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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CITY OF RICHMOND,  
Plaintiff,

v.

DONALD J. TRUMP, et al.,  
Defendants.

Case No. [17-cv-01535-WHO](#)

**ORDER GRANTING MOTION TO  
DISMISS**

Dkt. No. 26, 28, 32, 33

**INTRODUCTION**

The City of Richmond (“Richmond”) has brought claims challenging the constitutionality of Executive Order 13768, “Enhancing Public Safety in the Interior of the United States” (“Executive Order”). Richmond Complaint (“RI Compl.”) (RI Dkt. No. 1). The defendants have moved to dismiss Richmond’s claims, arguing that Richmond lacks standing, that it has failed to state any claim against the Executive Order, and that it has failed to state a claim for declaratory relief. As discussed more fully below, I conclude that Richmond has failed to establish pre-enforcement standing to challenge the Executive Order because it has not demonstrated a well-founded fear of enforcement against it. Further, it has failed to state a viable claim for declaratory relief because it has not demonstrated that there is an actual controversy regarding its compliance with 8 U.S.C. § 1373 (“Section 1373). For these reasons, the government’s motion to dismiss Richmond’s claims is GRANTED.

**BACKGROUND**

Richmond filed this case on March 21, 2017. *See* RI Compl. I related it to two prior-filed actions brought by the City and County of San Francisco (“San Francisco”) and the County of Santa Clara (“Santa Clara”), (collectively “the Counties”). (RI Dkt. No. 6); *See City & Cnty. of*

1 *San Francisco v. Trump*, No. 17-cv-485-WHO, *Cnty. of Santa Clara v. Trump*, No. 17-574-WHO.  
2 On April 4, 2017, Richmond filed a motion for preliminary injunction, seeking to enjoin  
3 enforcement of the Executive Order. (RI Dkt. No. 12). It moved to shorten time on the motion so  
4 that it could be heard on April 14, 2017, at the same time as the preliminary injunction motions  
5 filed weeks earlier by the Counties. (RI Dkt. No. 13). I denied the motion, concluding that  
6 shortening time would be unduly prejudicial to the government, which would have only five days  
7 to respond to Richmond’s motion. (RI Dkt. No. 15).

8 On April 25, 2017, I granted the Counties’ preliminary injunction motions and enjoined  
9 enforcement of Executive Order 13768 section 9(a). Preliminary Injunction Order (“PI Order”)  
10 (SF Dkt. No. 82); (SC Dkt. No. 98). I subsequently denied as moot Richmond’s motion that  
11 sought a similar injunction. (RI Dkt. No. 25).

12 On May 22, 2017, Attorney General Sessions issued a memorandum (“AG  
13 Memorandum”), putting forward the Department of Justice’s “conclusive” interpretation of the  
14 Executive Order. The government then moved for reconsideration of the PI Order, arguing that  
15 the AG Memorandum was a material change in fact and law that justified reconsideration. *See*  
16 (SF Dkt. No. 107); (SC Dkt. No. 113).

17 While the reconsideration motions were pending in the San Francisco and Santa Clara  
18 cases, the government moved to dismiss all the claims brought by San Francisco, Santa Clara, and  
19 Richmond. *See e.g.* Motion to Dismiss (“MTD”) (RI Dkt. No. 26). As to the Counties, I denied  
20 the government’s motion for reconsideration, concluding that the AG Memorandum was not a  
21 material change in fact or law and did not alter the analysis from the PI Order, and also denied the  
22 motions to dismiss, concluding that San Francisco and Santa Clara had established standing, as  
23 discussed at length in the PI Order, and had adequately stated all of their claims. *See* (SF Dkt. No.  
24 146); (SC Dkt. No. 145). Now, I address the motion to dismiss Richmond’s claims.

25 **LEGAL STANDARD**

26 A motion to dismiss filed pursuant to Rule 12(b)(1) is a challenge to the court’s subject  
27 matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). “Federal courts are courts of limited  
28 jurisdiction,” and it is “presumed that a cause lies outside this limited jurisdiction.” *Kokkonen v.*

1 *Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the  
2 federal court bears the burden of establishing that the court has the requisite subject matter  
3 jurisdiction to grant the relief requested. *Id.*

4 A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d  
5 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the  
6 allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).  
7 The challenger asserts that the allegations in the complaint are insufficient “on their face” to  
8 invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.  
9 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true  
10 and draws all reasonable inferences in favor of the party opposing dismissal. *See Wolfe*, 392 F.3d  
11 at 362.

## 12 **DISCUSSION**

13 The federal government has moved to dismiss Richmond’s claims on the grounds that  
14 Richmond lacks standing to challenge the Executive Order, has failed to adequately allege any  
15 claim against the Executive Order, and lacks standing to seek declaratory relief. Because I  
16 conclude that Richmond has failed to demonstrate pre-enforcement standing to challenge the  
17 Executive Order and has failed to allege an actual controversy regarding its compliance with  
18 Section 1373, the government’s motion to dismiss is GRANTED.

### 19 **I. WHETHER RICHMOND LACKS STANDING TO CHALLENGE THE** 20 **EXECUTIVE ORDER**

21 The government asserts that Richmond lacks standing to assert claims against the  
22 Executive Order and that its claims are unripe. In the PI Order I dedicated twenty-five pages to  
23 discussing these issues with regards to the Counties. *See PI Order* at 11-35. The framework I  
24 used in the PI Order is equally applicable to Richmond’s claims.

25 The first step in my standing analysis was to address the government’s argument that the  
26 Counties could not establish standing because the Executive Order does not change the law. I  
27 rejected this argument. The Executive Order does purport to change the law and could therefore  
28 give rise to the Counties’ alleged injuries. *See PI Order* at 12-16. This discussion, which related

1 to the meaning of the Executive Order and not the policies or conduct of any particular locality,  
2 applies to Richmond.

3 After concluding that the Executive Order changed the law, I addressed whether the  
4 Counties had established pre-enforcement standing to challenge the Order, since the Order had not  
5 yet been enforced against them. *See* PI Order at 16-32. In assessing this issue I borrowed the  
6 framework laid out in *Babbitt v. Farm Workers*, 442 U.S. 298, 298 (1979), in which the United  
7 States Supreme Court held that a plaintiff may establish pre-enforcement standing by  
8 demonstrating “an intention to engage in a course of conduct arguably affected with a  
9 constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution  
10 thereunder.” I concluded that San Francisco and Santa Clara had established pre-enforcement  
11 standing because (1) their policies are reasonably read as proscribed by the language of the  
12 Executive Order; (2) the Counties’ claims implicated a constitutional interest; (3) the Counties’  
13 had demonstrated that the Order threatened them with a loss of federal grants or other enforcement  
14 activity; and (4) the government had indicated an intent to enforce the Order generally and against  
15 the Counties specifically.

16 For purposes of this Order, I will assume without deciding that Richmond has  
17 demonstrated that it has policies proscribed by the Executive Order, that its claims implicate a  
18 constitutional interest, and that it could face a loss of federal grants if the Executive Order is  
19 enforced against it. But to establish pre-enforcement standing under the *Babbitt* framework, it  
20 must also demonstrate that it has a well-founded fear that the Executive Order will actually be  
21 enforced against it. Because Richmond’s complaint indicates that there is no real-world conflict  
22 between it and the federal government regarding its “sanctuary” policies, Richmond cannot meet  
23 this final burden.

24 In the PI Order I concluded that the government had indicated “an intent to enforce the  
25 [Executive] Order generally and against the Counties more specifically.” *See* PI Order at 22. This  
26 analysis was based on statements and conduct from key government actors and agencies regarding  
27 enforcement of the Executive Order and San Francisco’s and Santa Clara’s “sanctuary” policies.  
28 *Id.* at 22-27. While the statements regarding general enforcement of the Order would apply

1 equally to Richmond as they did to San Francisco and Santa Clara, the more specific statements  
2 regarding San Francisco's and Santa Clara's policies were specific to those plaintiffs. For  
3 example, I noted that Santa Clara and San Francisco have both been identified by ICE as  
4 jurisdictions that "Restrict Cooperation with ICE" and that both Santa Clara County Main Jail and  
5 San Francisco County Jail are listed as two of eleven detention centers with the "highest volume  
6 of detainers issued" that "do not comply with detainers on a routine basis." *See* PI Order at 25. I  
7 noted that Attorney General Sessions and former Secretary Kelly had called out and criticized San  
8 Francisco and Santa Clara in a letter to Chief Justice Cantil-Sakauye of the California Supreme  
9 Court, by asserting that some of California's "largest counties and cities" hinder the enforcement  
10 of immigration law by "denying requests by ICE officers and agents to enter prisons and jails to  
11 make arrests." *See id.* And I noted that President Trump had threatened to defund California,  
12 calling it "out of control." *Id.* Finally, with regard to San Francisco specifically, I noted that both  
13 President Trump and Attorney General Sessions had repeatedly criticized San Francisco's  
14 sanctuary policies and blamed them for causing the death of Kathryn Steinle.

15 With the exception of President Trump's comment regarding the State of California being  
16 "out of control," none of these statements is applicable to Richmond. Richmond has not alleged  
17 any facts indicating that it has been identified as a city that restricts cooperation with ICE or as one  
18 that regularly declines detainer requests. Instead, Richmond alleges in its complaint that "ICE has  
19 not in the past asked Richmond for information or issued detainer requests." RI Compl. ¶ 48.  
20 This is a clear and important distinction between the Counties and Richmond. While the Counties  
21 have had a number of clashes with immigration authorities and have histories of conflict with the  
22 federal government over their sanctuary policies, Richmond, according to its complaint, has never  
23 even been asked to assist in enforcing immigration policy. Its policies have not resulted in any  
24 actual conflict between it and ICE regarding immigration enforcement.

25 The Executive Order is aimed at encouraging or coercing previously uncooperative  
26 localities to cooperate with ICE on immigration enforcement. The likely targets of enforcement  
27 under the Order are jurisdictions that have actually refused to cooperate with ICE and that ICE  
28 believes are hindering its immigration enforcement efforts. While Richmond's policies may

1 conflict with Section 1373 and the Executive Order on paper, this conflict is, currently, purely  
2 academic. Richmond has not actually refused to cooperate or assist ICE, has not declined to honor  
3 any detainer requests, and has not otherwise hindered the enforcement of federal immigration law.  
4 Given that Richmond's policies have, apparently, had no practical effect on ICE's immigration  
5 enforcement efforts, it is hard to imagine that Richmond is a high priority for the federal  
6 government's efforts to discourage "sanctuary" policies. Rather, these efforts are likely to be  
7 focused on jurisdictions from which ICE is actively seeking, but not receiving, assistance.

8         Despite having no real-world friction with ICE or the defendants over its policies,  
9 Richmond argues that it is likely to face enforcement under the Executive Order because it has  
10 been called a sanctuary city and because it has a large Latino population. Neither of these  
11 arguments is persuasive.

12         Richmond asserts that it has been called a sanctuary city, but does not say by whom or in  
13 what context. This vague assertion that someone, somewhere, referred to Richmond as a  
14 sanctuary city is insufficient to demonstrate that the federal government believes Richmond is a  
15 sanctuary city or is likely to enforce the Executive Order against it.

16         Richmond does not explain why having a large Latino population is likely to subject it to  
17 enforcement under the Executive Order. It is possible that Richmond is suggesting that a large  
18 Latino population goes hand-in-hand with greater ICE enforcement activity and that, because of  
19 this, ICE is more likely to ask Richmond for assistance and therefore, more likely to develop  
20 conflicts with Richmond over its local policies. But even if this is true, and Richmond does not  
21 allege any facts supporting this reading, Richmond's own experience with ICE has not borne this  
22 out. As discussed above, regardless of what its large Latino population might indicate, ICE has  
23 never asked Richmond for assistance enforcing immigration laws and has never issued a detainer  
24 request to Richmond police. Richmond has not alleged any facts supporting the contention that its  
25 large Latino population is likely to subject it to defunding under the Executive Order.

26         Overall, Richmond's situation draws parallels with that of the plaintiffs in *Thomas v.*  
27 *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1140 (9th Cir. 2000) (en banc). In *Thomas*, two  
28 landlords brought a pre-enforcement free speech challenge to Alaska housing laws that prohibited

1 discrimination on the basis of marital status. *Id.* at 1137. The landlords contended that they were  
2 likely to face enforcement because, as devout Christians, they refused to accept unmarried, but  
3 cohabiting, couples as tenants. *Id.* The Ninth Circuit dismissed the case as non-justiciable. It  
4 concluded that the landlords had failed to demonstrate that they were likely to face enforcement in  
5 part because the landlords could not point to clear violations of the law; no prospective tenant had  
6 ever complained about their policies; and “the principal enforcement agencies had never even  
7 heard of these landlords before they filed this action.” *Id.* 1137, 1140. Similarly, while Richmond  
8 has policies that might restrict the ability of local officials to assist ICE, these policies have never  
9 been put to use as ICE has never requested information or assistance from Richmond and has  
10 never asked Richmond to honor any detainer requests. There is no indication from Richmond’s  
11 complaint that ICE or the defendants have ever taken note of Richmond’s policies in any way or  
12 identified Richmond as a jurisdiction hindering the enforcement of immigration law. *Id.*

13 It is not enough to dislike an Executive Order or to worry about its implications to  
14 establish pre-enforcement standing. Given the lack of a real-world controversy between  
15 Richmond and the federal government regarding Richmond’s sanctuary policies, and in contrast  
16 with the Counties, Richmond has failed to demonstrate that it has a well-founded fear of  
17 enforcement under the Executive Order. This is fatal to pre-enforcement standing.

## 18 **II. DECLARATORY RELIEF CLAIM**

19 Richmond has brought a claim for declaratory relief that its laws comply with Section  
20 1373. The government moves to dismiss this claim, asserting that Richmond has failed to identify  
21 a right of action that would allow it to pursue declaratory relief. RI MTD at 22 (RI Dkt. No. 26).  
22 The government also asserts that any such relief would be prohibited as an improper advisory  
23 opinion. *Id.* Because Richmond has failed to allege facts sufficient to demonstrate that there is an  
24 “actual controversy” between it and the federal government regarding its compliance with Section  
25 1373, it has failed to demonstrate standing on its declaratory relief claim.

26 The Declaratory Judgment Act creates a remedy for litigants but is not an independent  
27 cause of action. *See, e.g., Muhammad v. Berreth*, No. C 12-02407 CRB, 2012 WL 4838427, at \*5  
28 (N.D. Cal. Oct. 10, 2012) (“Declaratory relief is not an independent cause of action or theory of

1 recovery, only a remedy. The [Declaratory Judgment Act] does not itself confer federal subject-  
2 matter jurisdiction.”) (citation and internal quotation marks omitted). The Act provides that “[i]n a  
3 case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare  
4 the rights and other legal relations of any interested party seeking such declaration, whether or not  
5 further relief is or could be sought.” 28 U.S.C. § 2201(a). “[T]he question in each case is whether  
6 the facts alleged, under all the circumstances, show that there is a substantial controversy, between  
7 parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance  
8 of a declaratory judgment.” *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273  
9 (1941).

10 Richmond has not demonstrated that there is an actual controversy regarding its  
11 compliance with Section 1373 sufficient to warrant the issuance of a declaratory judgment. It  
12 asserts that there is a substantial controversy because “Richmond alleges that it believes that it  
13 complies with the statute, but Defendants contend otherwise.” RI MTD Oppo. at 21. If the  
14 defendants had actually indicated that they believe Richmond does not comply with Section 1373  
15 through public statements, written notice, or otherwise, this assertion might evidence an actual  
16 controversy. However, review of Richmond’s complaint demonstrates that Richmond’s assertion  
17 is pure speculation. Its only allegation in support of this claim is a line in its complaint stating,  
18 “Richmond believes that Defendants contend that Richmond does not comply with 8 U.S.C. §  
19 1373.” RI Compl. ¶ 116. Richmond cites nothing but its own unsupported belief in support of its  
20 claim that the federal government believes its policy is non-compliant with Section 1373. If this  
21 were sufficient to establish an actual controversy under the Declaratory Judgment Act, then any  
22 litigant could meet the actual controversy requirement simply by stating its belief as to the  
23 existence of a dispute. This is not sufficient to demonstrate Article III standing.

24 As discussed above, Richmond has not alleged any facts indicating that, prior to this  
25 lawsuit, the federal defendants were aware of Richmond’s “sanctuary” policies, that Richmond  
26 had ever put any of its policies into practice, or that the defendants had any opinion of whether  
27 Richmond’s policies comply with Section 1373. Richmond cannot manufacture standing to seek  
28 declaratory relief by citing to its own unsupported belief as to the existence of an actual



1 controversy. On the facts alleged, there is no evidence of an actual controversy regarding  
2 Richmond's compliance with Section 1373. Richmond's declaratory relief claim must be  
3 dismissed.

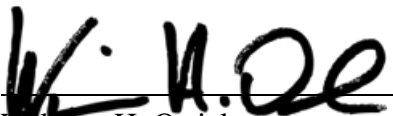
4 **CONCLUSION**

5 Because Richmond has failed to demonstrate any real-world conflict between it and the  
6 federal defendants regarding its sanctuary policies, it has not demonstrated a well-founded fear of  
7 enforcement under the Executive Order. Accordingly, it has not demonstrated that it has pre-  
8 enforcement standing to challenge the Order. The government's motion to dismiss these claims is  
9 GRANTED. For similar reasons, Richmond has failed to demonstrate that there is an actual  
10 controversy regarding its compliance with Section 1373, as it has alleged no facts in support of its  
11 claim that the government believes its policies fail to comply with Section 1373. The  
12 government's motion to dismiss Richmond's declaratory relief claim is GRANTED.

13 Richmond's claims are dismissed without prejudice. Richmond will have 20 days from the  
14 date of this Order to file an amended complaint if it wishes to attempt to address the jurisdictional  
15 issues identified above. Richmond is also welcome to continue to participate in the litigation  
16 regarding the Executive Order as an amicus curiae, which it, and many other cities, counties, and  
17 states, have done by filing amicus briefs in the San Francisco and Santa Clara cases. *See*  
18 Richmond Amicus Briefs (SC Dkt. No. 74); (SC Dkt. No. 129); (SF Dkt. No. 40); (SF Dkt. No.  
19 126). Richmond's perspective and position regarding the Executive Order is well-represented in  
20 these briefs. Obviously, in the event that the federal defendants in the future commence an  
21 enforcement action or otherwise target Richmond for its "sanctuary" policies, nothing in this  
22 Order would affect Richmond's ability to litigate those issues.

23 **IT IS SO ORDERED.**

24 Dated: August 21, 2017

25  
26   
27 William H. Orrick  
28 United States District Judge