply with all applicable federal laws. There is no statutorily prescribed method for evaluating CAMP and AHTF applications. Dorr Decl. ¶ 9. Rather, the COPS Office has discretion to determine how best to allocate each program's finite funds every year, and to evaluate and score applications. *Id.*[3] Beginning with FY 2016, the COPS Office has advised each CAMP and AHTF applicant that this requirement includes compliance with 8 U.S.C. § 1373. *See* Dorr Decl. ¶ 8. In FY 2017, the COPS Office required certification of compliance with Section 1373 as a threshold eligibility requirement. *Id.*

IV. Recent Developments

In a challenge brought by Chicago, a district court recently declined to enter a preliminary injunction against the Section 1373 condition in Byrne JAG. *See Chicago v. Sessions*, 2017 WL 4081821, at *8 (noting that "Congress could [rationally] expect an entity receiving federal funds to certify its compliance with [Section 1373], as the entity is – independent of receiving such funds – obligated to comply") ("*Chicago I*"). *But see Philadelphia v. Sessions*, 2017 WL 5489476 (E.D. Pa. Nov. 15, 2017) (enjoining Section 1373 condition as to Philadelphia). More recently, the Chicago court denied the plaintiff's motion for reconsideration as to its Section 1373 ruling, holding that any review of the City's compliance with Section 1373 would be "premature." *Chicago v. Sessions*, 2017 WL 5499167, at *1 (N.D. Ill. Nov. 16, 2017) ("*Chicago II*").

California submitted its application for an FY 2017 Byrne JAG award on August 25, 2017. *See* Hanson Decl. ¶ 4. On November 1, 2017, OJP sent California a letter setting forth its "preliminary assessment" of the State's compliance with Section 1373. *Id.* ¶ 13 & Ex. F. On November 13, California, as requested, replied in writing. *Id.* ¶ 14 & Ex. G. At present, OJP is assessing California's letter of November 13, and has not yet reached a decision on the issues. *Id.* ¶ 15. Further, at this time OJP is not issuing FY 2017 Byrne JAG award documents to *any* applicants while awaiting

[3] Beginning with FY 2017, the COPS Office offered applicants the opportunity to receive additional points in the scoring process by certifying the existence of circumstances similar to those called for in the Byrne JAG access and notice conditions described above. *See* Dorr Decl. ¶ 10. Those scoring factors are not at issue in this motion for preliminary injunction.

developments in the *Chicago* litigation. *Id.* ¶ 10. California has also submitted applications to the COPS Office for awards under CAMP and AHTF, which also remain pending. *See* Dorr Decl. ¶ 12.

Finally, as explained in plaintiff's original motion for preliminary injunction and as discussed further below, on October 17, 2017, the California Department of Justice received a request for a proposed statewide voter referendum regarding the Values Act (Dkt. No. 17 at 2 n.2).

ARGUMENT

A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). "A plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008) (emphasis added). Critically, this is "a four-part conjunctive test, not . . . a four-factor balancing test"; thus, *Winter* "reject[ed] the sliding-scale test as to the irreparable-injury prong" previously used by some courts. *U.S. Bank, N.A. v. SFR Invs. Pool 1, LLC*, 124 F. Supp. 3d 1063, 1070 (D. Nev. 2015); *see Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.") (footnote omitted). Plaintiff fails to satisfy any of these requirements for a preliminary injunction.

I. Plaintiff Cannot Establish a Likelihood of Success on the Merits

"The sine qua non of preliminary injunction inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Thomas v. Zachry*, 256 F. Supp. 3d 1114, 1118 (D. Nev. 2017).

A. The Byrne JAG Section 1373 Condition Is Consistent with Law

Plaintiff's first argument is that, notwithstanding that the State is bound to comply with Section 1373, the requirement that the State *certify* such compliance as a condition of receiving Byrne JAG funds violates both the Spending Clause and the APA. As set forth below, plaintiff's

arguments are unavailing, and thus fail to demonstrate any likelihood of success on the merits.

1. The Section 1373 Condition Is Consistent with the Spending Clause

Article I of the Constitution confers on Congress the authority to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. It is well-established that the Spending Clause authority is "broad," and empowers Congress to "set the terms on which it disburses federal money to the States[.]" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (noting that Congress has "repeatedly employed the [spending] power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.") (citations omitted).

For purposes of the instant motion, plaintiff does not dispute that the Byrne JAG Section 1373 condition is – as required under the Supreme Court's Spending Clause jurisprudence – both "in pursuit of the general welfare" and "unambiguous[]," thus properly enabling California to "exercise [its] choice" to participate (or not) in the Program "knowingly, cognizant of the consequences of [its] participation." *Dole*, 483 U.S. at 207 (internal citations omitted).

Rather, the sole Spending Clause-related argument presently advanced by the plaintiff is that the Section 1373 compliance condition purportedly does not have a sufficient "nexus" to the JAG program (Dkt. No. 26 at 15-16). According to California, the Section 1373 condition is insufficiently related to the purpose of the Byrne JAG Program because "it requires state and local jurisdictions to comply with a condition to support a different program (the federal government's civil immigration priorities) than the 'criminal justice' program being funded" (*id*. at 16). This argument fails, on multiple grounds.

First, courts have generally found that the relatedness showing does not pose a difficult hurdle. In *Dole* itself, the Supreme Court upheld conditioning the receipt of federal highway funds on the only loosely-related requirement that a State adopt a minimum drinking age of twenty-one. *See* 483 U.S. at 208; *see also New York*, 505 U.S. at 167 (stating that only "some relationship" is

necessary between spending conditions and "the purpose of federal spending."). The Ninth Circuit has emphasized that conditions on federal grants "*might* be illegitimate if the conditions share no relationship to the federal interest in particular national projects or programs," *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002), and characterized this bar as one that, at most, constitutes a "low-threshold" test that "is a far cry from . . . an exacting standard for relatedness," *id.* at 1067. As the D.C. Circuit has observed, the Supreme Court has never "overturned Spending Clause legislation on relatedness grounds." *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004).

Second, plaintiff is simply wrong in viewing immigration enforcement as unrelated to law enforcement. Numerous provisions of the INA link these two subjects. A conviction for any of a wide array of criminal offenses renders an alien removable from this country, *see* 8 U.S.C. § 1227(a)(2), and thus, once deported, no longer present here with the potential to re-offend. *See Demore v. Kim*, 538 U.S. 510, 518 (2003) (discussing Congress's strong interest in effective removal of aliens who have committed criminal offenses); 8 U.S.C. § 1226(a), (c) (authorizing detention of criminal alien during removal proceedings and requiring detention for certain criminal aliens); *id.* § 1231 (providing for continued detention during removal period). The INA also repeatedly contemplates cooperation among state and local officers and federal officials on immigration enforcement. *See, e.g.*, 8 U.S.C. § 1357(g) (providing for formal agreements under which local officers may perform specified immigration functions relating to the investigation, apprehension, or detention of aliens); *id.* § 1324(c) (authorizing state and local officers to make arrests for violations of INA's prohibition against smuggling, transporting, or harboring aliens); *id.* § 1252c (authorizing state and local officers to arrest certain felons who have unlawfully returned). Under authorities such as these, "state officers may perform the functions of an immigration officer." *Arizona*, 567 U.S. at 408. Thus, given that the INA expressly contemplates local law enforcement activity with respect to immigration law enforcement, it is perfectly germane and appropriate for USDOJ to condition grant funding to promote this purpose.[4]

[4] California's argument also fails to account for the federal Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, which – like the federal immigration

Accordingly, because there is a clear relationship between the Section 1373 condition and the Byrne JAG Program's goals, the condition easily satisfies the "low-threshold" relatedness inquiry. *Mayweathers*, 314 F.3d at 1067.

2. The Section 1373 Condition Is Consistent with the APA

Plaintiff further contends that imposition of the Section 1373 condition in Byrne JAG is "arbitrary and capricious" under the APA. But there has been no final determination that California is in violation of the condition, meaning that this APA claim fails at the threshold because the State does not challenge "final agency action." 5 U.S.C. § 704. Further, even if APA review were somehow available, the challenged condition is well-supported by a reasoned explanation.

a. The APA "does not provide judicial review for everything done by an administrative agency." *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (internal citation omitted)). One limitation is that "[u]nder the [APA], only 'final agency action' is subject to judicial review." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1064 (9th Cir. 2010) (quoting 5 U.S.C. § 704)). "Agency action is 'final' if a minimum of two conditions are met." *Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1198 (9th Cir. 1998). "[F]irst, the action must mark the consummation of the agency's decision making process . . . [I]t must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 1198-99. Consistent with this framework, and as relevant here, in the Ninth Circuit, there is no "final agency action" in the context of a federal grant program "until [the agency] has reviewed a grant application and decided to disburse [or withhold] the funds." *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007).

Plaintiff fails to identify any agency action that satisfies these tests for finality. Although OJP has sent California a letter containing a "preliminary assessment" of the State's compliance

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regime – is "a civil regulatory scheme rather than a criminal one." *United States v. Elkins*, 683 F.3d 1039, 1044-45 (9th Cir. 2012). Yet, notwithstanding that SORNA is civil in nature, a state's compliance with the same is directly tied, by statute, to its entitlement to its otherwise full allotment of Byrne JAG funding. 34 U.S.C. § 20927(a); *see, e.g.*, *United States v. Kebodeaux*, 133 S. Ct. 2496, 2504-05 (2013) (observing with approval that SORNA "used Spending Clause grants to encourage States to adopt its uniform definitions and requirements. It did not insist that the States do so."); *United States v. Gould*, 568 F.3d 459, 463 n.1 (4th Cir. 2009).

with Section 1373, Hanson Decl. ¶ 13 & Ex. F, to which the State has now replied, *Id*. ¶ 14 & Ex. G, OJP is, at present, still assessing California's response, and has not yet reached a decision on the issues addressed therein. *Id.* ¶ 15. This administrative review-and-reconsideration process is statutorily mandated prior to any "final[] disapprov[al]" of a Bryne JAG grant application, 34 U.S.C. § 10154 – and even were OJP to determine, at the conclusion of this conferral process, to deny plaintiff's grant application, the State would be entitled to invoke regulatory appeal procedures. *See generally* 28 C.F.R. Part 18 (Office of Justice Programs hearing and appeal procedures applicable to certain agency actions). Until this administrative appeal process is completed, "judicial review is premature." *San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

b. Even if APA review of the challenged conditions were available here (which it is not), plaintiff's claim is unlikely to succeed. Claims arising under the APA are accorded a "narrow standard of review" under which "a court is not to substitute its judgment for that of the agency, and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citation omitted). "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id*. at 515.

Here, "the agency's reasons for" imposing the challenged conditions "were entirely rational." *Fox Television*, 556 U.S. at 517. USDOJ publicly offered – before FY 2017 applications were due and before any FY 2017 awards were made – a sound explanation for the challenged conditions. Federal immigration enforcement undoubtedly intersects with criminal justice, at a minimum for the simple reason that a conviction for any of a wide array of criminal offenses renders an alien removable from this country. Once removed, a criminal alien who has committed such an offense – such as an aggravated felony, certain firearm offenses, domestic violence, or child abuse – is no longer present in this country with the potential to re-offend. *See* 8 U.S.C. § 1227(a)(2). Accordingly, as stated in USDOJ's July 25, 2017 "Backgrounder on Grant Requirements," *available at* https://www.justice.gov/opa/press-release/file/984346/download, the condi-

tions have a "goal of increasing information sharing between federal, state, and local law enforcement" so that "federal immigration authorities have the information they need to enforce the law and keep our communities safe."

Further, plaintiff's demand for supporting "studies" or "analysis" (Dkt. No. 26 at 17), ignores that Congress did not intend to encumber agencies with burdensome procedures for determining grant conditions; to the contrary, Congress expressly exempted "grants" from the APA's notice-and-comment procedures. 5 U.S.C. § 553(a)(2). It suffices that the challenged conditions rationally promote interests in "maintain[ing] liaison" among the various branches of government "in matters relating to criminal justice," 34 U.S.C. § 10102(a)(2), and in ensuring "appropriate coordination with affected agencies," *id.* § 10153(a)(5)(C), and that they comport with the cooperation between federal, state, and local authorities in immigration enforcement that Congress contemplates. *See, e.g.*, 8 U.S.C. §§ 1226(d), 1231, 1357(g), 1373; *cf. Fox Television*, 556 U.S. at 521 ("[E]ven in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense" as "an exercise in logic rather than clairvoyance."). Finally, while attempting to impose heightened scrutiny because USDOJ has allegedly departed from past practice, California ignores both that compliance with Section 1373 has been required since the statute's enactment in 1996, and that a requirement to certify compliance with Section 1373 was first imposed by the *prior* Administration in the FY 2016 grant cycle and accepted at that time by the State as a condition of its Byrne JAG award. *See* 2016 California Award ¶ 55.

For all of these reasons, even if APA review were available, plaintiff is unlikely to succeed on the merits of its claim regarding the Byrne JAG Section 1373 compliance condition.

B. Plaintiff Is Unlikely to Succeed in Showing that None of Its Laws Violate Section 1373

Plaintiff also seeks an order enjoining the defendants from "withholding, terminating, or clawing back funding" under the Byrne JAG Program or any COPS Office program from "the State and its political subdivisions" based on Section 1373 and any of several state statutes (Dkt. No. 26

at 1). In other words, plaintiff seeks an order enjoining the defendants from "interpreting or enforcing Section 1373" in such a way that any of those state statutes renders the State or its political subdivisions ineligible for funding under Byrne JAG or any COPS Office program.

Plaintiff lacks standing to seek a ruling regarding any state statutes other than the Values Act, and even its request for a ruling on the Values Act is unripe. Alternatively, if plaintiff's claim regarding the Values Act were justiciable, the State would be unlikely to succeed in showing that that law does not violate Section 1373.

1. Plaintiff's Claims Regarding Compliance with Section 1373 Are Non-Justiciable

Under Article III of the Constitution, the jurisdiction of the federal courts extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Matters outside this rubric are "non-justiciable." *Or. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414, 416 (9th Cir. 2002). Two principles of justiciability are involved here: standing and ripeness. "While standing is concerned with *who* is a proper party to litigate a particular matter, the doctrines of mootness and ripeness determine *when* that litigation may occur." *Haw. Cty. Green Party v. Clinton*, 14 F. Supp. 2d 1198, 1201 (D. Haw. 1998). Where a plaintiff lacks standing or its claims are unripe, the court lacks jurisdiction, and where jurisdiction is lacking, the plaintiff necessarily cannot show a likelihood of success for purposes of a preliminary injunction. *See Pollara v. Radiant Logistics Inc.*, 2012 WL 12887095, at *5 (C.D. Cal. Sept. 13, 2012) (noting that "standing to bring a claim . . . is a necessary predicate to demonstrate a likelihood of success on the merits").

To satisfy the "irreducible constitutional minimum" of standing, a plaintiff must demonstrate an "injury in fact," a "fairly traceable" causal connection between the injury and defendant's conduct, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). The injury needed for constitutional standing must be "concrete," "objective," and "palpable," not merely "abstract" or "subjective." *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975). Additionally, the injury must be "certainly impending"

rather than "speculative." *Whitmore*, 495 U.S. at 157, 158. In short, for the plaintiff to have standing, "an actual, live controversy must exist between parties with adverse legal interests." *Pollution Denim & Co. v. Pollution Clothing Co.*, 2009 WL 10672270, at *8 (C.D. Cal. Feb. 9, 2009).

Constitutional justiciability also requires that a dispute be ripe for judicial consideration – that is, that the challenged action "has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In other words, "[a] claim is not ripe for adjudication [under the Constitution] if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

Applying these standards here, the plaintiff cannot show the "injury in fact" needed for constitutional standing, and its claims are not constitutionally ripe for judicial review. First, defendants have not withheld or threatened to withhold grant funding based on any state statute other than the Values Act, such that plaintiff lacks standing to seek a ruling regarding any of the other statutes listed. Second, there is no ripe controversy regarding the Values Act itself because (1) defendants have not yet made a final determination regarding whether the Values Act violates Section 1373, (2) the Act is not currently in effect, and it may never come into effect because of a proposed voter referendum.

a. Plaintiff Lacks Standing to Seek a Ruling Regarding Any State Statute Other Than the Values Act

As described above, on April 21, 2017, OJP wrote to the California agency responsible for administering Byrne JAG grants, asking that it document its compliance with 8 U.S.C. § 1373. *See* Hanson Decl. ¶ 11 & Ex. D. That letter did not refer to any specific California statutes. On June 29, 2017, the State responded that "there are no state laws of general application that violate Section 1373," and specifically discussed only two enactments – the TRUST Act and the TRUTH Act – asserting that those statutes do not "create tension with Section 1373." *Id.* ¶ 12 & Ex. E.

In its reply of November 1, 2017, OJP stated that the Department of Justice had determined that two provisions of a different enactment – namely, the Values Act – "may violate 8 U.S.C.

§ 1373, depending on how your jurisdiction interprets and applies them": specifically, Sections 7284.6(a)(1)(A) and 7284.6(a)(1)(C) and (D) of that Act, which prohibit a law enforcement agency from using money or personnel to "[i]nquir[e] into an individual's immigration status" or to disclose, with certain exceptions, an individual's release date, personal information (including home address), or "other information." *Id*. ¶ 13 & Ex. F. OJP asked the State to "certify that it interprets and applies [Section 7284.6(a)(1)(A)] to not restrict California officers and employees from requesting information regarding immigration status from federal immigration officers" and that it "interprets and applies [Section 7284.6(a)(1)(C) and (D)] to not restrict California officers from sharing information regarding immigration status with federal immigration officers, including information regarding release date and home address." *Id*.

California responded on November 13, 2017 – nine days ago – stating (1) that Section 7284.6(a)(1)(A) "prohibits law enforcement officers from asking an individual about his or her immigration status, or from asking for that information from non-governmental third parties, but does not restrict law enforcement from inquiring about an individual's immigration status from government entities," and (2) that Section 7284.6(a)(1)(C) and (D) prohibit the disclosure of release dates and home addresses, but purportedly "do not violate Section 1373 because Section 1373 only prohibits restrictions on 'citizenship or immigration status information,' not other information." *Id*. ¶ 14 & Ex. G. OJP has not yet responded to California's letter of November 13, and has not yet determined administratively whether the State's laws comply with Section 1373. *Id*. ¶ 15.

Under these circumstances, plaintiff lacks standing to seek a ruling on whether any state laws other than the Values Act violate Section 1373 such that defendants may withhold federal grant funds based on non-compliance. Given that USDOJ has not addressed whether any provisions of California law other than the Values Act may violate Section 1373 and thus render California ineligible for grant funds, there is no "live controversy" regarding whether any other state statutes comply with Section 1373 and no foreseeable "injury in fact" arising out of defendants' application of any such statutes. *See Pollution Denim & Co.*, 2009 WL 10672270, at *8; *Steel Co.*, 523 U.S. at 102-03. Any assumption that defendants might one day withhold grant funds based on any

California statute other than the Values Act would be "speculative," and thus cannot be the basis for standing. *See Whitmore*, 495 U.S. at 157, 158.

b. Plaintiff's Request for a Ruling Regarding the Values Act Is Unripe

Plaintiff's request for a ruling on whether defendants can withhold grant funds based on the Values Act, is also non-justiciable, for three reasons. First, as noted already, OJP has not yet responded to California's letter regarding the Values Act, and has not determined administratively whether the Act violates Section 1373. *See* Hanson Decl. ¶ 15. OJP has only stated that portions of the Values Act "may" violate Section 1373, and has not had an opportunity to fully consider the State's arguments to the contrary. *Id*. Exs. D, F. Moreover, OJP's letter of November 1 stated explicitly that it was only a "preliminary assessment of [California's] compliance with 8 U.S.C. § 1373" and did not "constitute final agency action." *Id*. Ex. F; *see* 34 U.S.C. § 10223 (stating that OJP's "determinations, findings, and conclusions shall be final and conclusive upon all applications"). As the district court in Chicago recently explained, "addressing an as-applied challenge to Section 1373 based on [USDOJ's preliminary determination regarding plaintiff's compliance] is premature." *Chicago II*, 2017 WL 5499167, at *1. Moreover, even after OJP determines whether the Values Act violates Section 1373, the State will have an opportunity to appeal that initial determination administratively. *See* 34 U.S.C. § 10154; *see generally* 28 C.F.R. Part 18. OJP could decide, either upon consideration of the State's letter of November 13, 2017, or upon consideration of any administrative appeal, that the Values Act does not violate Section 1373 and thus that USDOJ will not withhold grant funds on that basis. Therefore, plaintiff's request for a ruling on whether the Values Act violates Section 1373 "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.[5]

Second, the Values Act is not currently in effect, and it may never come into effect because

[5] Defendants' alternative argument below that plaintiff is unlikely to show that part of the Values Act does not violate Section 1373 does not make this claim ripe, given that OJP must still be permitted to consider the State's arguments in the administrative process. *Cf. Ardalan v. McHugh*, 2014 WL 3846062, at *12 n.10 (N.D. Cal. Aug. 4, 2014) (noting that "the futility exception [to administrative exhaustion] requires a plaintiff [to] show it is *certain* that the claim will be denied on appeal, or that resort to administrative remedies is clearly useless") (citations omitted).

of a referendum request. The Values Act was approved by the Governor on October 5, 2017 (Dkt. No. 28-1 p. 54). But on October 17, 2017, the Attorney General received a referendum request (Attachment 3 hereto);[6] under California law, proponents of the referendum have until January 3, 2018, to submit the requisite number of signatures. If the proposed referendum is submitted with the required signatures by that deadline, the referendum will appear on the ballot for "the next general election." *See* Cal. Const. art. II, § 9(c). The Values Act will not go into effect until this process is concluded, and if a referendum on November 6, 2018, results in rejection of the Values Act, it will *never* become effective.

Finally, this case is not justiciable because 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 consistent with Section 1373. That is a fact-intensive inquiry, and is much better handled through the administrative process rather than through the type of ruling sought here. As noted earlier, that process is ongoing and is narrowing the scope of the dispute between the parties. Importantly, if this Court does address the Values Act, that ruling cannot properly immunize the State from liability under Section 1373 if it turns out, in fact, that the State is implementing the Act in a way that violates Section 1373.

Under these circumstances, plaintiff's request for an order regarding whether the Values Act would violate the Section 1373 compliance condition is constitutionally unripe, in that it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300. Thus, any judicial consideration of this issue should await further developments.

2. Plaintiff Is Unlikely to Succeed in Showing that None of Its Laws Would Violate the Section 1373 Compliance Condition

Alternatively, even if plaintiff's request for an order against withholding grant funds based on any California laws were justiciable at this point, the State could not establish a likelihood of success on its claim that none of its laws would violate the Section 1373 compliance condition. As explained already, the only state law that may legitimately be at issue here is the California Values

[6] Also available at https://oag.ca.gov/system/files/initiatives/pdfs/17-0040%20%28Referendum%20of%20SB%2054%29_0.pdf (last visited Nov. 22, 2017).

Act, Cal. Gov't Code §§ 7284-7284.12. Assuming this issue were justiciable, however, plaintiff is unlikely to show that the Values Act is consistent with Section 1373.

The Values Act provides, among other things, that California law enforcement agencies shall not use "moneys or personnel to investigate persons "for immigration enforcement purposes," including by "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities in accordance with Section 7282.5, or by "[p]roviding personal information, as defined in Section 1798.3 of the Civil Code, about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public." Cal. Gov't Code § 7284.6(a). Section 7282.5 of the Government Code, referenced in the Values Act, sets forth a very specific list of circumstances in which a law enforcement agency is permitted to "cooperate with federal immigration officials," based mostly on whether the individual in question has committed any of certain listed felonies. *Id*. § 7282.5(a). Section 1798.3 of the Civil Code, also cited in the Values Act, defines "personal information" as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history." Cal. Civ. Code § 1798.3(a).

As described earlier, 8 U.S.C. § 1373 provides, among other things:

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

8 U.S.C. § 1373(a). The Values Act cannot be squared with this statute.

a. Section 1373 forbids a state or local government from prohibiting the exchange of "information *regarding*" an individual's immigration status, not merely the individual's immigration status, as California argues in its attempt to narrow the reach of the federal law. Congress's use of "information regarding" was clearly intended to broaden the scope of information covered, as

demonstrated by comparing Section 1373(a) to Section 1373(c), which uses the alternative phrase "[immigration] status information." *See Dean v. United States*, 556 U.S. 568, 573 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted). And the meaning of the word "regarding" is quite broad. *See Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (citing Black's Law Dict. 1158 (5th ed. 1979)) (interpreting the closely analogous words "relating to," and concluding that the "ordinary meaning of these words is a broad one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with….'"); *Davis v. Fenton*, 26 F. Supp. 3d 727, 740 (N.D. Ill. 2014) (concluding that the term "regarding" is "just as broad of a term as 'arising out of' and 'relating to'"). The breadth of the provision is also reinforced by the language Congress used, such as making clear that no local policy could "in any way restrict" the sharing of such information, reinforcing Congress's overarching interest in halting policies that might stymie the sharing of information between local law enforcement and immigration authorities. *See Bologna v. San Francisco*, 121 Cal. Rptr.3d 46, 414 (Cal. App. 2011) (law "'designed to prevent any State or local law . . . that prohibits or *in any way restricts* any communication between State and local officials and the INS'") (quoting House report) (emphasis added). Indeed, California's cramped reading of Section 1373 would render it largely meaningless, as DHS already is aware of an individual's legal right to be present in the United States. *See Steinle v. San Francisco*, 230 F. Supp. 3d 994, 1016 (N.D. Cal. 2017) (explaining that "ICE was already aware of Lopez-Sanchez's immigration status"). Such an overly narrow interpretation, so as to render the congressional enactment all but meaningless, should not be adopted. *See* Dkt. No. 26 at 19 ("Section 1373 must be read in the context of the rest of the INA.").

b. The Values Act prevents sharing personal and identifying information that plainly qualifies as information regarding immigration status. First, California law defines personal information very broadly as "any information . . . that identifies . . . an individual" such as name or address. Thus, under the law, state officials would be unable to confirm or reveal the identity of

individuals in state custody. But a person's identity and name are highly relevant to determining immigration status and removability: No such evaluation can be made if the person's identity is not disclosed. And the person's address directly relates to whether the person is "lawfully *present* in the United States," which Congress described as a component of "immigration status." 8 U.S.C. § 1357(g)(10)(A) (emphasis added); *see* Webster's New Intern'l Dict. (2d ed. 1958) (defining "present" as "being in a certain place and not elsewhere"). Identity and other personal information are also relevant to many immigration status issues, such as whether the person was born outside the United States, whether the person derived citizenship from a relative, whether the person qualifies for immigrant status under 8 U.S.C. § 1101(a)(15), whether the alien's place of residence qualifies them as a non-resident visitor, 8 U.S.C. § 1227(a)(1)(C), and to facilitate taking the alien into custody for lawful removal proceedings, *id*. § 1226(a). The restrictions on sharing personal information cannot be squared with Section 1373.

c. The Values Act provisions that prevent the sharing of prisoner release dates also violate Section 1373 because an alien's release date is information regarding the person's immigration status. An alien's release date is directly relevant to when the alien can ultimately be removed from the country. Federal immigration law recognizes the importance of allowing States and localities to impose criminal punishment on individuals who are in this country illegally and commit crimes, to allow state and local governments to vindicate their core criminal law enforcement interests. Thus, federal law specifies that, except in limited circumstances, DHS "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. § 1231(a)(4). But that law – and the comity interests that underlie it – render the time of an alien's release from state custody critical information regarding the alien's immigration status, as the alien is subject to removal only at the end of that custody period. *See id.* § 1231(a)(1)(B)(iii) (removal period "begins on . . . the date the alien is released from [state criminal] detention"). Similarly, the statute requiring the detention of criminal aliens specifies that immigration detention for removal proceedings must begin "when the alien is released" from state criminal custody. *Id.* § 1226(c)(1). The Ninth Circuit has held that this statute requires that immigration custody begin immediately upon the release from

state criminal custody, underscoring the importance of the release date to the person's status under the immigration laws. *See Preap v. Johnson*, 831 F.3d 1193, 1202 (9th Cir. 2016) (Section 1226(c) "governs the full life cycle of the criminal aliens' detention" including "specifying the requirements for taking them into custody"), *petition for cert filed*, No. 16-1363 (May 11, 2017). Other INA provisions also confirm that an alien release date is highly relevant to the person's status under the immigration laws given the relevance of that persons' location within the United States. *See* 8 U.S.C. § 1357(g)(10)(A) ("immigration status" includes whether individual is "lawfully *present* in the United States"); *id*. § 1357(a)(1) (immigration officers "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States"); *id*. § 1226(a) ("alien may be arrested and detained" on a warrant). Because a key premise of these immigration statutes is that when an alien commits a crime subject to punishment by a state or locality, that locality will first have the opportunity to prosecute and punish for that crime, and then the alien will be detained to consider whether removal is appropriate and, if so, to effectuate removal. *See id*. §§ 1226(c) & 1231(a). Given that premise, release date information relates to that persons' status under the immigration laws because it is a core aspect of the enforcement process Congress designed.

In light of all the above, although no final agency decision has been made by OJP, plaintiff is unlikely to show that the Values Act does not violate Section 1373, and the State cannot prevail in its request for an injunction regarding conformity of its laws with Section 1373.

C. Plaintiff Is Unlikely to Succeed in Showing that the Section 1373 Compliance Condition Violates the Tenth Amendment

California's final argument is that the Section 1373 compliance condition would violate the Tenth Amendment if the statute were construed to "cover" the state statutes identified in plaintiff's motion (Dkt. No. 26 at 21). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It stands for the proposition that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" or to "act on the Federal

Government's behalf." *New York*, 505 U.S. at 188; *NFIB*, 567 U.S. at 620.

As explained above, only one state statute could possibly become legitimately at issue here under the present circumstances: the Values Act. The question under plaintiff's Tenth Amendment claim, therefore, is whether applying the Section 1373 compliance condition in such a way that the Values Act violates the condition would "compel the State[] to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf." For several reasons, it would not.

First, the dispute here does not involve a federal statutory mandate that directly regulates California, but rather a condition on receipt of federal funds that the State and its subdivisions are free to accept or reject. Thus, the relevant question here is not whether Section 1373, as an independent statutory obligation, would violate the Tenth Amendment. Instead, the only pertinent question is whether conditioning the receipt of federal funds on compliance with Section 1373 is a valid exercise of the spending power – which, as discussed above, it is. In this context, it is well-settled that the federal government "may offer funds to the States, and may condition those offers on compliance with specified conditions.." *NFIB*, 567 U.S. at 537; *cf. Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) ("[A]s long as the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation.") (citation omitted). In effect, by requesting funds from the Federal Government, the State acts voluntarily and waives any Tenth Amendment concerns. [7]

Second, the purpose and effect of Section 1373 and the challenged grant condition are to further the express goals of the INA, not to "commandeer" state officials. As noted earlier, the INA

[7] As discussed above, SORNA provides an instructive analogy. That statute generally requires States to comply with various requirements related to the maintenance of sex offender databases – including "provid[ing] the information in the registry" to various national and local law enforcement agencies and community organizations – on penalty of forfeiture of 10% of the state's otherwise allotted Byrne JAG grant funds. 34 U.S.C. § 20927(a). Courts have uniformly rejected Tenth Amendment challenges to this requirement. As the Ninth Circuit explained, "SORNA does not compel states or state officials to comply with its requirements; *rather, Congress engaged in a constitutionally valid exercise of its spending power by conditioning the receipt of [Byrne JAG] federal funds on the implementation of SORNA.*" *United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014) (emphasis added).

provides that a federal immigration officer "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). The INA also provides that certain classes of non-citizens, including certain criminal aliens, shall be removed from the United States upon the order of the Attorney General or the Secretary of Homeland Security, *see*, *e.g.*, *id.* §§ 1227(a), 1228. Federal officials cannot carry out these duties without knowing where those persons are located. Indeed, the legislative history of Section 1373 indicates that the statute was intended to counteract passive resistance to sharing information. *See*, *e.g.*, S. Rep. No. 104-249, at 19-20 (1996) (noting that "the acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the [INA]").

Third, even if an outright mandate rather than a grant condition were involved here, a mere requirement not to prohibit individuals from providing information would not violate the Tenth Amendment. The courts have rejected Tenth Amendment challenges to a number of federal statutes that regulated the handling of information. For example, in *Reno v. Condon*, the Supreme Court rejected a challenge to a federal law regarding information on motor vehicle operators, which both required States to disclose the information in certain circumstances and prohibited its disclosure in other circumstances. 528 U.S. 141, 143-46, 149-150 (2000).[8] Similarly, in *Freilich v. Upper Chesapeake Health, Inc*., the Fourth Circuit rejected a challenge to a federal statute that required health care entities to provide certain information regarding physicians to the State Board of Medical Examiners, and required state boards to forward that information to a federal database under the auspices. 313 F.3d 205, 213-14 (4th Cir. 2002); *see* 42 U.S.C. §§ 11133, 11134. In rejecting that claim, the court wrote that the federal statute "does not commandeer the state legislature or executive" and "does not compel states to implement a federal regulatory program either. . . . All that the

[8] Plaintiff objects that the information covered by the Values Act includes "private information" (Dkt. No. 26 at 22), but the federal statute in *Condon* regulated the disclosure or non-disclosure of drivers' "personal information," including their addresses, "medical or disability information," photographs, and Social Security numbers. 528 U.S. at 144; 18 U.S.C. § 2725(3).

[statute] requires of states is the forwarding of information." 313 F.3d at 213-14. Further, the Second Circuit has rejected a Tenth Amendment challenge to Section 1373 on this very basis, noting that the statute does not "directly compel states or localities to require or prohibit anything. Rather, [it] prohibit[s] state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information . . . ." *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999); *accord Chicago I*, 2017 WL 4081821, at *10.

Fourth, contrary to plaintiff's contention, the Section 1373 grant condition – again, even assuming it were more than a mere grant condition – does not "command[]" state and local governments "to allow the unfettered use of their resources and personnel to act in furtherance of a federal immigration enforcement program" (Dkt. No. 26 at 22). For this proposition and others, plaintiff cites *Printz v. United States*, 521 U.S. 898, 918 (1997), but that decision actually undercuts the State's Tenth Amendment claim. There, the Supreme Court struck down certain provisions of the Brady Act, which required local law enforcement officers to conduct background checks on prospective handgun purchasers. The Act required much more than the forwarding of information, compelling law enforcement officers to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun by a prospective purchaser] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General," and to provide, upon request, a written statement of the reasons for any contrary determination. *Id*. at 903. Other federal laws requiring action by state or local officials were cited in support of the constitutionality of those provisions, but the Court rejected the relevance of those laws, observing that some of them were "connected to federal funding measures, and [could] perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States" and that others "require[d] only the provision of information to the Federal Government" and thus did not "involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program." *Id*. at 917-18. Unlike the Brady Act, Section 1373 only involves the exchange of information with federal authorities, and it is only a prohibition on policies that bar sharing

information, not an affirmative obligation to share information.

Moreover, merely barring a state or local government grantee from prohibiting or restricting the exchange of certain information with federal immigration authorities does not "weaken the State's ability to regulate the actions of [its] own governmental employees" (Dkt. No. 26 at 23), any more than did the statutes at issue in *Condon* and *Freilich.* Indeed, the Court in *Condon* expressly acknowledged that the provisions in that case regarding the disclosure or non-disclosure of driver information would "require time and effort on the part of state employees," but the Court rejected plaintiff's argument that those effects constituted a violation of the Tenth Amendment. 528 U.S. at 149-50.

Fifth and finally, because only the Values Act is involved here, plaintiff's motion presents no issue regarding "encourag[ing] residents to report crimes" or potentially "entangling local law enforcement in federal immigration matters" (Dkt. No. 26 at 21). Section 1373 merely protects the Federal Government's receipt of "information regarding the citizenship or immigration status" of individuals, and the Values Act, as relevant here, only prohibits disclosing release dates, "personal information" such as home addresses, and "other information." Cal. Gov't Code § 7284.6(a)(1)(C), (D). In seeking a preliminary injunction, therefore, the State cannot rely on the avowed purposes of the other state statutes it has cited, such as the TRUST Act, which governs when a law enforcement agency may detain an individual at the request of federal authorities, or Penal Code § 422.93, which prohibits "reporting" the victim or witness of a hate crime to federal immigration authorities.

II. Plaintiff Fails to Establish Irreparable Harm Absent Preliminary Relief

"[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely that it is possible. *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (quoting *Winter*, 555 U.S. at 22). Further, "[t]he threat of irreparable harm must . . . be 'immediate.'" *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1071 (N.D. Cal. 2015) (quoting *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988)). "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief."

Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted). Further, where the plaintiff "has failed to establish a likelihood of irreparable harm," a court need not even consider the other requirements. *Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.*, 685 F. Supp. 2d 1123, 1139 (D. Haw. 2010).

Here, as both a preliminary and a dispositive matter, plaintiff's claim of irreparable harm is belied by its acceptance of a requirement to certify compliance with Section 1373 in the FY 2016 Byrne JAG cycle, and its long delay in raising any legal challenge. At minimum, this delay disqualifies the State from demonstrating *immediate* irreparable harm, as necessary to obtain the relief it here seeks. *See Boardman*, 822 F.3d at 1022.

Further, even apart from California's own conduct demonstrating a lack of urgency, its claim that the condition causes irreparable harm by attempting to unconstitutionally coerce the State into abandoning its right to self-government also fails. The Supreme Court has admonished that "courts should not conclude that [an enactment] is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear," *NFIB*, 567 U.S. at 681 (plurality), such as where a State is subjected to the risk of losing "over *10 percent* of a State's overall budget" if it declines to adopt certain conditions. *Id*. at 582 (emphasis added). The amount of potential funding at stake to California through the subject programs does not come close to meeting that threshold. Plaintiff asserts that it expects to receive $28.3 million in FY 2017 Byrne JAG funding, as well as a combined $2.8 million from the two COPS programs (Dkt. No. at 26 at 3-4, 52). However, the State's FY 2017 budget estimated obligations of more than $125 billion. *See* California 2017-18 State Budget Overview, *available at* http://www.ebudget.ca.gov/ budget/2017-18EN/#/Home. Thus, the combined funds that are even potentially at issue constitute approximately 0.025% of California's overall budget. Such a miniscule impact on the State's finances does not come close to establishing unconstitutional coercion. *See NFIB*, 567 U.S. at 581 (noting that in *Dole* "the threatened loss of less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy"). Plaintiff thus does not meet its burden to demonstrate it will suffer irreparable harm absent preliminary relief.

III. The Public Interest and the Balance of Equities Militate Against the Entry of a Preliminary Injunction

Lastly, a party seeking a preliminary injunction must "establish . . . that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. These factors merge in a suit against the Federal Government. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the public interest weighs heavily against plaintiff's attempt to enjoin statutorily authorized Executive Branch policies that are designed to promote enforcement of federal immigration law in jurisdictions that receive federal law enforcement funds. Courts have routinely held that "the United States has an interest in enforcing federal law . . . ." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 693 (7th Cir. 1986) (emphasis omitted). The State's requested relief threatens, in particular, "the public interest in the speedy and effective enforcement of the immigration laws . . . ." *Sofinet v. INS*, 188 F.3d 703, 708 (7th Cir. 1999), as well as the Federal Government's interest in seeing that federal funds are used "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

As discussed in the accompanying DHS declaration, the challenged Section 1373 compliance condition promotes those interests by promoting operational efficiency by conserving the resources needed by DHS to execute its mission; supporting the federal ability to remove criminal aliens from the country; and helping reduce federal expenditures on the State Criminal Alien Assistance Program, *see* 8 U.S.C. § 1231(i), under which the federal government compensates states and localities for their incarceration of certain criminal aliens. *See* Declaration of Jim Brown ¶¶ 6-11 (Attachment 4 hereto). At bottom, encouraging cooperation among local governments and federal immigration authorities promotes the public interest in executing federal laws that require removal of criminal aliens. *See id*. These concrete interests tip the equities in this case sharply toward denying an injunction.

CONCLUSION

Accordingly, plaintiff's motion for preliminary injunction should be denied.

Dated: November 22, 2017

Respectfully submitted,

CHAD A. READLER
Principal Deputy Assistant Attorney General

BRIAN STRETCH
United States Attorney

JOHN R. TYLER
Assistant Director

/s/ W. Scott Simpson

W. SCOTT SIMPSON (Va. Bar #27487)

ANTONIA KONKOLY
Trial Attorney

Attorneys, Department of Justice
Civil Division, Room 7210
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@usdoj.gov

COUNSEL FOR DEFENDANTS JEFFERSON B. SESSIONS III, Attorney General of the United States; ALAN R. HANSON, Acting Assistant Attorney General; and U.S. DEPARTMENT OF JUSTICE

EXHIBIT C

CHAD A. READLER
Acting Assistant Attorney General
BRIAN STRETCH
United States Attorney
JOHN R. TYLER
Assistant Director
W. SCOTT SIMPSON (Va. Bar #27487)
Senior Trial Counsel
ANTONIA KONKOLY
Trial Attorney
Department of Justice, Room 7210
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@usdoj.gov
COUNSEL FOR DEFENDANTS
JEFFERSON B. SESSIONS III, Attorney General of the United States; ALAN R. HANSON, Principal Deputy Assistant Attorney General; and U.S. DEPARTMENT OF JUSTICE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

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

Defendants.

No. 3:17-cv-04701-WHO

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: February 28, 2018
Time: 2:00 p.m.

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on Wednesday, February 28, 2018, at 2:00 p.m., or as soon thereafter as counsel may be heard, before The Honorable William H. Orrick, in Courtroom 2, 17th Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the defendants will move, and hereby do move, to dismiss this action under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on the following Memorandum of Points and Authorities, Defendants' Request for Judicial Notice, the other evidence and records on file in this action, and any other written or oral evidence or argument that may be presented at or before the time this motion is heard by the Court.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case asks the Court to determine whether the U.S. Department of Justice ("USDOJ" or "Department") can require, in exchange for certain federal law enforcement grants, that state and local governments comply with federal law and cooperate in providing certain information needed for federal law enforcement. USDOJ distributes federal grant funds to aid law enforcement in jurisdictions throughout the country. These funds serve to aid both local and cooperative law enforcement priorities. Consistent with federal prerogatives, the Department has long imposed conditions on these grants, including in the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG Program"). If plaintiff's theories were correct, all of these longstanding and never-before-challenged conditions would be in jeopardy.

To receive grant funds, Byrne JAG Program recipients are required to certify compliance with Section 1373 of Title 8, U.S. Code, part of the Immigration of Nationality Act ("INA"), which bars state and local governments from prohibiting or restricting the exchange of "information regarding the . . . citizenship or immigration status" of any individual with federal immigration

[1] Plaintiff names "DOES 1-100" as defendants in this matter but does not identify those individuals or specify the capacity in which they are being sued. *See* Am. Compl. ¶ 29 (Dkt. No. 11). Undersigned counsel does not purport to represent those individuals, and claims against them are not at issue in this motion to dismiss. Moreover, because those individuals have not been named or served, granting this motion would resolve this litigation in its entirety.

authorities. Also, grants under the Byrne JAG Program are conditioned on giving federal immigration authorities access to correctional facilities to meet with aliens and on notifying federal authorities "as early as practicable" before the scheduled release of an alien from custody. Plaintiff argues that these grant conditions are *ultra vires* and violate the constitutional Separation of Powers, the Spending Clause, and the Administrative Procedure Act ("APA"). Those claims are without merit, however, because – as the INA makes clear – immigration enforcement and law enforcement are inextricably linked. The INA contemplates that federal, state, and local authorities will cooperate on immigration enforcement and that federal authorities will take custody of certain aliens upon their release from state or local custody.

Alternatively, plaintiff seeks an order enjoining defendants from finding that any of several state laws violate the Section 1373 compliance condition in either the Byrne JAG Program or two other programs. Specifically, plaintiff seeks an order that Section 1373 is not violated by California's "TRUST Act," Cal. Gov't Code §§ 7282-7282.5; the "TRUTH Act," Cal. Gov't Code §§ 7283-7283.2; the "California Values Act," Cal. Gov't Code §§ 7284-7284.12 ("Values Act"); California Penal Code §§ 422.93, 679.10, or 679.11; California Code of Civil Procedure § 155; or California Welfare and Institutions Code §§ 827 or 831 (Dkt. No. 26-1). In considering awarding the Byrne JAG grants, the Office of Justice Programs ("OJP") has not, however, indicated that any of those state statutes other than the Values Act *might* violate the Section 1373 condition, and even as to that Act, OJP has not yet reached a final decision. Therefore, plaintiff lacks standing to seek an order regarding any of those statutes other than Values Act, and even plaintiff's claim regarding that Act is unripe.

In any event, even if this alternative claim were justiciable, plaintiff's request for a ruling that the Values Act complies with the Section 1373 condition should be dismissed on its merits. The Values Act, among other things, prohibits state and local agencies from disclosing an individual's release date, personal information (including home address), or "other information," with certain exceptions not referencing federal immigration authorities. *See* Cal. Gov't Code § 7284.6(a)(1)(C), (D). Section 1373 however, bars prohibiting or restricting the exchange of "information regarding" immigration status with federal immigration authorities, which necessarily

encompasses information regarding custody status and location as needed to carry out the federal responsibilities to "interrogate any . . . person believed to be an alien as to his right to be or to remain in the United States," to take aliens into federal custody upon release from state or local custody, and to remove certain classes of aliens from the United States as ordered by the Attorney General or the Secretary of Homeland Security. 8 U.S.C. §§ 1357(a)(1), 1226(c)(1), 1227(a), 1228.

Finally, plaintiff argues that Section 1373 would violate the Tenth Amendment if defendants construe it as conflicting with any of the state statutes listed above. Finding that the Values Act – the only state statute legitimately at issue here – violates Section 1373 would not, however, "compel [California] to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf" in violation of the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 188 (1992); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 620 (2012). This case involves a grant condition that the State is free to accept or reject, and, in any event, merely protecting the exchange of information with federal authorities does not compel state and local governments to administer a federal program.

For these reasons, plaintiff's First Amended Complaint and all of its claims should be dismissed.

STATUTORY AND ADMINISTRATIVE BACKGROUND

I. The Immigration and Nationality Act

Enforcement of the immigration laws, including and especially the investigation and apprehension of criminal aliens, is quintessentially a law enforcement function. Through the INA, 8 U.S.C. §§ 1101 *et seq.*, Congress granted the Executive Branch significant authority to control the entry, movement, and other conduct of foreign nationals in the United States. These responsibilities are assigned to law enforcement agencies, as the INA authorizes the Department of Homeland Security ("DHS"), USDOJ, and other Executive agencies to administer and enforce the immigration laws. The INA permits the Executive Branch to exercise considerable discretion to direct enforcement pursuant to federal policy objectives. *See Arizona v. United States*, 567 U.S. 387, 396 (2012).

The INA includes several provisions that protect the ability of federal officials to investigate the status of aliens in the United States and otherwise enforce the immigration laws. For example,

the statute provides that a federal immigration officer "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). Separately, pursuant to Section 1373, "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *Id.* § 1373(a).[2] The INA provides that certain classes of aliens shall be removed from the United States upon order of the Attorney General or Secretary of Homeland Security. *See, e.g.*, *id.* §§ 1227(a), 1228.

II. DOJ Office of Justice Programs and the Byrne JAG Program

Title I of the Omnibus Crime Control and Safe Streets Act of 1968 established the Office of Justice Programs ("OJP"), and provides for OJP to be headed by an Assistant Attorney General ("AAG"). *See* Pub. L. No. 90-351, 82 Stat. 197 (1968), *codified as amended at* 34 U.S.C. §§ 10101 *et seq*. Congress gave the AAG certain "[s]pecific, general and delegated powers," including the power to "*maintain liaison with* . . . State governments in matters relating to criminal justice." 34 U.S.C. § 10102(a)(2) (emphasis added). Notably, the statute also authorizes the AAG to "exercise such other powers and functions as may be vested in [him] pursuant to this chapter or by delegation of the Attorney General, *including placing special conditions on all grants, and determining priority purposes for formula grants*." *Id.* § 10102(a)(6) (emphasis added).

The same title of the Omnibus Crime Control Act also established the Byrne JAG Program. *See generally* 34 U.S.C. §§ 10151-58. Under this program, OJP is authorized to "make grants to States and units of local government . . . to provide additional personnel, equipment . . . and information systems for criminal justice, including for any one or more of [certain enumerated] programs." *Id.* § 10152(a)(1). In the same chapter, "criminal justice" is defined broadly to include

[2] Additionally, 8 U.S.C. § 1373(b) provides that "[n]otwithstanding any other provision of Federal, State, or local law, no person or 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: (1) Sending such information to, or requesting or receiving such information from, [federal immigration authorites]. (2) Maintaining such information. (3) Exchanging such information with any other Federal, State, or local government entity."

various activities of the police, the courts, and "related agencies." *Id.* § 10251(a)(1).

The Byrne JAG Program provides "formula grants" – that is, grants that, when awarded, must follow a statutory formula based on population, the rate of violent crime, and other factors. *Id.* §§ 10152(a)(1), 10156. Funding under the Program is subject to annual appropriations. For FY 2017, Congress appropriated $396,000,000 for the Byrne JAG Program, with certain carve-outs from that amount obligated to specific initiatives. *See* Consolidated Appropriations Act, Pub. L. No. 115-31, Div. B, Title II, 131 Stat. 135, 203 (2017). By statute, in order to request a Byrne JAG grant, the chief executive officer of a State or unit of local government must submit an application "in such form as the Attorney General may require," 34 U.S.C. § 10153(a); and the application must include, among other things, "[a] certification, made in a form acceptable to the Attorney General . . . that . . . the applicant will comply with . . . all . . . applicable Federal laws," *id.* § 10153(a)(5)(D). The application also must contain several assurances, including "[a]n assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." *Id.* § 10153(a)(4).

OJP has historically included a variety of conditions in Byrne JAG award documents. For example, OJP has imposed, without objection, conditions related to information sharing and privacy protection, *see* Request for Judicial Notice ("RJN"), Ex. A ¶ 27, research using human subjects, *see id.* ¶ 30, and training, *see id.* ¶¶ 33-34. Other historical conditions imposed by the Assistant Attorney General have been inspired by Executive Branch prerogatives, and in some instances resulted in *subsequent* congressional codification. One such condition, which prohibits use of Byrne JAG funds to purchase military style equipment, relates in part to an Executive Order issued by President Obama in 2015. *See id.* ¶ 43; Exec. Order No. 13,688, 80 Fed. Reg. 3451 (Jan. 16, 2015). Since 2012, other conditions have required that recipients (a) comply with specific national standards when purchasing body armor and (b) institute a "mandatory wear" policy for any purchased armor. RJN, Ex. A ¶¶ 39-40. While those conditions have now been codified by Congress, *see* 34 U.S.C. §§ 10202(c)(1)(B), (C), they originated as exercises of USDOJ's authority to impose special conditions. And the Assistant Attorney General has

imposed an "American-made" requirement for body armor purchases, something Congress did not choose to codify last year. RJN, Ex. A ¶ 39. The conditions attached to Byrne JAG grants have varied over time, depending on national law enforcement necessities and USDOJ priorities.

For the current Byrne JAG grant cycle, Fiscal Year ("FY") 2017, OJP notified applicants that awards under the Program will include three conditions requiring modest cooperation with federal law enforcement prerogatives in the immigration setting. Those conditions will require grantees to (1) have a policy of providing DHS with advance notice of the scheduled release date of certain individuals held in state or local correctional facilities (the "notice condition"); (2) have a policy permitting federal agents to access state or local correctional facilities for certain immigration enforcement purposes (the "access condition"); and (3) comply with 8 U.S.C. § 1373, which, as noted above, prohibits state and local government and law enforcement entities or officials from restricting certain communications with DHS (the "Section 1373 condition"). RJN, Ex. B (Greenville SC Award 2017) ¶¶ 53, 55, 56; RJN, Ex. C (Binghamton NY Award 2017) ¶¶ 16, 24, 41; Am. Compl. ¶¶ 75-77, 84 (Dkt. No. 11).

Under the "Rules of Construction" within those grant conditions, the award documents make clear that nothing in the notice or access conditions requires a grantee to detain "any individual in custody beyond the date and time the individual would have been released in the absence of this condition." RJN, Ex. B ¶¶ 53, 55, 56; RJN, Ex. C ¶¶ 53, 55, 56. The documents also make clear that these conditions impose no requirements in relation to any requests by federal immigration authorities to detain non-citizens, and that the notice condition requires "only as much advance notice as practicable" before the release of a non-citizen. *Id*. Finally, the conditions apply only to the "program or activity" to be funded under the award (as stated above), and they allow awarded funds to be used for costs incurred in implementing the conditions. *See id*.

III. DOJ Office of Community Oriented Policing Services and the Anti-Methamphetamine and Anti-Heroin Task Force Programs

Pursuant to authority granted by the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"), the Attorney General created the Office of Community Oriented Policing

Services ("COPS Office") to administer certain community policing grants. The Office is headed by a Director appointed by the Attorney General, 28 C.F.R. §§ 0.119, 0.120, and currently administers several programs, including the COPS Anti-Methamphetamine Program ("CAMP") and the Anti-Heroin-Task Force Program ("AHTF"). CAMP "provid[es] funds directly to state law enforcement agencies to investigate illicit activities related to the manufacture and distribution of methamphetamine." RJN, Ex. D (CAMP Fact Sheet 2017). AHTF "provid[es] funds to investigate illicit activities related to the distribution of heroin or unlawful distribution of prescriptive opioids, or unlawful heroin and prescription opioid traffickers[.]" RJN, Ex. E (AHTF Fact Sheet 2017); *see* Am. Compl. ¶¶ 95-96. Both programs are authorized by the Consolidated Appropriations Act, 2017. 131 Stat. at 207.

Like all programs administered by the COPS Office, CAMP and AHTF are discretionary programs, meaning all applicants must compete against each other for limited available funds. *See* Am. Compl. ¶¶ 95-96. Funding under these programs is subject to annual appropriations. For FY 2017, Congress appropriated $7,000,000 "for competitive grants to State law enforcement agencies in States with high seizures of precursor chemicals, finished methamphetamine, laboratories, and laboratory dump seizures" (*i.e.*, CAMP), and $10,000,000 "for competitive grants to statewide law enforcement agencies in States with high rates of primary treatment admissions for heroin and other opioids" (*i.e.*, AHTF). 131 Stat. at 208.

CAMP and AHTF grantees, like all federal grantees, are required to comply with all applicable federal laws. There is no statutorily prescribed method for evaluating CAMP and AHTF applications. Rather, the COPS Office develops factors and methods to determine how best to allocate each program's finite funds each year, and to evaluate and score applications. RJN, Ex. F (2017 CAMP Methodology), Ex. G (2017 AHTF Methodology). Beginning with FY 2016, the COPS Office has advised each CAMP and AHTF applicant that this requirement includes compliance with 8 U.S.C. § 1373. RJN, Ex. H at 1 (CAMP Award Owner's Manual 2016), Ex. I at 1 (AHTF Award Owner's Manual 2016). In FY 2017, the COPS Office required certification of compliance with Section 1373 as a threshold eligibility requirement. RJN, Ex. J at 5 (CAMP Pre-Award FAQs 2017), Ex. K at 5 (AHTF Pre-Award FAQs 2017).

IV. Recent Developments

On September 15, 2017, a federal district court entered a partial preliminary injunction in similar litigation brought by the City of Chicago. *Chicago v. Sessions*, 264 F. Supp. 3d 933, 945 (N.D. Ill. 2017) ("*Chicago I*"). The Chicago court enjoined the notice and access conditions in the Byrne JAG Program, but declined plaintiff's request to enjoin the Section 1373 condition. *See id.* (noting that "Congress could [rationally] expect an entity receiving federal funds to certify its compliance with [Section 1373], as the entity is – independent of receiving federal funds – obligated to comply"). Defendants appealed the preliminary injunction order; that appeal is now fully briefed and scheduled to be argued before the U.S. Court of Appeals for the Seventh Circuit on January 19, 2018, *Chicago v. Sessions*, 17-2991 (7th Cir.).

ARGUMENT

Defendants move for dismissal of this action under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. A motion under Rule 12(b)(1) challenges the subject matter jurisdiction of the court to reach a claim. "A 'facial' attack [on jurisdiction] asserts that a complaint's allegations are themselves insufficient to invoke jurisdiction," *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014), while a factual challenge to jurisdiction "relies on affidavits or any other evidence properly before the court to contest the truth of the complaint's allegations," *id.* at 780 (citation omitted). A motion under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under this rule is proper if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (internal citation omitted). Under both 12(b)(1) and 12(b)(6), the court "may take judicial notice of matters of public record." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted); *see Louisiana Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063 (9th Cir. 2016).

Plaintiff's constitutional and APA challenges to the access, notice, and Section 1373 conditions in the Byrne JAG Program should be dismissed on their merits under Rule 12(b)(6). Further, plaintiff's request for a ruling that none of its statutes violate Section 1373 should be

dismissed under both Rule 12(b)(1) and 12(b)(6): Plaintiff lacks standing to seek an order regarding any of the state statutes it identifies other than the California Values Act and the claim regarding the Values Act is unripe – thus depriving the Court of jurisdiction. And even if the Court had jurisdiction over plaintiff's request for a ruling regarding the Values Act, the request should be dismissed on its merits under Rule 12(b)(6). Finally, plaintiff's claim that Section 1373 violates the Tenth Amendment should also be dismissed on its merits.

I. The Challenged Immigration-Related Byrne JAG Conditions Are Lawful

A. The Access and Notice Conditions Are Authorized by Statute and Do Not Violate the Separation of Powers

In the First and Third Claims for Relief in its Amended Complaint,[3] California alleges that the notice and access conditions in the Byrne JAG Program – although not, notably, the Section 1373 compliance condition – are *ultra vires* and violate the Constitution's separation of powers. Am. Compl. ¶¶ 122-26, 133-38. Both theories rest fundamentally on the State's incorrect view that Congress has not authorized USDOJ to impose these conditions. *See id.* ¶¶ 88-94.

As a threshold matter, there is no serious dispute that Congress may delegate to the Executive Branch the authority to attach conditions on funding. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 488 (1998) ("Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money."); *DKT Mem'l Fund Ltd. v. AID*, 887 F.2d 275, 280-81 (D.C. Cir. 1989) (upholding statutory delegation to the Executive to impose terms and conditions on federal spending programs). Further, and as relevant here, the Attorney General has "final authority over all functions, including any grants" made by OJP, which administers the Byrne JAG Program. 34 U.S.C. § 10110. Under the Attorney General's authority, an Assistant Attorney General heads OJP. *See id.* § 10101; 28 U.S.C. § 530C(a)(4). In setting forth the duties

[3] The theories pled under the First Claim for Relief (which purports to arise directly under the Constitution) and the Third Claim for Relief (which is pled under the APA) are substantively identical (except insofar as the Third Claim *also* reiterates, under the aegis of the APA, the constitutional Spending Clause theory additionally pled as a stand-alone constitutional claim in the Second Claim for Relief). For the reasons stated in Section I.C. below, the Third Claim should be dismissed for the additional threshold reason that California fails to identify a challengeable final agency action under the APA.

and functions of the AAG, Congress stated that the AAG is to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." 34 U.S.C. § 10102(a)(6).

Thus, a plain reading of the statutory text indicates that the AAG's power includes, *at a minimum*, the power to "plac[e] special conditions on all grants" administered by OJP. *Id*. The breadth of the AAG's statutory power is reinforced by the authority to "determin[e] priority purposes for formula grants." *Id.* Confirming the statute's plain text, a report accompanying the enactment of this language stated that the provision "allows the Assistant Attorney General to place special conditions on all grants and to determine priority purposes for formula grants." H.R. Rep. No. 109-233, at 101 (2005).

Indeed, the particular statutory language at issue here – the authority for "placing special conditions on all grants, and determining priority purposes for formula grants" – was added *as part of the very same legislation that created the Byrne JAG Program*. *See* DOJ Reauthorization Act of 2005, Pub. L. No. 109-162, § 1152(b), 119 Stat. 2960 (2006) (adding language to subsection (a)(6)); *id*. § 1111 (creating Byrne JAG Program). Prior to that 2006 enactment, the provision stated only that the AAG for OJP "exercise[s] such other powers and functions as may be vested in the Assistant Attorney General pursuant to this title or by delegation of the Attorney General." Joint Resolution Making Continuing Appropriations for FY 1985, Pub. L. No. 98-473, § 603, 98 Stat. 1837 (1984). Also, by contrast, the organic statute for the head of a separate USDOJ grant-making component, enacted in 2002, continues to contain substantially the same, more limited language as Section 10102 earlier contained, without the additional "special conditions" and "priority purposes" powers that Congress elected to bestow with respect to OJP. *See* 34 U.S.C. § 10444(7) (providing only that Director of Violence Against Women Office "[e]xercis[es] such other powers and functions as may be vested in the Director pursuant to this subchapter or by delegation of the Attorney General"). This context confirms that Congress intended the "special conditions" and "priority purposes" language to confer distinctive and meaningful power. "When Congress acts to amend a statute, [courts] presume it intends its

amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

Thus, the notice and access conditions – which merely promote intergovernmental law enforcement cooperation, so that grantee policies do not impair federal policies – come comfortably within the fonts of delegated power in Section 10102(a)(6). Pursuant to this authority, the AAG may prioritize formula grants, like the Byrne JAG Program, for jurisdictions that cooperate with federal authorities in achieving federal law enforcement priorities, including removal of criminal aliens under immigration law.

B. The Notice, Access, and Section 1373 Conditions Are Consistent with the Spending Clause

The Second and Third Claims for Relief in the Amended Complaint[4] allege that the notice, access, and Section 1373 conditions in the Byrne JAG Program violate the Spending Clause. Am. Compl. ¶¶ 127-32, 137. More specifically, these claims allege that the notice and access conditions – although, again, *not* the Section 1373 compliance condition – are impermissibly ambiguous, *id.* ¶¶ 86-87, 131, and further that all three conditions are insufficiently related to the statutory purposes of the Byrne JAG Program, *id.* ¶ 130; *see id.* ¶ 137. Both contentions are wrong.

1. The Notice and Access Conditions are Unambiguous

Article I of the Constitution confers on Congress the authority to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. It is well-established that the Spending Clause authority is "broad," and empowers Congress to "set the terms on which it disburses federal money to the States[.]" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also, e.g., S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (noting that Congress has "repeatedly employed the [spending] power to further broad policy objectives by conditioning

[4] As with the separation of powers claims in the First and Third Claims for Relief discussed above, there is substantial overlap between the Second and Third Claims for Relief, the latter of which reiterates the theories of the First and Second Claims, but under the aegis of the APA. Defendants again note that, for the reasons stated in Section I.C. below, the Third Claim fails for the additional threshold reason that California fails to identify a challengeable final agency action under the APA.

receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.") (citations omitted); *United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002) ("Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations" on the recipient).

While it is beyond cavil that the Spending Clause confers "broad" authority, that authority is nonetheless subject to certain discrete limitations, including that any terms attached to the receipt of federal funds must be "unambiguous[]," and thus enable the potential recipient to "exercise [its] choice" to participate (or not) in the program "knowingly, cognizant of the consequences of [its] participation." *Dole*, 483 U.S. at 207 (citations omitted); *see also, e.g.*, *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006) (the Spending Clause is a "'permissible method of encouraging a State to conform to federal policy choices,' because 'the ultimate decision' of whether to conform is retained by the States – wh[ich] can always decline the federal grant.") (quoting *New York*, 505 U.S. at 168)). Contrary to plaintiff's assertions, the notice and access conditions easily satisfy the clear-notice requirement.

These conditions clearly state what conduct is required, so that grantees can "exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (citation omitted). They require grantees (1) to give "agents of the United States acting under color of federal law" access to correctional facilities "to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States," and (2) to notify DHS, upon "formal written request" and "as early as practicable," before "the scheduled release date and time for a particular alien in such facility." RJN, Ex. B (Greenville SC Award 2017) ¶¶ 55, 56; RJN, Ex. C (Binghamton NY Award 2017) ¶¶ 55, 56. The award documents also specify that nothing in these conditions requires a grantee to detain "any individual in custody beyond the date and time the individual would have been released in the absence of this condition"; that the conditions impose no requirements regarding any requests by federal immigration authorities to detain aliens; and that the notice condition requires "only as much advance notice as practicable." *Id.* Moreover, to the extent any uncer-

tainty might remain, the FY 2017 Byrne JAG solicitation invited any prospective grantee with a question about "any . . . requirement of this solicitation" to contact OJP's Response Center (customer service center) by telephone, email, or Internet chat. *See* Am. Compl., Ex. A at 2. A prospective grantee could also contact the appropriate "State Policy Advisor" – that is, a specific, named OJP employee assigned to work with jurisdictions within a specified geographical area. *Id.*; BJA Programs Office Contact Information, *available at* https://www.bja.gov/ About/ Contacts/ ProgramsOffice.html (last visited Jan. 16, 2018).[5]

Further, to the extent there is any uncertainty at the margins of the notice and access conditions, such a penumbra would not render these conditions unconstitutionally ambiguous. Indeed, "the exact nature of [grant] conditions may be largely indeterminate, provided that the existence of the conditions is clear, such that States have notice that compliance with the conditions is required." *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (citation omitted); *see*, *e.g.*, *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) ("Once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper.") (citation omitted). Moreover, plaintiff does not complain about the clarity of any other Byrne JAG conditions, such as those requiring compliance with restrictions on lobbying under 18 U.S.C. § 1913 and 31 U.S.C. § 1352, RJN, Ex. B (Greenville SC Award 2017) ¶ 19; compliance with "federal appropriations statutes" generally, *id.* ¶ 20; reporting of evidence of violations of the False Claims Act, *id.* ¶ 21; and compliance with prohibitions on reprisal under 41 U.S.C. § 4712, *id.* ¶ 23.

2. The Notice, Access, and Section 1373 Conditions Are Related to the Purposes of the Byrne JAG Program

California further alleges that the notice, access, and Section 1373 compliance conditions are not adequately related to the purposes of the Byrne JAG Program to satisfy the Spending Clause. Am. Compl. ¶ 130. This argument also fails on its face.

[5] "BJA" refers to the Bureau of Justice Assistance, the OJP component that administers the Byrne JAG Program.

First, any relatedness inquiry required by the Spending Clause does not pose a difficult hurdle; to the contrary, the Ninth Circuit has emphasized that this is a "low-threshold" inquiry that "is a far cry from . . . an exacting standard for relatedness." *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002); *see id.* (stating that conditions on federal grants "*might* be illegitimate if the conditions share no relationship to the federal interest in particular national projects or programs") (citation omitted)). Thus, in *Dole*, the Supreme Court upheld conditioning the receipt of federal highway funds on the loosely-related requirement that a State adopt a minimum drinking age. *See* 483 U.S. at 208-09; *see also New York*, 505 U.S. at 167 (stating that only "some relationship" is necessary between spending conditions and "the purpose of the federal spending."); *Koslow v. Pennsylvania*, 302 F.3d 161, 175 (3d Cir. 2002) (explaining that there need only be a "discernable relationship" between a condition imposed pursuant to the Spending Clause and the "federal interest in a program it funds"). As the D.C. Circuit has observed, the Supreme Court has never "overturned Spending Clause legislation on relatedness grounds." *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004).

The grant conditions at issue here easily satisfy this "low-threshold" relatedness inquiry. *Mayweathers*, 314 F.3d at 1067. The Byrne JAG Program's organic statute specifies that program funds are designed to provide resources "for criminal justice," to support programs including law enforcement, prosecution, crime prevention, and corrections. 34 U.S.C. § 10152(a)(1). These goals are also reflected in the responsibilities of the AAG, which involve "disseminat[ing] information" and "*maintain[ing] liaison with* . . . State governments" in matters relating to "criminal justice." 34 U.S.C. § 10102(a)(1), (2) (emphasis added). Further, immigration enforcement, which the conditions promote, undoubtedly intersects with the Byrne JAG Program's criminal justice purposes, at a minimum for the simple reason that a conviction for any of a wide array of criminal offenses renders an alien removable from this country. *See* 8 U.S.C. § 1227(a)(2). Indeed, "[a] primary goal of several recent overhauls of the INA has been to ensure and expedite the removal of aliens convicted of serious crimes." *Duvall v. Att'y Gen. of U.S.*, 436 F.3d 382, 391 (3d Cir. 2006); *see Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (observing that "deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes")

(citation omitted). Once removed, a criminal alien who has committed a removable offense – for example, an aggravated felony, domestic violence, child abuse, or certain firearm offenses – is no longer present in this country with the potential to re-offend.

The Immigration and Nationality Act also repeatedly contemplates cooperation among state and local officers and federal officials on immigration enforcement. *See, e.g.*, 8 U.S.C. § 1357(g) (authorizing formal cooperative agreements under which trained and qualified state and local officers may perform specified functions of a federal immigration officer in relation to the investigation, apprehension, or detention of aliens); *id*. § 1324(c) (authorizing state and local officers to make arrests for violations of the INA's prohibition against smuggling, transporting, or harboring aliens); *id*. § 1252c (authorizing state and local officers to arrest certain felons who have unlawfully returned to the United States). Under authorities such as these, "state officers may perform the functions of an immigration officer." *Arizona*, 567 U.S. at 408. Furthermore, given that the INA contemplates the federal detention of certain aliens upon their release from state or local custody, *see* 8 U.S.C. § 1226(c), the conditions can be understood as seeking to ensure that a state or local grantee's law enforcement activities not impair the law enforcement activities of the federal government. Congress has mandated that certain aliens who have committed criminal offenses be taken into federal custody pending removal proceedings, but only "when the alien is released" from state custody. *Id.* § 1226(c)(1); *see Preap v. Johnson*, 831 F.3d 1193, 1199 (9th Cir. 2016) (holding that mandatory detention provision applies only to aliens who are detained promptly after their release from criminal custody). With respect to incarcerated aliens subject to a final removal order, the INA establishes a "removal period" of 90 days that begins with the date of the alien's release. 8 U.S.C. § 1231(a)(1)(B). It is crucial to this cooperative law enforcement framework that states and localities respond to requests for release date information, give federal agents access to detainees in their custody, and avoid restricting communication of information regarding immigration status to DHS.

C. Plaintiff's APA Claims Must Be Dismissed for Additional Reasons

1. The APA Claims Do Not Challenge Final Agency Action Reviewable under the APA

"To obtain judicial review under the APA, [a plaintiff] must challenge a final agency action." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (citing 5 U.S.C. § 704). "[F]inality is . . . a jurisdictional requirement," *id.* (internal citation omitted), which is satisfied only when the challenged action (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

Notwithstanding this black-letter requirement, neither of California's APA claims (the Third and Fourth Claims for Relief) identifies any qualifying final agency action. Indeed, California initiated this litigation before even seeing the text of the actual conditions, and even now USDOJ has not yet reached a final determination as to whether to grant or deny the State's FY 2017 Byrne JAG application. To the contrary, the Department has, to date, issued only a "preliminary assessment" of California's compliance with Section 1373, RJN, Ex. L, and the State's response to the same, RJN, Ex. M, remains under consideration. Further, even if OJP determined to deny California's grant application at the conclusion of this process, the State would then be entitled to invoke regulatory appeal procedures before any such denial could become statutorily "final[]." 34 U.S.C. § 10154; *see generally* 28 C.F.R. Part 18. In such circumstances, no final, reviewable agency action will exist until OJP has thoroughly "reviewed [the] grant application *and decided [whether] to disburse the funds*." *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (emphasis added); *see, e.g.*, *Citizens Alert Regarding Env't v. EPA*, 102 F. App'x 167, 168 (D.C. Cir. 2004) ("Until EPA completes its review and reaches a decision [as to whether to award a proposed grant], there has been no final agency action . . . and the matter is not ripe for judicial review."); *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 403 F. Supp. 2d 74, 81 (D.D.C. 2005) (no final agency action where agency had taken "some action with respect to the grant application, but "had not yet decided whether to award the grant"), *aff'd*, 475

F.3d 1291 (D.C. Cir. 2007).

Thus, as concerns California's challenge to the conditions, the consummation of OJP's decision-making process has not yet occurred, plaintiff's "rights or obligations" have not been determined, and no "legal consequences" have arisen. *Cf. Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016) (affirming dismissal because "a challenge to agency conduct is ripe only if it is filed after the final agency action"; the challenge otherwise "rests upon contingent future events that may not occur as anticipated, or that may not occur at all"); *Abbs v. Sullivan*, 963 F.2d 918, 927 (7th Cir. 1992) ("A challenge to administrative action . . . falls outside the grant of jurisdiction in . . . the Administrative Procedure Act when the only harm the challenger seeks to avert is the inconvenience of having to go through the administrative process before obtaining a definitive declaration of his legal rights."). This Court should, accordingly, dismiss both of California's APA claims on this threshold jurisdictional ground alone.

2. The Challenged Conditions Are Not Arbitrary or Capricious

Plaintiff's Fourth Claim for Relief alleges that the notice, access, and Section 1373 conditions are arbitrary or capricious in violation of the APA. *See* Am. Compl. ¶¶ 139-44. As an initial matter, if the conditions are statutorily authorized and comport with the Spending Clause – which plaintiff largely *concedes* at least for the Section 1373 condition[6] – it is unclear how "arbitrary or capricious" scrutiny could otherwise limit USDOJ's broad discretion. In any event, when the courts review an agency's action under the "arbitrary or capricious" standard, it is "required to be 'highly deferential,'" and to "presum[e] the agency action to be valid" as long as it is supported by a rational basis. *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (quoting *J&G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1051 (9th Cir. 2007)). This standard of review is "narrow," and does not authorize a district court "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

[6] As explained above, the Amended Complaint raises no claim that the Section 1373 compliance condition violates the separation of powers, is *ultra vires*, or offends the "ambiguity" inquiry under the Spending Clause.

Here, plaintiff's claim fails because "the agency's reasons for" imposing the challenged conditions "were entirely rational." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009). The imposition of the challenged conditions is understandable as a result of a May 2016 report by the Department's Office of Inspector General ("OIG") finding deteriorating local cooperation with "efforts to remove undocumented criminal aliens from the United States." RJN, Ex. N (OIG Memorandum) at 1-2 n.1. The 2016 OIG report advised that "the information we have learned to date during our recent work about the present matter differs significantly from what OIG personnel found nearly 10 years ago" in a 2007 audit, in which federal immigration authorities had "commented favorably to the OIG with respect to cooperation and information flow they received from the seven selected jurisdictions" that were examined. *Id.* The OIG report focused on California, among other jurisdictions, in reaching its conclusions about the changed state of affairs in 2016. *See id.* at 13.

In the FY 2016 grant cycle, USDOJ under the prior Administration instituted a requirement for grantees to certify compliance with Section 1373. RJN, Ex. C ¶ 55 (California Byrne JAG Award 2016). For the FY 2017 cycle, the Department maintained that condition and added the notice and access conditions, publicly offering a sound explanation for all three conditions. The Department's "Backgrounder on Grant Requirements" of July 25, 2017, RJN, Ex. O, stated that the conditions have a "goal of increasing information sharing between federal, state, and local law enforcement" so that "federal immigration authorities have the information they need to enforce the law and keep our communities safe." *Id*. The Backgrounder also noted that some jurisdictions have "refus[ed] to cooperate with federal immigration authorities in information sharing about illegal aliens who commit crimes," and stated that the conditions will "prevent the counterproductive use of federal funds for policies that frustrate federal immigration enforcement." *Id.* Thus, the three conditions are "common-sense measures," *id.*, and "even in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense" as "an exercise in logic rather than clairvoyance." *Fox Television*, 556 U.S. at 521.

Finally, as discussed above in relation to the Spending Clause, immigration enforcement undoubtedly relates to criminal justice. Numerous federal statutes expressly connect these two

subjects. *See supra* text at 13-15. The challenged conditions thus rationally promote interests in "maintain[ing] liaison" among tiers of government "in matters relating to criminal justice," 34 U.S.C. § 10102(a)(2), and comport with the intergovernmental cooperation that Congress contemplates in immigration enforcement. *See, e.g.*, 8 U.S.C. §§ 1226(d), 1357(g), 1373; *Arizona*, 567 U.S. at 411-12 ("Consultation between federal and state officials is an important feature of the immigration system" and Congress "has encouraged the sharing of information about possible immigration violations.").

II. Plaintiff's Claim for a Declaration Regarding its Statutes' Compliance with Section 1373 Should Be Dismissed

Aside from the Byrne JAG grant conditions, plaintiff's Fifth Claim for Relief seeks a declaration that several California statutes "comply with Section 1373" – specifically, the TRUST Act, Cal. Gov't Code §§ 7282-7282.5; the TRUTH Act, Cal. Gov't Code §§ 7283-7283.2; the California Values Act, Cal. Gov't Code §§ 7284-7284.12 ("Values Act"); California Penal Code §§ 422.93, 679.10, and 679.11; California Code of Civil Procedure § 155; and California Welfare and Institutions Code §§ 827 or 831. *See* Am. Compl. ¶¶ 145-153. Plaintiff also seeks an order enjoining the defendants from "withholding [funding] and terminating, or disbarring and making ineligible the State and its political subdivisions" under the Byrne JAG Program or any COPS Office program based on Section 1373 and any of those state statutes. *Id*. at 38. Plaintiff lacks standing, however, to seek a ruling regarding any state statutes other than the Values Act, and its request for a ruling on the Values Act is unripe. Alternatively, if plaintiff's claim regarding the Values Act were justiciable, the Court should deny on its merits the State's request for a declaration that the Act does not violate Section 1373.

A. Plaintiff's Request for a Ruling Regarding Compliance with Section 1373 Is Non-Justiciable

Under Article III of the Constitution, the jurisdiction of the federal courts extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Matters outside this rubric are "non-justiciable." *Or. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc'ns, Inc*., 288 F.3d 414, 416 (9th Cir. 2002). Two principles of justiciability are involved here: standing and ripeness.

"While standing is concerned with *who* is a proper party to litigate a particular matter, the doctrines of mootness and ripeness determine *when* that litigation may occur." *Haw. Cty. Green Party v. Clinton*, 14 F. Supp. 2d 1198, 1201 (D. Haw. 1998). Where a plaintiff lacks standing or its claims are unripe, the court lacks jurisdiction, and where jurisdiction is lacking, the plaintiff necessarily cannot show a likelihood of success for purposes of a preliminary injunction. *See Pollara v. Radiant Logistics Inc.*, 2012 WL 12887095, at *5 (C.D. Cal. Sept. 13, 2012) (noting that "standing to bring a claim . . . is a necessary predicate to demonstrate a likelihood of success on the merits").

To satisfy the "irreducible constitutional minimum" of standing, a plaintiff must demonstrate an "injury in fact," a "fairly traceable" causal connection between the injury and defendant's conduct, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (citation omitted). The injury needed for constitutional standing must be "concrete," "objective," and "palpable," not merely "abstract" or "subjective." *See Whitmore v. Arkansas*, 495 U.S. 149, 155, 178 (1990); *Bigelow v. Virginia*, 421 U.S. 809, 816-17, 830 (1975). Additionally, the injury must be "certainly impending" rather than "speculative." *Whitmore*, 495 U.S. at 157, 158. In short, for the plaintiff to have standing, "an actual, live controversy must exist between parties with adverse legal interests." *Pollution Denim & Co. v. Pollution Clothing Co.*, 2009 WL 10672270, at *8 (C.D. Cal. Feb. 9, 2009).

Constitutional justiciability also requires that a dispute be ripe for judicial consideration. In a challenge to governmental action, that means the challenged action must have been "formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In other words, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). Like the rules of standing described above, these considerations are part of whether the case presents a concrete controversy under Article III. *See Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 850 (9th Cir. 2001) ("The ripeness doctrine is derived from Article III's case or controversy requirement. It prevents the courts from entangling themselves in abstract disagreements over administrative policies, and

also protects the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.") (citation omitted), *aff'd sub nom. Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).[7]

Applying these standards here, the plaintiff cannot show the "injury in fact" needed for constitutional standing, and its claims are not constitutionally ripe for judicial review. First, defendants have not withheld or threatened to withhold grant funding based on any state statute other than the Values Act, such that plaintiff lacks standing to seek a ruling regarding any of the other statutes listed. Second, there is no ripe controversy regarding the Values Act itself because defendants have not yet made a final determination regarding whether it violates Section 1373.

1. Plaintiff Lacks Standing to Seek a Ruling Regarding Any State Statute Other Than the Values Act

OJP wrote to the California agency responsible for administering Byrne JAG grants on April 21, 2017, asking the agency to document its compliance with 8 U.S.C. § 1373. RJN, Ex. L. That letter did not refer to any specific California statutes. On June 29, 2017, the State responded that "there are no state laws of general application that violate Section 1373," and specifically discussed only two enactments – the TRUST Act and the TRUTH Act – asserting that those statutes do not "create tension with Section 1373." *Id.* Ex. M.

In its reply of November 1, 2017, OJP stated that the Department of Justice had determined that two provisions of a different enactment – namely, the Values Act – "may violate 8 U.S.C. § 1373, depending on how your jurisdiction interprets and applies them": specifically, Sections 7284.6(a)(1)(A) and 7284.6(a)(1)(C) and (D) of that Act, which prohibit a law enforcement agency from using money or personnel to "[i]nquir[e] into an individual's immigration status" or to disclose, with certain exceptions, an individual's release date, personal information (including home address), or "other information." *Id.* Ex. N. OJP asked the State to "certify that it interprets and applies [Section 7284.6(a)(1)(A)] to not restrict California officers and employees from requesting information regarding immigration status from federal immigration officers" and that it "interprets

[7] These considerations do not involve merely "prudential ripeness," which asks, in contrast, about the "fitness" of the issues presented for judicial review and whether withholding review would subject the parties to "hardship." *See Coons v. Lew*, 762 F.3d 891, 900 (9th Cir. 2014).

and applies [Section 7284.6(a)(1)(C) and (D)] to not restrict California officers from sharing information regarding immigration status with federal immigration officers, including information regarding release date and home address." *Id.*

California responded on November 13, 2017, stating (1) that Section 7284.6(a)(1)(A) "prohibits law enforcement officers from asking an individual about his or her immigration status, or from asking for that information from non-governmental third parties, but does not restrict law enforcement from inquiring about an individual's immigration status from government entities," and (2) that Section 7284.6(a)(1)(C) and (D) prohibit the disclosure of release dates and home addresses, but purportedly "do not violate Section 1373 because Section 1373 only prohibits restrictions on 'citizenship or immigration status information,' not other information." *Id.* Ex. O. OJP has not yet responded to California's letter of November 13; thus, OJP has not yet determined administratively whether the State's laws comply with Section 1373.

Under these circumstances, plaintiff lacks standing to seek a ruling on whether any state laws other than the Values Act violate Section 1373 such that defendants may withhold federal grant funds based on non-compliance. Given that USDOJ has not addressed whether any provisions of California law other than the Values Act may violate Section 1373 and thus render California ineligible for grant funds, there is no "live controversy" regarding whether any other state statutes comply with Section 1373 and no foreseeable "injury in fact" arising out of defendants' application of any such statutes. *See Pollution Denim & Co.*, 2009 WL 10672270, at *8-10; *Steel Co.*, 523 U.S. at 102-03. Any assumption that defendants might one day withhold grant funds based on any California statute other than the Values Act would be "speculative," and thus cannot be the basis for standing. *See Whitmore*, 495 U.S. at 157, 158.

2. Plaintiff's Request for a Ruling Regarding the Values Act Is Constitutionally Unripe

Plaintiff's request for a ruling on whether defendants can withhold grant funds based on the Values Act is also non-justiciable, for two reasons. First, as noted already, OJP has not yet responded to California's letter regarding the Values Act, and thus has not determined administratively whether the Act violates Section 1373. RJN, Ex. O. OJP has only stated that portions of

the Values Act "may" violate Section 1373, and has not had an opportunity to fully consider the State's arguments to the contrary. *Id.* Ex. N. Moreover, OJP's letter of November 1 stated explicitly that it was only a "preliminary assessment of [California's] compliance with 8 U.S.C. § 1373" and did not "constitute final agency action." *Id.* Ex. N; *see* 34 U.S.C. § 10223 (stating that OJP's "determinations, findings, and conclusions shall be final and conclusive upon all applications"). As the district court in Chicago recently explained, "addressing an as-applied challenge to Section 1373 based on [USDOJ's preliminary determination regarding plaintiff's compliance] is premature." *Chicago v. Sessions*, 2017 WL 5499167, at *1 (N.D. Ill. Nov. 16, 2017) *("Chicago II").* Moreover, even after OJP determines whether the Values Act violates Section 1373, the State will have an opportunity to appeal that initial determination administratively. *See* 34 U.S.C. § 10154; *see generally* 28 C.F.R. Part 18. OJP could decide, either upon consideration of the State's letter of November 13, 2017, or upon consideration of any administrative appeal, that the Values Act does not violate Section 1373 and thus that USDOJ will not withhold grant funds on that basis. Therefore, plaintiff's request for a ruling on whether the Values Act violates Section 1373 "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300 (citation omitted).[8]

Additionally, this case is not justiciable because 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 consistent with Section 1373. That is a fact-intensive inquiry, and is much better handled through the administrative process rather than through the type of ruling sought here. As noted earlier, that process is ongoing and is narrowing the scope of the dispute between the parties. Importantly, if this Court does address the Values Act, that ruling cannot properly immunize the State from liability under Section 1373 if it turns out, in fact, that the State is

[8] Defendants' alternative argument below that the Court should dismiss plaintiff's request for a declaratory judgment regarding the Values Act on its merits does not make this claim ripe, given that OJP must still be permitted to consider the State's arguments in the administrative process. *Cf. Ardalan v. McHugh*, 2014 WL 3846062, at *12 n.10 (N.D. Cal. Aug. 4, 2014) (noting that "the futility exception [to administrative exhaustion] requires a plaintiff [to] show it is *certain* that the claim will be denied on appeal, or that resort to administrative remedies is clearly useless") (citations omitted).

implementing the Act in a way that violates Section 1373.

Under these circumstances, plaintiff's request for an order regarding whether the Values Act would violate the Section 1373 compliance condition is unripe, in that it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. Thus, any judicial consideration of this issue should await further developments.[9]

B. The Court Should Dismiss Plaintiff's Claim for Declaratory Relief Regarding the Values Act on Its Merits

Alternatively, even if plaintiff's request for an order against withholding grant funds based on any California laws were justiciable at this point, this Court should dismiss on its merits plaintiff's request for an order that none of its laws would violate the Section 1373 compliance condition. As explained already, the only state law that may legitimately be at issue here is the California Values Act, Cal. Gov't Code §§ 7284-7284.12. Assuming this issue were justiciable, however, the Court should decline to rule that the Values Act is consistent with Section 1373.

The Values Act provides, among other things, that California law enforcement agencies shall not use "moneys or personnel to investigate persons . . . for immigration enforcement purposes," including by "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities in accordance with Section 7282.5," or by "[p]roviding personal information, as defined in Section 1798.3 of the Civil Code, about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public." Cal. Gov't Code § 7284.6(a). Section 7282.5 of the Government Code, referenced in the Values Act, sets forth a very specific list of circumstances in which a law enforcement agency is permitted to "cooperate with [federal] immigration officials," based mostly on whether the individual in question has committed any of certain listed felonies. *Id.* § 7282.5(b). Section 1798.3 of the Civil Code, also

[9] In opposing plaintiff's motion for preliminary injunction, defendants argued that plaintiff's request for a ruling regarding the Values Act was unripe for the additional reason that the California Secretary of State had received a request for a voter referendum on the Act. As far as defendants have been able to learn, however, no signatures in support of that referendum have been submitted, and the Values Act is apparently in effect.

cited in the Values Act, defines "personal information" as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history." Cal. Civ. Code § 1798.3(a).

As described earlier, 8 U.S.C. § 1373 provides, among other things:

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

8 U.S.C. § 1373(a). The Values Act cannot be squared with this statute.

a. Section 1373 forbids a state or local government from prohibiting the exchange of "information *regarding*" an individual's immigration status, not merely the individual's immigration status. Congress's use of "information regarding" was clearly intended to broaden the scope of the information covered, as demonstrated by comparing Section 1373(a) to Section 1373(c), which uses the different phrase "[immigration] status information." 8 U.S.C. §1373; *see Dean v. United States*, 556 U.S. 568, 573 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted). And the meaning of the word "regarding" is quite broad. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (concluding that "ordinary meaning" of the closely analogous "relating to" is "a broad one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with'") (citing Black's Law Dictionary 1158 (5th ed. 1979)); *Davis v. Fenton*, 26 F. Supp. 3d 727, 740 (N.D. Ill. 2014) (concluding that "regarding" is "just as broad . . . as 'arising out of' and 'relating to'"). The breadth of this provision is also reinforced by other language that Congress used, such as making clear that no local policy could "in any way restrict" the sharing of such information, reinforcing Congress's overarching interest in halting policies that might stymie the sharing of information between local law enforcement and immigration authorities. *See Bologna v. San Francisco*, 121 Cal. Rptr. 3d 406, 414 (Cal. App. 2011) (law "'designed to prevent any State or local law . . . that prohibits or *in any way restricts* any

communication between State and local officials and the INS'") (quoting House report) (emphasis added). Indeed, a contrary reading of Section 1373 would render it largely meaningless, as DHS is already aware of an individual's legal right to be present in the United States. *See Steinle v. San Francisco*, 230 F. Supp. 3d 994, 1016 (N.D. Cal. 2017) (explaining that "ICE was already aware of Lopez-Sanchez's immigration status").

b. The Values Act prevents sharing personal and identifying information that plainly qualifies as information regarding immigration status. First, California law defines personal information very broadly as "any information . . . that identifies or describes an individual" such as name or address. *See* Cal. Civ. Code § 1798.3. Thus, under the Values Act, state officials would be unable to confirm or reveal the identity of individuals in state custody. But a person's identity and name are highly relevant to determining immigration status and removability: No such evaluation can be made if the person's identity is not disclosed. And the person's address directly relates to whether the person is "lawfully *present* in the United States," which Congress described as a component of "immigration status." 8 U.S.C. § 1357(g)(10)(A) (emphasis added); *see* Black's Law Dictionary 1065 (5th ed. 1979) (defining "presence" as "being in a certain place and not elsewhere"). Identity and other personal information are also relevant to many immigration status issues, such as whether the person was born outside the United States, whether the person derived citizenship from a relative, whether the person qualifies for immigrant status under 8 U.S.C. § 1101(a)(15), whether the alien's place of residence qualifies them as a non-resident visitor, 8 U.S.C. § 1227(a)(1)(C); such information also facilitates taking an alien into custody for lawful removal proceedings, *id.* § 1226(a). The restrictions on sharing personal information cannot be squared with Section 1373.

c. The Values Act provisions that prevent the sharing of prisoner release dates also violate Section 1373 because an alien's release date is information regarding the person's immigration status. An alien's release date is directly relevant to when the alien can ultimately be removed from the country. Federal immigration law recognizes the importance of allowing States and localities to impose criminal punishment on individuals who are in this country illegally and commit crimes. Thus, federal law specifies that, except in limited circumstances, DHS "may not remove an alien

who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. § 1231(a)(4). But that law – and the comity interests that underlie it – render the time of an alien's release from state custody critical information regarding the alien's immigration status, as the alien is subject to removal only at the end of that custody period. *See id.* § 1231(a)(1)(B)(iii) (removal period "begins on . . . the date the alien is released from [state criminal] detention"). Similarly, the statute requiring the detention of criminal aliens specifies that immigration detention for removal proceedings must begin "when the alien is released" from state criminal custody. *Id.* § 1226(c)(1). The Ninth Circuit has held that this statute requires immigration custody to begin immediately upon release from state criminal custody, underscoring the importance of the release date to the person's status under the immigration laws. *See Preap v. Johnson*, 831 F.3d 1193, 1202 (9th Cir. 2016) (Section 1226(c) "governs the full life cycle of the criminal aliens' detention" including "specifying the requirements for taking them into custody"), *pet. for cert. filed*, No. 16-1363 (May 11, 2017). Other INA provisions also confirm that an alien's release date is highly relevant to the person's status under the immigration laws given the relevance of that persons' location within the United States. *See* 8 U.S.C. § 1357(g)(10)(A) ("immigration status" includes whether individual is "lawfully *present* in the United States"); *id.* § 1357(a)(1) (immigration officers "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States"); *id.* § 1226(a) ("alien may be arrested and detained" on a warrant). Thus, release date information relates to an individual's status under the immigration laws because it is a core aspect of the enforcement process Congress designed.

In light of all the above, although OJP has made no final agency decision, this Court should decline to hold that the Values Act does not violate Section 1373 or to enter an injunction regarding conformity of California's laws with Section 1373.

IV. Section 1373 Is Consistent with the Tenth Amendment

Plaintiff's final claim is that the Section 1373 compliance condition would violate the Tenth Amendment if the statute were construed as "extending" to the state statutes identified in the Amended Complaint. See Am. Compl. ¶¶ 149-150, 153. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people." It stands for the proposition that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf." *New York*, 505 U.S. at 188; *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 620 (2012).

As explained above, only one state statute could possibly become legitimately at issue here under the present circumstances: the Values Act. The question under plaintiff's Tenth Amendment claim, therefore, is whether applying the Section 1373 compliance condition in such a way that the Values Act violates the condition would "compel the State[] to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf." *Id.* at 575, 620. For several reasons, it would not.

First, the dispute here does not involve a federal statutory mandate that directly regulates California, but rather a condition on receipt of federal funds that the State and its subdivisions are free to accept or reject. Thus, the relevant question here is not whether Section 1373, as an independent statutory obligation, would violate the Tenth Amendment. Instead, the only pertinent question is whether conditioning the receipt of federal funds on compliance with Section 1373 is a valid exercise of the spending power – which, as discussed above, it is. In this context, it is well-settled that the federal government "may offer funds to the States, and may condition those offers on compliance with specified conditions." *Id.* at 537; *cf. Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) ("[A]s long as the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation.") (citation omitted). In effect, by requesting funds from the Federal Government, the State acts voluntarily and waives any Tenth Amendment concerns.

Second, the purpose and effect of Section 1373 and the challenged grant condition are to further the express goals of the INA, not to "commandeer" state officials. As noted earlier, the INA provides that a federal immigration officer "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). The INA also provides that certain classes of aliens, including certain criminal

aliens, shall be removed from the United States upon the order of the Attorney General or the Secretary of Homeland Security, *see, e.g.*, *id.* §§ 1227(a), 1228. Federal officials cannot carry out these duties without knowing where those persons are located. Indeed, the legislative history of Section 1373 indicates that the statute was intended to counteract passive resistance to sharing information. *See, e.g.*, S. Rep. No. 104-249, at 19-20 (1996) (noting that "[t]he acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the [INA]").

Third, even if an outright mandate rather than a grant condition were involved here, a mere requirement not to prohibit individuals from providing information would not violate the Tenth Amendment. The courts have rejected Tenth Amendment challenges to a number of federal statutes that regulated the handling of information. For example, in *Reno v. Condon*, the Supreme Court rejected a challenge to a federal law regarding information on motor vehicle operators, which both required States to disclose information in certain circumstances and prohibited its disclosure in other circumstances. 528 U.S. 141, 143-46, 149-150 (2000). Similarly, in *Freilich v. Upper Chesapeake Health, Inc.*, the Fourth Circuit rejected a challenge to a federal statute that required health care entities to provide certain information regarding physicians to the State Board of Medical Examiners, and required state boards to forward that information to a federal database. 313 F.3d 205, 213-14 (4th Cir. 2002); *see* 42 U.S.C. §§ 11133, 11134. In rejecting that claim, the court wrote that the federal statute "does not commandeer the state legislature or executive" and "does not compel states to implement a federal regulatory program either. . . . All that the [statute] requires of states is the forwarding of information." 313 F.3d at 213-14. Further, the Second Circuit has rejected a Tenth Amendment facial challenge to Section 1373 of the kind the State raises here, noting that the Tenth Amendment does not give States and their subdivisions "an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs," particularly in the information sharing context. *City of New York v. United States*, 179 F.3d 29, 34-35 (2d Cir. 1999); s*ee Printz v. United States*, 521 U.S. 898, 918 (1997) (contrasting federal statutes that "require only the provision of information to the Federal

Government" with those that "force[] participation of the States' executive in the actual administration of a federal program"); *Freilich v. Bd. of Directors*, 142 F. Supp. 2d 679, 697 (D. Md. 2001) ("This Court has found no case" holding that a statutory command to report information for a federal data bank "commandeers the state."); *accord Chicago I*, 264 F. Supp. 3d at 946-47.

Fourth, contrary to plaintiff's allegation, the Section 1373 condition – again, even assuming it were more than a mere grant condition – does not "commandeer[] the State and its political subdivisions by directing their personnel how to act and handle data under State and local control in order to advance a federal program." *See* Am. Compl. ¶ 150. For this proposition, plaintiff cites *Printz v. United States*, 521 U.S. 898, 918 (1997), but that decision actually undercuts the State's claim. There, the Court struck down certain provisions of the Brady Act, which required local law enforcement officers to conduct background checks on prospective handgun purchasers. The Act required much more than the forwarding of information, compelling officers to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General," and to provide, upon request, a written statement of the reasons for any contrary determination. *Id.* at 903 (citation omitted). Other federal laws requiring action by state or local officials were cited in support of the constitutionality of those provisions, but the Court rejected the relevance of those laws, observing that some were "connected to federal funding measures, and [could] perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States" and that others "require[d] only the provision of information to the Federal Government" and thus did not "involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program." *Id.* at 917-18. Unlike the Brady Act, Section 1373 only involves the exchange of information with federal authorities, and it is only a prohibition on policies that bar sharing information, not an affirmative obligation to share information.

CONCLUSION

Accordingly, the Court should dismiss plaintiff's First Amended Complaint and all of its claims.

Dated: January 16, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

BRIAN STRETCH
United States Attorney

JOHN R. TYLER
Assistant Director

/s/ W. Scott Simpson

W. SCOTT SIMPSON (Va. Bar #27487)

ANTONIA KONKOLY
Trial Attorney

Attorneys, Department of Justice
Civil Division, Room 7210
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@usdoj.gov

COUNSEL FOR DEFENDANTS JEFFERSON B. SESSIONS III, Attorney General of the United States; ALAN R. HANSON, Principal Deputy Assistant Attorney General; and U.S. DEPARTMENT OF JUSTICE

EXHIBIT D

CHAD A. READLER
Acting Assistant Attorney General
ALEX G. TSE
United States Attorney
JOHN R. TYLER
Assistant Director
W. SCOTT SIMPSON (Va. Bar #27487)
Senior Trial Counsel
ANTONIA KONKOLY
Trial Attorney
Department of Justice, Room 7210
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@DOJ.gov
COUNSEL FOR DEFENDANTS
JEFFERSON B. SESSIONS III, Attorney General of the United States; ALAN R. HANSON, Principal Deputy Assistant Attorney General; and U.S. DEPARTMENT OF JUSTICE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

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

Defendants.

No. 3:17-cv-04701-WHO

DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS

Date: February 28, 2018
Time: 2:00 p.m.

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INTRODUCTION

Law enforcement in this country is a cooperative endeavor. Criminal acts often implicate the jurisdiction of more than one agency, and thus local, state, tribal, and federal officials work together in a variety of ways to fight crime and ensure public safety. Not surprisingly, then, federal law often contemplates, and is premised upon, such cooperation. This is true for the Immigration and Nationality Act, and it is true for the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG Program"). Both statutes explicitly contemplate and encourage effective law enforcement by promoting cooperation between the Federal Government on the one hand and local, state, and tribal governments on the other. Unfortunately, California has in recent years adopted policies of non-cooperation with respect to law enforcement involving aliens who have committed serious crimes. And in this suit, California seeks to further that policy by claiming that the Federal Government cannot condition its own law enforcement grants on such cooperation—even when the express statutory purpose of that funding is to promote cooperation.

As explained in detail in previous briefing in this case, at the core of this suit are three conditions that the DOJ has notified applicants that Fiscal Year ("FY") 2017 Byrne JAG awards will include. Specifically, the challenged conditions will require grantees to (1) have a policy of providing DHS with advance notice of the scheduled release date of certain individuals held in state or local correctional facilities (the "Notice Condition"); (2) have a policy permitting federal agents to access state or local correctional facilities for certain immigration enforcement purposes (the "Access Condition"); and (3) comply with a federal statute, 8 U.S.C. § 1373, that prohibits state and local government and law enforcement entities from restricting certain communications with DHS (the "Section 1373 Condition"). *See* Dkt. No. 71-1 (Defendants' Request for Judicial Notice ("Def. RJN")), Ex. B (2017 Greenville Award) ¶¶ 53, 55, 56. The call for the modest intergovernmental law enforcement cooperation embodied in these three grant conditions follows from recognition that "[c]onsultation between federal and state officials is an important feature of the immigration system." *Arizona v. United States*, 567 U.S. 387, 411 (2012). And the conditions are consonant with the Byrne JAG Program's purposes of ensuring that grantees "report such data

… and information … as the Attorney General may reasonably require" and undertake "appropriate coordination with affected agencies." 34 U.S.C. § 10153(a)(4), (5).

California's suit nevertheless attacks the prospective imposition of these conditions, and seeks a declaration that the State complies with Section 1373. The Amended Complaint warrants dismissal in its entirety, as the claims set forth therein contravene clear statutory language authorizing the Department to condition Byrne JAG funding; ignore the close relationship between the grant conditions, federal law enforcement prerogatives, and the purposes of the Byrne JAG Program; and otherwise suffer from various legal defects. Further, California's alternative request for an injunction prohibiting any DOJ finding that any of several state laws violate the Section 1373 Condition in either the Byrne JAG Program or two other programs fails to present a justiciable controversy—and, in any event, further fails on its merits, as set forth below.

At bottom, California cannot sustain its counterintuitive theory that Byrne JAG applicants can insist on their entitlement to a federal law enforcement grant even as they refuse to provide basic cooperation on law enforcement related to criminal aliens, which the Department has identified as a federal priority and which plainly intersects with criminal justice under the framework of the INA. *Cf. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds."). For all of these reasons, and as discussed in more detail below, the Court should dismiss this action in its entirety.

ARGUMENT

I. The Challenged Immigration-Related Byrne JAG Conditions Are Lawful

A. The Access and Notice Conditions Are Authorized by Statute

California's first contention is that DOJ lacks the statutory authority to impose either the Access or the Notice Condition,[1] because there is "no provision of the JAG authorizing statute that affirmatively supports the imposition" of these conditions. Dkt. No. 80 ("Opp.") at 5. But the

[1] California makes no such argument with respect to the Section 1373 condition. Thus, California concedes that this condition is indeed within the statutory parameters of the Byrne JAG Program.

relevant question is not whether the JAG authorizing statute *requires* the imposition of the Notice and Access Conditions. Rather, it is whether the statute *delegates to the DOJ* the authority to add conditions to Byrne JAG funds in order to further Departmental policies and priorities. As explained in Defendants' opening memorandum, *see* Dkt. No. 77 ("Def. Mem.") at 9, Congress may, of course, delegate to the executive branch the authority to attach specific conditions on the receipt of federal funds, just as it may delegate other types of legislative authority. *See*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 488 (1998) ("Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money.") (citation omitted).

Here, as relevant to the administration of the Byrne JAG Program, Congress expressly authorized the Department to "*plac[e] special conditions* on all grants," 34 U.S.C. § 10102(a)(6), to "*determin[e] priority purposes* for formula grants," *id*. (emphasis added), and to ensure that grantees "comply with . . . all other applicable Federal laws." *Id*. § 10153(a)(5)(D); *see also* H.R. Rep. No. 109-233, at 101 (2005). These capacious delegations of authority plainly empower the Department to impose the Notice and Access Conditions to promote intergovernmental law enforcement cooperation, so that grantee policies do not impair federal policies.

In an attempt to evade this conclusion, California contends that, as it is used in 34 U.S.C. § 10102(a)(6), the phrase "special conditions" constitutes a "narrow" "term of art" that is necessarily—and strictly—limited in scope to such conditions as may be placed "on particular high-risk grantees that have struggled or failed to comply with grant conditions in the past," Opp. at 8 (citing, *inter alia*, two expired regulations), and DOJ must accordingly award all appropriated Byrne JAG funds to any entity that merely satisfies certain "ministerial requirements and certifications" set forth by the Byrne JAG authorizing statute. Preliminarily, however, California's purported limitation has no support in the Byrne JAG authorizing statute itself. Further, as Defendants have explained at length, *see* Def. Mem. at 5-6, the Department has long employed its "special conditions" authority to impose a number of conditions applicable to *all* grantees—including, to cite but two recent examples, limitations on research using human subjects, and an "American-made" requirement for body armor purchases. Def. RJN, Ex. A ¶¶

30, 39; *see generally* Def. Mem. at 5-6 (discussing other conditions); Def. RJN, Ex. A (setting forth more than 50 "special conditions" of general applicability). California fails to explain how its narrow reading of "special circumstances" is compatible with any of the across-the-board conditions the Department has historically imposed pursuant to this delegated authority.[2]

Finally, California argues that were the Court to find delegated authority for the Notice and Access Conditions, it would necessarily bestow Defendants with "unfettered discretion" to impose any condition(s) at all on the receipt of Byrne JAG funds, no matter how remote or irrational. *Id.* This argument, too, is a straw man. The Byrne JAG Program is indisputably an exercise of the Congressional Spending authority. Thus, in exercising its delegated authority to impose "special conditions on," and "determin[e] priority purposes for," Bryne JAG grants, 34 U.S.C. § 10102(a)(6), there is no dispute that the Department must adhere to the Spending Clause. While the spending authority is undoubtedly "broad," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), it is "of course not unlimited," *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted). However, as set forth below, the Notice and Access Conditions fall easily within the scope of the Spending authority.[3]

B. The Challenged Conditions Comply with the Spending Clause

The Spending Clause authorizes Congress—or, where relevant, its agency delegee—may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory *and administrative* directives." *Dole*, 483 U.S. at 206 (emphasis

[2] To the extent California contends that the use of the "special conditions" term in other contexts requires its ahistorical interpretation here, the Supreme Court has "several times affirmed" that "identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, --- U.S. ---, 135 S. Ct. 1074, 1082 (2015) (collecting cases).

[3] Because this is so, California's contentions that the Notice and Access Conditions run afoul of federalism principles, *see* Opp. at 5, 7, are similarly misplaced, as "[i]t is well settled that Congress is entitled to further policy goals indirectly through its spending power that it might not be able to achieve by direct regulation." *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 230 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013). Indeed, federal grants routinely further federal policy in areas within the traditional purview of state or local governments, such as education and community development. *See, e.g.*, 20 U.S.C. §§ 1411, 6332-33 (grants under the Individuals with Disabilities Education Act and Elementary and Secondary Education Acts, respectively); 42 U.S.C. § 5301 *et seq.* (Community Development Block Grant Program).

added); *cf.*, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program."). Consistent with these principles (and as relevant to this suit), any terms attached to the receipt of federal funds must be "unambiguous[]," *Dole*, 483 U.S. at 207, and also bear "some relationship" to "the purpose of the federal spending," *New York v. United States*, 505 U.S. 144, 167 (1992). The challenged conditions easily satisfy these standards.

1. The Notice and Access Conditions are Unambiguous

There is nothing "ambiguous" about the Notice and Access Conditions, and California can determine whether to accept FY 17 Byrne JAG funds "knowingly, cognizant of the consequences of [its] participation." *Dole*, 483 U.S. at 207 (citation omitted). As Defendants have explained, both conditions are clearly and straightforwardly stated, and do not plausibly fail to give the State adequate notice of the terms to which it would need to commit in order to participate in the FY 17 Byrne JAG Program. *See* Def. Mem. at 12-13 (discussing the challenged grant terms in detail).

Further, although California complains that there is no "federal statute that provides guidance on the Access or Notification Conditions," Opp. at 13, this argument ignores the opportunity for administrative consultation that the Byrne JAG Program invites. The FY 2017 Byrne JAG solicitation invited any prospective grantee with a question about "any . . . requirement of this solicitation" to contact the Office of Justice Program's ("OJP") Response Center (customer service center) by telephone, email, fax, or online chat. *See* Dkt. No. 1-16 at 2. A prospective grantee could also contact the appropriate "State Policy Advisor"—that is, a specific, named OJP employee assigned to work with jurisdictions within a specified geographical area. *Id*. Beyond this invitation in the FY 2017 solicitation, in each of the challenged conditions that appears in the award document for a prospective grantee to consider accepting, the Department has invited submission of "[a]ny questions about the meaning or scope of this condition . . . before award acceptance." Def. RJN, Ex. B (2017 Greenville Award) ¶¶ 53, 55, 56. Indeed, while California complains that "[t]he Access Condition … fails to provide … notice of whether a law or policy that requires local jurisdictions to inform inmates of their right to have a

lawyer present or to decline an interview with ICE would violate the condition," Opp. at 13, had California simply availed itself of this consultation process, litigation of this issue could have been avoided altogether. As Defendants would have made clear to California, the Department does not understand either the Notice or the Access Condition to forbid a jurisdiction from informing detainees, where required by law, that they may choose not to meet with immigration authorities.

Accordingly, and for the additional reasons set forth in Defendants' motion, *see* Def. Mem. at 11-13, the Notice and Access Conditions satisfy the *Dole* clear statement rule.

2. The Conditions Are Related to the Byrne JAG Program

California also argues that the Notice, Access, and Section 1373[4] Conditions "do not have a sufficient nexus" to the goals of the Byrne JAG Program. Opp. at 10. But this aspect of *Dole* does not impose an "exacting standard":

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

Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002).

The challenged conditions easily satisfy this standard. The Byrne JAG Program's authorizing statute specifies that Byrne JAG funds are designed to provide resources "for criminal justice," 34 U.S.C. § 10152(a)(1), defined broadly as "activities pertaining to crime prevention, control, or reduction, or the enforcement of the criminal law, including, *but not limited to*, police efforts to prevent, control, or reduce crime *or to apprehend criminals*, … activities of courts having criminal jurisdiction, and *related agencies*," *id.* § 10251(a)(1) (emphasis added). Thus, contrary to California's view that the Byrne JAG Program's "overarching goal" is to promote State and local flexibility, Opp. at 6, the program's overall goals are much broader: to support and strengthen law enforcement and criminal justice. And, because the challenged conditions relate to

[4] California does not dispute that the Section 1373 Condition, at least, is statutorily authorized. California does not, however, explain how a condition that is concededly within the statutory parameters of the Byrne JAG Program can be wholly "unrelated" to that Program.

specifically to aliens who are under detention and who have either committed crimes or are suspected of having committed crimes, the conditions plainly intersect with these broad programmatic purposes. Relatedly, the INA's authorization of removal of aliens who commit any of a wide array of criminal offenses, 8 U.S.C. § 1227(a)(2), is part and parcel of law enforcement and criminal justice, if for no other reason than that removal is one of the means by which the Federal Government protects the public and prevents recidivism by criminal aliens. And even if that basic point were not enough, numerous other provisions of the INA also intertwine these two subjects, and/or contemplate cooperation among state and local officers and federal officials on immigration enforcement.[5]

Tellingly, California's assertion that "immigration law has nothing to do with enforcement of local criminal laws," Opp. at 11 (citation omitted), is belied by the connection that the State itself draws between its immigration enforcement policies and its crime rates. *See id*. at 16 (arguing that "law enforcement policies that collaborate and build trust with immigrant communities result in positive criminal enforcement and safety outcomes"). Thus, while California may disagree with the *substance* of the federal policy choices embodied by the challenged conditions, the undeniable *relationship* between these subjects is evident from the State's own arguments.[6]

In sum, the challenged conditions relate only to aliens who are under detention and who

[5] *See, e.g.*, 8 U.S.C. § 1226(a), (c) (authorizing detention of criminal alien during removal proceedings and requiring detention for certain criminal aliens); *id.* § 1231 (providing for continued detention during removal period); *id*. § 1357(g) (providing for formal agreements under which local officers may perform specified immigration functions relating to the investigation, apprehension, or detention of aliens); *id.* § 1324(c) (authorizing state and local officers to make arrests for violations of INA's prohibition against smuggling, transporting, or harboring aliens); *id*. § 1252c (authorizing state and local officers to arrest certain felons who have unlawfully returned).

[6] Further, insofar as California's argument that immigration enforcement cannot bear even "some relationship" to criminal justice relies on the civil nature of the former, *see* Opp. at11, this argument fails to account for the federal Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, which is also "a civil regulatory scheme rather than a criminal one." *United States v. Elkins*, 683 F.3d 1039, 1044-45 (9th Cir. 2012). Yet notwithstanding SORNA's civil nature, a state's compliance with the same is directly tied to its entitlement to its full allotment of Byrne JAG funding. 34 U.S.C. § 20927(a); *see, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387 (2013) (observing with approval that SORNA "used Spending Clause grants to encourage States to adopt its uniform definitions and requirements."). The relatedness inquiry under the Spending Clause thus plainly allows for the linkage of civil and criminal subject areas.

have either committed crimes or are suspected of having committed crimes. State and local cooperation with the Federal Government through the provision of basic information and access allows for effective enforcement of federal immigration law against aliens who are criminals or suspected criminals—and thus makes communities safer. The challenged conditions thus *directly* advance the purposes of the Byrne JAG Program, and easily clear the low bar of bearing "some relationship" to the Program's purposes. *Mayweathers*, 314 F.3d at 1067.

C. Plaintiff's APA Claims Must Be Dismissed for Additional Reasons

1. The APA Claims Do Not Challenge Final Agency Action

"[T]he Administrative Procedure Act does not provide judicial review for everything done by an administrative agency." *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (citation omitted). One limitation, which is jurisdictional in nature, is that "[t]o obtain judicial review under the APA, [a plaintiff] must challenge a final agency action." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (citing 5 U.S.C. § 704). As a preliminary matter, "[f]or there to be 'final' agency action, there must, of course, be 'agency action,'" as defined by 5 U.S.C. § 551(13). *Impro Prods., Inc. v. Block*, 722 F.2d 845, 848-49 (D.C. Cir. 1983). Once an appropriate "agency action" is identified, finality is reached only when the action in question (1) "marks the consummation of the agency's decisionmaking process," and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

California fails to identify an "agency action" within the meaning of the APA, much less one that is "final." As relevant here, the APA defines "agency action" as "the whole or a part" of, *inter alia*, agency "relief … or [the] denial thereof," 5 U.S.C. § 551(13), and "relief," in turn, as including an agency "grant of money [or] assistance …," *id.* § 551(11)(A). In comportment with these definitions, the Ninth Circuit has held that in the context of agency grant-making in particular, "the congressional appropriation to [an agency] of funds for a particular project *does not constitute a final agency action* by the [agency] until the [agency] has *reviewed a grant application and decided to disburse the funds*." *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103-

04 (9th Cir. 2007) (emphasis added). As there is no dispute that DOJ has not yet determined whether to grant FY 17 Byrne JAG funds to California, or deny its pending application, it follows that there is, as of yet, no final agency action for this Court to review.

California responds that "by requiring the [state's] chief legal officer to certify compliance under penalty of perjury with the Section 1373 condition, and the [state] to certify compliance with all three conditions … Defendants have committed to a view that requires California to act." Opp. at 14-15. However, as the Ninth Circuit recently explained, this argument "confuses the issue of whether an agency action is final with that of whether a case is ripe for judicial review." *San Francisco Herring Ass'n v. U.S. Dep't of Interior*, 683 F. App'x 579, 581 (9th Cir. 2017) (explaining that an interlocutory step in an ongoing administrative process may require an entity to make "'an immediate and significant change in [its] conduct of [its] affairs with serious penalties attached to noncompliance'" and yet not be "final" for purposes of APA review) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967)). Similarly, although California is correct that the "practical effects" of an agency decision can be relevant to the "final agency action" analysis, *see* Opp. at 14 (citing *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014)), where, as here, "the practical effect of the agency action is not a *certain change* in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (emphasis added); *see also, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 941-946 (D.C. Cir. 2012) (FDA letters requesting that the plaintiffs cease, on potential penalty of "regulatory action," the marketing and distribution of certain products which the FDA considered to be misbranded medical devices was not "final agency action"); *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) (EPA letter providing requested opinion on whether it would apply certain conditions to a permit application had no legal consequences).

In sum, it is for good reason that "[t]he propriety of an agency's action is reviewed after the final administrative decision." *Commodity Futures Trading Comm'n v. Monex Deposit Co.*, 824 F.3d 690, 692 (7th Cir. 2016) (citation omitted). "The principal purpose of the APA['s]

limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004). "[T]he effect of the judicial review sought by [California] is likely to be interference with the proper functioning of the agency and a burden for the courts." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980); *id.* at 243 (cautioning that APA review is not "a means of turning prosecutor into defendant before adjudication concludes"). California's APA claims falter on this threshold ground, apart from the failure of those claims on their merits.

2. The Challenged Conditions Are Not Arbitrary or Capricious

It is well-established that when a court reviews an agency's action under the "arbitrary or capricious" standard, it is "required to be highly deferential," and to "presum[e] the agency action to be valid" as long as it is supported by a rational basis. *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (citation omitted). Thus, in an APA action, the burden is on the plaintiff to show that the challenged action is arbitrary and capricious, not on the defendant agency to disprove the plaintiff's claim. *See Pierce v. SEC*, 786 F.3d 1027, 1035 (D.C. Cir. 2015); *Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921, 928 (S.D. Cal. 2013), *aff'd*, 673 F. App'x 709 (9th Cir. 2016). The APA standard of review is "narrow," and does not authorize a district court "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The challenged conditions easily meet this standard. As detailed above, Congress established the Byrne JAG Program to further "criminal justice"-related purposes, 34 U.S.C. § 10152(a)(1), broadly defined, *id.* § 10251(a)(1). And, as also explained above, such purposes are rationally advanced by facilitating federal access to aliens who have violated, or are suspected of violating, state or local criminal laws—if for no other reason than that once removed, an alien who has committed a removable criminal offense is undeniably no longer present in this country with the potential to re-offend. *See* 8 U.S.C. § 1227(a)(2) (providing that a criminal conviction for any of a wide array of criminal offenses renders an alien removable).

Further, the challenged conditions rationally promote interests in "maintain[ing] liaison" among tiers of government "in matters relating to criminal justice," 34 U.S.C. § 10102(a)(2), and comport with the intergovernmental cooperation that Congress contemplates in immigration enforcement—which cooperation the May 2016 Office of Inspector General ("OIG") report found decidedly lacking in various jurisdictions around the country. Def. RJN, Ex. P at 1-2 n.1 (OIG report finding deteriorating local cooperation with "efforts to remove undocumented criminal aliens from the United States," including in California, among other jurisdictions); *see also, e.g.*, 8 U.S.C. §§ 1226(d), 1357(g), 1373; *Arizona*, 567 U.S. at 411-12 ("Consultation between federal and state officials is an important feature of the immigration system" and Congress "has encouraged the sharing of information about possible immigration violations.") (citation omitted). As the Department explained in its July 25, 2017 "Backgrounder on Grant Requirements," "[i]mproving the flow of information between federal and state law enforcement authorities is paramount to ensuring that federal immigration authorities have the information they need to enforce the law and keep our communities safe"). Def. RJN, Ex. Q. Thus, the challenged conditions have more than a "reasonable basis" and easily satisfy the "deferential and narrow" APA standard. *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000).

In response, California argues that none of the challenged conditions were incorporated into Byrne JAG grants prior to 2016 (the Section 1373 Condition) or 2017 (the Access and Notice Conditions). *See* Opp. at 15. But where the agency action in question represents a shift in policy, the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted). Further, California's additional argument, that certain unidentified "evidence from jurisdictions around the country" purportedly demonstrates that "law enforcement policies that collaborate and build trust with immigrant communities result in positive criminal enforcement and safety outcomes," Opp. at 16, reflects only a "difference in view" with the Federal Government regarding how best to promote

public safety. *See All. for the Wild Rockies v. Peña*, 865 F.3d 1211, 1217 (9th Cir. 2017). While California is entitled to its views, its disagreement does not establish a violation of the APA.

II. California's Claim for a Declaration Regarding its Statutes' Compliance with Section 1373 Should Be Dismissed

A. The Claim Regarding Compliance with Section 1373 Is Non-Justiciable

1. California Lacks Standing to Seek a Ruling Regarding Any State Statute Other Than the Values Act

Defendants have not withheld or threatened to withhold grant funding based on any California statute other than the Values Act, Cal. Gov't Code §§ 7284-7284.12. Thus, there is no "live controversy" regarding whether any other state statute violates Section 1373 and no foreseeable "injury in fact" arising from Defendants' application of Section 1373 to any other statutes, such that California lacks standing to seek a ruling on any statute other than the Values Act. *See Pollution Denim & Co. v. Pollution Clothing Co*., 2009 WL 10672270, at *8-10 (C.D. Cal. Feb. 9, 2009); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). California makes essentially two arguments to the contrary: that the Federal Government has "called out" other California laws, and that Defendants have asserted that "similar" laws and policies in other jurisdictions violate Section 1373. Opp. at 17-18. Neither of these arguments establishes a "live controversy" regarding any California laws other than the Values Act.

California's assertion that Defendants have "called out" other California laws for non-compliance with Section 1373 is based on very general statements from the Attorney General, the DOJ Office of Public Affairs, and the Acting Director of Immigration and Customs Enforcement. *See* Opp. at 17-18; Am. Compl. ¶¶ 109-110. None of those statements, however, referred to any specific state statutes, and some of them did not even refer to Section 1373. Moreover, as the State acknowledges, some of those statements asserted only that California had "laws that *potentially* violate[d] 8 U.S.C. § 1373," Am. Compl. ¶ 110 (emphasis added); *see* Opp. at 18. A statement regarding a "potential" violation does not create a live controversy warranting judicial intervention.

California's references to "similar" laws in other jurisdictions also does not establish

standing to seek relief regarding California statutes other than the Values Act. Given the specific language of Section 1373 and the great variety in the language of the various state and local laws regarding cooperation with federal authorities, each such law must be evaluated on its own. Each law has its own specific (or general) prohibitions, its own definitions (or lack of definitions), and its own exceptions or purported saving clause. Thus, an assertion by Defendants that a "similar" law elsewhere violates Section 1373 would not establish a live controversy regarding a given California statute, unless the two enactments were identical or very nearly identical.

2. California's Request for a Ruling Regarding the Values Act is Unripe

As to the Values Act, although Defendants have expressed concern that the Act appears to violate Section 1373, the parties have not yet completed their discussion on that subject and DOJ has not yet issued any final determination that the Act violates Section 1373. Indeed, after Defendants filed their motion to dismiss, OJP requested certain documents from the State to facilitate that decision, and awaits the State's response. Pl. RJN, Ex. D. Thus, California's claim regarding the Values Act is constitutionally unripe because it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted).

When evaluating ripeness in the context of a statutory challenge, a Court may consider "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id*. California argues that these factors are met here because the State's November 13, 2017 letter to OJP, Def. RJN, Ex. O, "articulated a clear plan" to violate Section 1373 as understood by Defendants; Defendants allegedly "threatened prosecution" against the State in OJP's initial letter of November 1 (*id*., Ex. N) and in "public statements"; and Defendants "sought to enforce Section 1373 [thirty-five] times since October 2017, including against California." Opp. at 20. The facts indicate, however, that OJP has not yet determined whether to initiate "prosecution"—that is, withholding of funds—because of the Values Act. And, as discussed, any action that OJP may take regarding the laws of any other

jurisdiction cannot predict what the agency may decide regarding the laws of California, given the almost infinite variety among the laws of different jurisdictions. Indeed, OJP's most recent letter to California, dated January 24, 2018, stated that DOJ "remains concerned that [the State's] laws, policies, or practices *may* violate section 1373, or, at a minimum, that they *may* be interpreted or applied in a manner inconsistent with section 1373." Pl. RJN, Ex. D (emphasis added). In short, "neither the mere existence of a proscriptive statute [here, Section 1373] nor a generalized threat of prosecution [here, the ongoing correspondence between the State and OJP regarding the Values Act] satisfies the 'case or controversy' requirement," *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc), and the Values Act claim is constitutionally unripe.

B. Alternatively, the Court Should Dismiss California's Claim for Declaratory Relief Regarding the Values Act on Its Merits

Section 1373 facilitates the INA's comprehensive and cooperative plan of first requiring aliens to serve any criminal sentences imposed by state and local governments, then commencing federal immigration detention immediately upon conclusion of criminal sentences. *See* 8 U.S.C. §§ 1226(c)(1), 1231(a)(1)(B)(iii), (a)(4); *see also Preap v. Johnson*, 831 F.3d 1193, 1202 (9th Cir. 2016) (Section 1226(c) "governs the full life cycle of the criminal aliens' detention" including "specifying the requirements for taking them into custody"), *pet. for cert. filed*, No. 16-1363 (May 11, 2017). Thus, Section 1373 forecloses "prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from, [federal authorities] information regarding the citizenship or immigration status … of any individual." 8 U.S.C. § 1373(a). Contrary to this congressional plan, the Values Act prohibits state and local law enforcement from using "moneys or personnel to investigate … persons for immigration enforcement purposes," including by "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities" or by "[p]roviding personal information … about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public." Cal. Gov't Code § 7284.6(a).

A "fundamental canon of statutory construction" is that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Protecting the exchange of information regarding the status of aliens with federal immigration authorities ensures that those authorities will be able to track the status of such persons and take custody of them, as required by the INA, upon their release from state and local custody. Moreover, as California acknowledges, federal immigration authorities presumably already have "definitive information" as to whether any given individual is in the United States legally or illegally. Opp. at 24. Thus, limiting Section 1373 to that information would render the statute essentially meaningless as applied to the transfer of information from state and local authorities to federal authorities. The phrase "information *regarding* . . . citizenship or immigration status" must, therefore, mean something more. And that something more logically includes information needed by federal authorities to carry out their responsibilities under the INA to take custody of aliens upon their release from criminal detention.

California also seeks to rely on the Values Act's purported saving clause, which essentially quotes Section 1373, *see* Cal. Gov't Code § 7284.6(e); the State argues that that clause "permits compliance with all aspects of Section 1373." Opp. at 23. In light of the State's arguments in this action, however, the California Attorney General obviously reads the language of that clause too narrowly, as permitting the disclosure only of an individual's citizenship or immigration status, and nothing more. The saving clause does not, therefore, save the Values Act from violation of Section 1373, as the federal statute is properly construed.

Lastly, relying on *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), California argues that Section 1373 "alter[s] the usual constitutional balance between the States and the Federal Government," such that the statute cannot encompass "release dates, home addresses, or other information about a person's identity" unless that congressional intent is "unmistakably clear." Opp. at 25. The situation here is decisively different from that presented in *Gregory*, however. In *Gregory*, Missouri state judges argued that a state constitutional provision requiring judges to retire at age seventy violated the Age Discrimination in Employment Act. 501 U.S. at 455-61. The Court

observed that the authority to "establish a qualification for those who sit as their judges . . . goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Id*. at 460. In that context, the Court observed, it would not construe a federal statute as overriding the State's will unless that intention were "unmistakably clear." *Id*.

The information covered by Section 1373 is entirely unlike the qualifications of state judges involved in *Gregory*. As *Gregory* observed, state judges are among the "most important [state] government officials." 501 U.S. at 463. By contrast, Section 1373 covers information regarding aliens in the United States, whose admission, conduct, presence, and potential removal are quintessentially the responsibility of the *Federal Government*. *See Arizona*, 567 U.S. 387. Protecting the transmission information regarding such persons to federal immigration authorities, far from endangering "the independence of the States," *Gregory*, 501 U.S. at 460, merely ensures that federal officers can perform their duties. Thus, there is no basis for applying *Gregory*'s "unmistakable clarity" rule here.[7]

III. Section 1373 Is Consistent with the Tenth Amendment

Finally, California's Tenth Amendment challenge to Section 1373 is without merit. Merely protecting the transmission of information to federal authorities does not "compel the State[] to enact or administer a federal regulatory program" or to "act on the Federal Government's behalf," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575, 620 (2012). But Section 1373 *does* ensure that the Federal Government can carry out its statutory responsibilities to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" and to remove the alien "upon the order of the Attorney General" after completion of criminal sentences. 8 U.S.C. §§ 1227(a), 1228, 1357(a)(1).[8]

California relies primarily on *Printz v. United States*, 521 U.S. 898 (1997) in attempting to

[7] Plaintiff also seeks to rely on *Steinle v. San Francisco*, 230 F. Supp. 3d 994 (N.D. Cal. 2017), regarding the scope of Section 1373. Opp. at 24 & n.17). The court in that case did not, however, have the advantage of the Federal Government's briefing on that issue.

[8] Courts have rejected a number of Tenth Amendment challenges to federal statutes regulating the handling of information. *See Reno v. Condon*, 528 U.S. 141 (2000) (rejecting challenge to requirement that States disclose certain information on motor vehicle operators); *Freilich v. Upper Chesapeake Health, Inc*., 313 F.3d 205 (4th Cir. 2002) (rejecting challenge to requirement to share certain information regarding

show that the Section 1373 Condition violates the Tenth Amendment. Opp. at 27-29. But the State ignores crucial differences between this case and the Brady Act, challenged there. As discussed in Defendants' motion, the provisions of the Brady Act at issue in *Printz* required local law enforcement officers to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law" by conducting research in available databases, and to provide a written statement of the reasons for any contrary determination. 521 U.S. at 903. Section 1373's mere bar against prohibiting or restricting the exchange of information regarding aliens is in no way comparable to the detailed instructions and mandates of the Brady Act. Nor does Section 1373 require state or local agencies to "absorb" any appreciable costs. *Contra* Opp. at 28.

Finally, California asserts that the Values Act does not "selectively restrict[] the exchange of confidential information with immigration authorities." Opp. at 30. In reality, however, the Act is expressly and specifically directed at preventing cooperation with federal immigration authorities, stating in its "findings," among other things, that the State's interests are "threatened when state and local agencies are entangled with federal immigration enforcement." Cal. Gov't Code § 7284.2(c). In short, while Section 1373 does not "commandeer" the States in violation of the Tenth Amendment, California itself seeks to commandeer the Federal Government's constitutional control over the admission, conduct, and potential removal of aliens by preventing federal authorities from securing the information they need regarding such persons.

CONCLUSION

For the reasons set forth above and also in Defendants' opening memorandum, the Court should dismiss plaintiff's First Amended Complaint in its entirety.

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physicians); *see also City of New York v. United States*, 179 F.3d 29, 34-35 (2d Cir. 1999) (rejecting Tenth Amendment challenge to Section 1373). California argues that the federal law at issue in *Reno* "regulate[d] states as operators of databases and sellers of information in the same manner that Congress regulates private entities." Opp. at 29. But *Reno* expressly *declined* to address the plaintiffs' argument that the Federal Government could "only regulate the States by means of 'generally applicable' laws." 528 U.S. at 151. Rather, *Reno* held that the statute did not require the State "to enact any laws or regulations" or otherwise "assist in the enforcement of federal statutes" other than by conveying information. *Id.*

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Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ALEX G. TSE
United States Attorney

JOHN R. TYLER
Assistant Director

/s/ Antonia Konkoly

ANTONIA KONKOLY

W. SCOTT SIMPSON
Senior Trial Counsel

Attorneys, Department of Justice
Civil Division, Room 7210
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: antonia.konkoly@usdoj.gov

COUNSEL FOR DEFENDANTS JEFFERSON B. SESSIONS III, Attorney General of the United States; ALAN R. HANSON, Principal Deputy Assistant Attorney General; and U.S. DEPARTMENT OF JUSTICE