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ATTORNEYS FOR PLAINTIFF COUNTY OF SANTA CLARA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COUNTY OF SANTA CLARA,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States of America, JOHN F. KELLY, in his official capacity as Secretary of the United States Department of Homeland Security, JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States, JOHN MICHAEL "MICK" MULVANEY, in his official capacity as Director of the Office of Management and Budget, and DOES 1-50,

Defendants.

Case No. 17-cv-00574-WHO

PLAINTIFF COUNTY OF SANTA CLARA'S OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

Judge: Hon. William Orrick

Date Filed: February 3, 2017

Trial Date: April 23, 2017

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I. INTRODUCTION

In a last-ditch effort to avoid injunctive relief, defendants announced an implausible new interpretation of President Trump's Executive Order 13,768 (the "Executive Order" or "EO") at the April 14, 2017 oral argument on the County of Santa Clara's motion for a preliminary injunction. Having declined to defend the substance of the Executive Order in their briefing, defendants declared for the first time during the hearing that—despite the plain text of the Executive Order expressing the Administration's intent to starve state and local governments deemed "sanctuary jurisdictions" of all "Federal funds" and to strip them of eligibility for all "Federal grants"—the EO was actually vanishingly narrow in scope and not meant to affect any change in the law. The Court carefully considered, then rejected, these arguments because defendants' reading of the Executive Order was incompatible with its text. *See County of Santa Clara v. Trump*, --- F. Supp. 3d ---, 2017 WL 1459081, at *7–10 (N.D. Cal. Apr. 25, 2017) ("*Santa Clara*" or "PI Order").

Defendants now contend that the law governing the County's request for a preliminary injunction materially changed on May 22, 2017, when one of the named defendants, Attorney General Jeff Sessions, issued a two-page memorandum repeating the same interpretation of the Executive Order defendants presented to the Court at oral argument. *See* Dkt. 113-1(the "AG Memorandum"). Defendants' Motion for Reconsideration is nothing more than a rehash of the eleventh-hour and implausible argument that the Court has already considered and properly rejected.

This Court should decline to reconsider its ruling for numerous reasons, both procedural and substantive. First, defendants have failed to show "reasonable diligence" as Local Rule 7-9 demands. Indeed, they make no attempt to make the required showing of diligence, and their conduct belies any such effort. The purported new legal authority on which the Administration now relies was entirely within defendants' control to produce before the Court entered its order. Defendants' failure to include this new "guidance" in their opposition to the County's motion, or in writing at oral argument—or at any time before the eve of their deadline to file a motion for reconsideration—would eviscerate any claim of diligence, had defendants bothered to make one.

Second, defendants concede they are repeating an argument they made (and the Court rejected) previously. Third, not only is defendants' proffered "legal authority" nothing "new," is also lacks legal relevance; the Attorney General's belated, litigation-driven interpretation of the Executive Order lacks the force of law and in no way binds the Court. Fourth, even if the Court were to excuse these failures and consider the AG Memorandum as a potential basis for reconsideration, that memorandum still offers an implausible interpretation that contradicts the Executive Order's plain text and stated purpose, just as the Court recognized in its April 25, 2017 order. Finally, even if the AG Memorandum offered a plausible interpretation of the Executive Order, it comes nowhere close to curing the Executive Order's many constitutional infirmities. Accordingly, the Court should deny defendants' motion and leave its nationwide preliminary injunction undisturbed.

II. FACTUAL BACKGROUND

A. The President signs Executive Order 13,768 and repeatedly explains its broad purpose and scope.

By now the Court is familiar with the relevant facts, nearly all of which are undisputed. On January 25, 2017, President Donald J. Trump issued Executive Order 13,768, entitled "Enhancing Public Safety in the Interior of the United States." Harris Decl. (Dkt. 36) ¶ 2 & Ex. A (Dkt. 36-1). Section 2 describes the "policy of the executive branch" as, among other things, "[e]nsur[ing] that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." *Id.* § 2(c).

Section 9 of the Executive Order implements this "policy" by authorizing federal officials to take punitive actions against state and local governments that the Administration deems to be "sanctuary jurisdictions." Although the Executive Order nowhere defines "sanctuary jurisdiction," section 9(a) uses that term synonymously with state and local governments that "willfully refuse to comply with 8 U.S.C. § 1373," *id.* § 9(a), or those that decline to honor Immigration and Customs Enforcement ("ICE") civil detainer requests. *Id.* § 9(b) (equating "sanctuary jurisdictions" with jurisdictions "that ignored or otherwise failed to honor any detainers with respect to such aliens"). Section 9(a) grants the Secretary of Homeland Security—

not the Attorney General—authority to develop a fuller definition of the term and to designate states and localities as "sanctuary jurisdictions." *Id.* § 9(a).

Section 9(a) begins by directing executive branch officials to strip state and local sanctuary jurisdictions of eligibility "to receive Federal grants," without limitation:

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

Id. § 9(a) (the "Defunding Provision") (emphasis added). As the Court recognized in its PI Order, the Defunding Provision must be read in the context of the Executive Order as carrying out the President's policy of denying all federal funds to targeted jurisdictions. *See id.* § 2(c). Indeed, Section 9(c) orders the Director of the Office of Management and Budget ("OMB") to provide "information on ***all*** Federal grant money that currently is received by ***any*** sanctuary jurisdiction," *id.* § 9(c) (emphases added), not simply a list of certain federal grants issued by certain agencies for certain purposes.

Section 9(a) further contains a separate Enforcement Provision, which orders the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." *Id.* § 9(a) (the "Enforcement Provision"). The Executive Order neither defines what it means to "prevent[] or hinder[]" federal law enforcement nor cabins or defines the phrase "Federal law" in any way.

As the Court noted in its PI Order, defendants' own statements further confirm that the Executive Order means what it says. *See Santa Clara*, 2017 WL 1459081, at *2. The President repeatedly pledged, both on the campaign trail and after election, to deny ***all*** federal funding to jurisdictions he believes are hindering his immigration enforcement agenda, thereby "ending" such jurisdictions altogether. *See* Compl. ¶ 93 (listing statements). After being sworn in and issuing the Executive Order, the President characterized defunding as a "weapon" he could wield to deprive jurisdictions of "the money they need to properly operate as a city or state." Harris

Decl. ¶ 3 & Ex. B (Dkt. 36-2) at 4. The President's press secretary confirmed that the President's goal was to ensure that "counties and other institutions that remain sanctuary cities don't get ***federal government funding***." *Id.* ¶ 4 & Ex. C (Dkt. 36-3) at 4–5 (emphasis added).

Defendants persisted in publicly describing the Executive Order as all-encompassing even after the County moved for a preliminary injunction. On March 27, 2017, the Attorney General stated that any jurisdiction the Department of Justice determines does not comply with Section 1373 will suffer "***withholding [of] grants, termination of grants, and disbarment or ineligibility for future grants***," as well as the "claw back" of "***any funds***" previously awarded. Dkt. 82-1, Req. for Court Approval to Supp. Record, Ex. A at 2 (emphases added). All of these statements confirm that the Executive Order was intended to apply to all funds provided by the federal government, without limitation.

B. Defendants fail to respond to the County's constitutional arguments or submit any evidence.

On February 3, 2017, the County filed this lawsuit, seeking a declaration that the Executive Order is unconstitutional and preliminary and permanent injunctive relief against the enforcement of Section 9. Dkt. 1. On February 23, 2017, the County moved for a nationwide preliminary injunction of Section 9, asserting four separate constitutional violations. Dkt. 26.

On March 9, 2017, defendants opposed the County's motion, but "present[ed] no defense to the [County's] constitutional arguments." *Santa Clara*, 2017 WL 1459081, at *21. Instead, defendants argued that the County lacked standing, its claims were unripe, and it had not suffered irreparable harm because the Executive Order "does not alter or expand the existing law that governs when the Federal Government may revoke a federal grant," and "does not change existing law." Dkt. 46, Defs.' Opp. to Pl.'s Mot. for Prelim. Injunction at 3, 8. Even though the President had executed the Executive Order five weeks earlier, defendants failed to submit a declaration or any other competent evidence supporting their counsel's arguments that the Executive Order applied narrowly and did not expand or change existing law.

C. Defendants attempt to re-write the Executive Order at the hearing on the preliminary injunction motion.

On April 14, 2017, at the hearing on the County's motion, defendants argued for the first time that, despite its plain text, the Executive Order does not actually purport to give the Secretary of Homeland Security and the Attorney General the power to declare "sanctuary jurisdictions" ineligible for any "Federal funds." EO § 2(c). Instead, defendants' counsel asserted that, despite the Executive Order's plain text and defendants' many confirmatory statements, it applies only to "federal grants issued by [two] specific agencies"—DOJ and DHS—and only to those DOJ and DHS grants that Congress had expressly conditioned on compliance with section 1373. Apr. 14, 2017 Tr. ("Tr.") at 34:24–35:9; *see also id.* at 25:4–6 ("[T]he Executive Order is directed to only grants issued by DHS and DOJ."). The Administration further represented that DHS had not yet identified any DHS grants that Congress had expressly conditioned on compliance with section 1373, although it might do so in the future. *Id.* at 35:3–4. For its part, DOJ had identified only three grant programs that it claimed were expressly conditioned on compliance with section 1373: the State Criminal Alien Assistance Program ("SCAAP"), the Justice Assistance Grant ("JAG") program, and the Community Oriented Policing Assistance ("COPS") initiative. *Id.* at 35:4–9. Despite the fact that Section 9(a) specifically exempts grants "deemed necessary for law enforcement purposes" from the Defunding Provision, EO § 9(a), defendants argued at the hearing that the only federal funds subject to the Executive Order are grants from these three programs, even though all three grants are provided specifically ***for*** law-enforcement purposes.[1]

At oral argument the County questioned whether the defendants' counsel was capable of binding the Department of Justice or the Executive Branch in light of past statements made by federal officials. Dkt. 108, Defs.' Mot. for Leave to File Mot. for Reconsideration at 4. But defendants repeatedly emphasized, and the Court stated its understanding, that the interpretation

[1] For example, the JAG website (located at www.bja.gov/jag/) explains that: "The JAG Program provides states, tribes, and local governments with critical funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives."

offered at the hearing represented the official position of the Department of Justice. The Court noted that defendants' counsel had "taken this up through the Department," and the interpretation was based on "what the Department says the Order says." Tr. at 45:15–24.

D. The Court rejects defendants' revised interpretation of the Executive Order.

On April 25, 2017, the Court granted the County's motion and entered an order enjoining enforcement of Section 9(a) of the Executive Order. *See Santa Clara*, 2017 WL 1459081, at *29. In its order, the Court carefully considered the last-minute re-interpretation of the Executive Order that defendants had offered at the hearing, rejecting it as "not legally plausible." *Id.* at *2. The Court based its finding that defendants' reading was implausible principally on the plain language of the Executive Order, which the Court held "is not readily susceptible to the Government's narrow interpretation. Indeed, '[t]o read [the Order] as the Government desires requires rewriting, not just reinterpretation.'" *Id.* at *8 (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). The Court further held that "Section 9(a), by its plain language, attempts to reach all federal grants, not merely the three mentioned at the hearing." *Id.* at *2. The Court found that defendants' attempt to save Section 9(a) by "reading the defunding provision narrowly and 'consistent with law,' so that all it does is direct the Attorney General and Secretary to enforce existing grant conditions," was "in conflict with the Order's express language and is plainly not what the Order says." *Id.* at *9.

The Court reinforced its conclusions with the repeated public statements by the President and the Attorney General, both of whom consistently characterized the Executive Order as a means of stripping sanctuary jurisdictions of ***all*** federal funding. *See id.* at *2 ("And if there was doubt about the scope of the Order, the President and the Attorney General have erased it with their public comments"); *see also id.* at *14–15 (collecting statements). In sum, the Court rejected the Administration's implausible, litigation-driven interpretation, instead taking the Executive Order on its own terms and according to its authors' own statements.

E. The AG Memorandum formalizes the same flawed interpretation that the Court already rejected as incompatible with the Executive Order's plain text.

On May 22, 2017, the Attorney General released a two-page memorandum entitled

"Implementation of Executive Order 13768, 'Enhancing Public Safety in the Interior of the United States.'" AG Memo at 1. The Attorney General issued this document 117 days after the President signed the Executive Order, 108 days after the County filed its lawsuit, 38 days after the oral argument in which the Administration's interpretation was first announced, and 27 days after the Court issued its PI Order. The AG Memorandum does nothing more than reduce to writing the same implausible interpretation of the Executive Order that the Administration adopted at oral argument and that the Court carefully considered and properly rejected in granting the injunction.

The AG Memorandum announces that: (1) Section 9(a) "will be applied solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding;" (2) "the Executive Order [does not] purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary of Homeland Security in any respect;" and (3) the Executive Order only applies to "certain Department grants [that require recipients] to certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award." AG Memo at 1–2. Although Section 9 expressly vests the Secretary of Homeland Security with the authority to designate entities as "sanctuary jurisdictions," the Attorney General, "[a]fter consultation with the Secretary of Homeland Security," purports to exercise that authority on his own, setting forth a definition of "sanctuary jurisdictions" as only "'jurisdictions that 'willfully refuse to comply with 8 U.S.C. § 1373.'" *Id.* at 2.

On the same day that defendant Sessions issued the AG Memorandum, defendants moved for leave to file a motion for reconsideration claiming that the Memorandum "constitutes new authority." Dkt. 108 at 2.[2] But there is nothing "new" in the AG Memorandum. The Court has already heard—and rejected—each of these arguments:

PI Oral Argument	**AG Memorandum**	**PI Order**
"[T]he Executive Order is directed to only grants issued by DHS and DOJ. And it's --	"[S]ection 9(a) of the Executive Order . . . will be applied solely to federal grants	"At the hearing, Government counsel argued that the Order applies only to grants issued

[2] On May 23, 2017, the Court granted defendants leave to file their motion for reconsideration, but noted that it would consider issues "regarding diligence and material change of fact when evaluating the merits of the government's motion for reconsideration." Dkt. 112 at 2.

and it's expressly to grants." (Tr. at 25:4–6.)	administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding." (AG Memo. at 1.)	by the Department of Justice and the Department of Homeland Security because it is directed only at the Attorney General and Secretary of Homeland Security. This reading is similarly implausible. Nothing in Section 9(a) limits the "Federal grants" affected to those only given th[r]ough the Departments of Justice and Homeland Security." *Santa Clara*, 2017 WL 1459081, at *9.
"The Order does not rewrite the law. It does not invoke new powers and does not instruct the Department of Justice or Department of Homeland Security to engage in unconstitutional activity." (Tr. at 21:1–4.)	"[T]he Executive Order [does not] purport to expand the existing statutory or constitutional authority of the Attorney General and the Secretary of Homeland Security in any respect." (AG Memo. at 2.)	"While the Government urges that the Order 'does not purport to give the Secretary or Attorney General the unilateral authority' to impose new conditions on federal grants, that is exactly what the Order purports to do." *Santa Clara*, 2017 WL 1459081, at *8.
"9(a), again, applies to federal grants where it's made clear to the grantee that they must require 1373." (Tr. at 24:4–6.) "[A]gain, it's three – it's three grants that DOJ identified. DHS has not, as far as I know, identified any grants yet. But DOJ has identified three that expressly relate to criminal justice issues or immigration issues: The SCAAP grant; the JAG grant; and the COPS grant. And those are the three where they put these express conditions, given the Department's authority to do so, regarding the compliance with 1373." (Tr. at 35:2–9.)	"Department of Justice will require jurisdictions applying for certain Department grants to certify their compliance with federal law, including 8 U.S.C. § 1373, as a condition for receiving an award. Any jurisdiction that fails to certify compliance with section 1373 will be ineligible to receive such awards. This certification requirement will apply to any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services. . . ." (AG Memo. at 2.)	"Under this interpretation, Section 9(a) applies only to three federal grants in the Department of Justice and Homeland Security that already have conditions requiring compliance with 8 U.S.C. 1373. This interpretation renders the Order toothless; the Government can already enforce these three grants by the terms of those grants and can enforce 8 U.S.C. 1373 to the extent legally possible under the terms of existing law. . . . Section 9(a) is not reasonably susceptible to the new, narrow interpretation offered at the hearing." *Santa Clara*, 2017 WL 1459081, at *1.

"This use of the term 'sanctuary jurisdiction' is, again, a broad term. And it can mean different things to different people. And, importantly, in Section 9(a), it's used after the sentence 'failure to comply with 8 U.S.C. 1373.' So there the reference is -- sanctuary jurisdiction is with respect to a city that violates 1373. We know that's how it's being used there." (Tr. at 36:25–37:6.)	"[T]he term 'sanctuary jurisdiction' will refer only to jurisdictions that 'willfully refuse to comply with 8 U.S.C. § 1373." (AG Memo. at 2.)	"Section 9(b) equates 'sanctuary jurisdictions' with 'any jurisdiction that ignored or otherwise failed to honor any detainers with respect to [aliens that have committed criminal actions].' This language raises the reasonable concern that a state or local government may be designated a sanctuary jurisdiction, and subject to defunding, if it fails to honor ICE detainer requests." *Santa Clara*, 2017 WL 1459081, at *13.

III. LEGAL STANDARD

Reconsideration of a court order is "'an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *English v. Apple Inc.*, 2016 WL 1108929, at *2 (N.D. Cal. Mar. 22, 2016) (Orrick, J.) (quoting *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)). Motions for reconsideration "may not be used to relitigate old matters and 'may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Victor v. R.C. Bigelow, Inc.*, 2015 WL 5569716, at *2 (N.D. Cal. Sept. 21, 2015) (Orrick, J.) (quoting *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). Nor is reconsideration a "substitute for appeal or a means of attacking some perceived error of the court." *Washington v. Sandoval*, 2011 WL 2039687, at *1 (N.D. Cal. May 24, 2011). Such a motion may not "be used to ask the Court to rethink what it has already thought." *Garcia v. City of Napa*, 2014 WL 342085, at *1 (N.D. Cal. Jan. 28, 2014).

To meet the high standard justifying reconsideration, this District's Civil Local Rule 7-9 requires defendants to "specifically show" that (1) they acted with reasonable diligence; and (2) one of the following three grounds for reconsideration applies:

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or

> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civil L.R. 7-9(b)(1)–(3). To prevail on such a motion, "a party must set forth facts or law of a strongly convincing nature" to induce the court to change its prior decision. *Omstead v. Dell, Inc.*, 533 F. Supp. 2d 1012, 1019 (N.D. Cal. 2008).

IV. ARGUMENT

A. Defendants fail to satisfy Local Rule 7-9's requirements for reconsideration.

1. Defendants make no effort to "specifically show reasonable diligence" in bringing their motion.

The Court should deny reconsideration of PI Order because defendants' moving papers make no attempt to "specifically show reasonable diligence in bringing [this] motion," as Rule 7-9(b) requires. Defendants offer no argument, much less the required competent evidence, showing that they acted with reasonable diligence. The Court should decline to reconsider its order for this reason alone.

Further, the factual record shows defendants were dilatory, not diligent. Despite having notice of the County's claims and arguments on February 3, 2017, defendants waited more than three months to issue their purportedly new authority. What's more, defendants failed to issue this interpretation when opposing the County's motion, which—as the Court pointed out—would have been a good time to do so. *See* Tr. at 50:21-22 (THE COURT: "If it was a plain reading, it would have been argued earlier in the papers."). Nor did defendants unveil the memorandum before oral argument, or even at oral argument. And defendants' lack of reasonable diligence did not end there: after the Court entered the injunction, defendants waited 27 days—one day shy of their deadline to seek leave to file a motion for reconsideration—to publish the AG Memorandum and to seek such leave.

Defendants offer neither explanation nor excuse for this delay. And in fact none exists; the issuance and timing of the memorandum were entirely within their control. Defendants therefore run afoul of the Ninth Circuit's prohibition on using a motion for reconsideration to

"present evidence for the first time," which "could reasonably have been raised earlier in the litigation." *Kona Enters.*, 229 F.3d at 890. In short, defendants' long and unjustified delay, along with the absence of any new factual development or substantive change to their legal position in the interim, establishes a clear lack of diligence.

2. Defendants' motion repeats the same arguments they advanced, and the Court properly rejected, in their opposition to the County's preliminary injunction motion.

Defendants' request for reconsideration also violates Local Rule 7-9(c), which prohibits them from "repeat[ing] any ***oral*** or written argument" they made in opposing the ruling they "now seek[] to have reconsidered." Civil L. R. 7-9(c) (emphasis added). Defendants violate this rule extensively and without apology. *See* Dkt. 113, Defs.' Mot. for Reconsideration ("Mot.") at 1 (conceding that "[t]he AG Memorandum . . . reaffirms the representations made by government counsel at oral argument"); *compare* Part II.C, *supra* (defendants' interpretation of the Executive Order at the April 14, 2017 oral argument) *with* Part II.E, *supra* (interpretation of Executive Order in the AG Memorandum, with comparisons to substantively identical prior arguments at April 14 hearing).

The only thing that has changed since oral argument is that defendants have taken the oral representations they made to the Court at the April 14, 2017 hearing and written them down in a memorandum. But revising the form of a previously-made argument provides no valid basis for reconsideration. *See, e.g.*, *Keen v. JPMorgan Chase Bank, N.A.*, 2015 WL 6601775, at *2 (N.D. Cal. Oct. 30, 2015) (Orrick, J.) (denying reconsideration based on CFPB's official interpretations of a regulation where the CFPB had adopted prior Federal Reserve Board interpretations "in wholesale form, minus a few technical changes") (internal quotations omitted); *Victor*, 2015 WL 5569716, at *1 (denying motion for leave to file a motion for reconsideration where "Victor's motion repeats previously made arguments"); *Boyd v. Avanquest N. Am. Inc.*, 2014 WL 5840811, at *1 (N.D. Cal. Nov. 10, 2014) (Orrick, J.) (denying leave to file motion for reconsideration where movant "repeat[ed] the arguments that it made in its motions to dismiss" and "simply dispute[d] the conclusions that the Court made"). Indeed, Local Rule 7-9(b)'s express prohibition on repeating "oral" arguments is designed to prevent litigants from raising an argument for the

first time at a hearing, losing, and then taking another run at the same argument after reducing it to writing. *See McLaughlin v. Wells Fargo Bank, N.A.*, 2015 WL 10889994, at *2 (N.D. Cal. Nov. 24, 2015) (denying reconsideration where litigant "simply rehashed its old arguments" that had been presented at oral argument).

3. Defendants have failed to show any "material difference in fact or law" from what was previously presented to the Court.

Defendants contend that the AG Memorandum justifies reconsideration of the preliminary injunction in this case because it constitutes "a material difference in controlling authority." Mot. at 7. Presumably, defendants are attempting to invoke Local Rule 7-9(b)(1), which requires them to show "a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought." Civil L.R. 7-9(b)(1); *see also* Mot. at 7 (quoting subsection (b)(1)). Plainly, no new facts undercutting the Court's reading of the Executive Order have emerged since the Court entered its injunction. Instead, defendants point only to the AG Memorandum, which they describe variously as a "conclusive interpretation of the scope of the grant-eligibility provision in Section 9(a) of the Executive Order," an "authoritative position" of the Department of Justice, and "binding guidance" regarding how the Executive Order should be interpreted. Mot. at 1, 2. Accordingly, their lone argument for reconsideration must be that the AG Memorandum constitutes "a material difference in . . . law" governing the interpretation of the Executive Order for purposes of Local Rule 7-9(b)(1).[3]

This argument fails. To begin with, what constitutes a "conclusive" interpretation of an Executive Order is a matter properly left to the courts, not to executive branch officials—particularly ones who are named defendants in litigation challenging the executive order they are purporting to interpret. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188 (1999) (resolving a dispute over the correct interpretation of an executive order);

[3] Defendants make no argument that their motion is proper under Local Rule 7-9(b)(3), which allows for reconsideration when the Court has made a "manifest failure . . . to consider material facts or dispositive legal arguments" previously presented to the Court. Civ. L.R. 7-9(b)(3). And in fact, there was no such failure here; the Court carefully considered defendants' interpretation of the Order and discussed it at length in its PI Order. *Santa Clara*, 2017 WL 1459081, at *12–15.

Marbury v. Madison, 5 U.S. 137, 26 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir.), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017) (affirming reviewability of executive orders and noting, "Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the [r]esolution of litigation challenging the constitutional authority of one of the three branches" (internal quotation marks omitted)). As the Ninth Circuit has explained, "the interpretation of an Executive Order begins with its text." *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). Crucially, "[t]he text must be construed consistently with the Order's object and policy," and courts must reject interpretations that do not serve the purpose of the Order. *Id.* (internal quotation marks omitted). Further, because executive orders are presidential directives that carry the force of law, courts may focus on statements made by the President when determining the order's scope and intent. *See International Refugee Assistance Project v. Trump*, 2017 WL 2273306, at *19 (4th Cir. May 25, 2017), as amended (May 31, 2017) (considering "explicit statements of purpose" that "are attributable either to President Trump directly or to his advisors" when determining the purpose of an executive order); *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (considering President's statements about "his intent to implement a 'Muslim Ban'" when analyzing an executive order's constitutionality).[4] Here, the President's statements—which neither the President nor his co-defendants have ever walked back, much less disavowed in some legally binding form—confirm the Executive Order's text and stated purpose while contradicting the Attorney General's belated attempt to rewrite the order and evade this Court's ruling.

The AG Memorandum is not new law that supersedes the President's Executive Order. Although defendants assert that "the AG Memorandum constitutes formal and binding guidance," Mot. at 10, their own authority fails to support the bold claim that executive-branch guidance

[4] *See also Mille Lacs*, 526 U.S. at 191 (relying on the President's intent to determine severability of executive order); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 275–76 (1974) (considering executive branch officials' statements when analyzing whether executive order restricted protected speech under the NLRA).

memoranda are binding—even within the executive branch.[5] And regardless of the extent to which such opinions may be authoritative within the executive branch, "the courts are ***not*** bound by them." *See Cherichel v. Holder*, 591 F.3d 1002, 1016 & n.17 (8th Cir. 2010) ("declin[ing] to adopt [the] reasoning" in an Office of Legal Counsel memo). Indeed, courts should (and do) reject executive branch guidance that conflicts with the text or stated purpose of the law being interpreted, or with preexisting court rulings. *See, e.g.*, *Public Citizen v. Burke*, 655 F. Supp. 318, 322 (D.D.C. 1987), *aff'd* 843 F.2d 1473 (holding that a DOJ memo purportedly implementing the Presidential Recordings and Materials Preservation Act was "contrary to law and cannot be relied on," because it "thwarted the legislative intent of the Act" and "cannot be reconciled with" a prior D.C. Circuit decision interpreting the Act).

To the extent defendants argue the Attorney General's reading of the Executive Order is entitled to some deference as matter of administrative law, they are wrong. This is not a case involving an agency's interpretation of its own ambiguous regulation. Even if it were, "[d]eference is undoubtedly inappropriate . . . when the agency's interpretation is plainly erroneous or inconsistent with the regulation," "when it appears that the interpretation is nothing more than a convenient litigating position," or when it is a "*post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012) (internal quotation marks omitted). Those principles apply with particular force in this case, where defendants' *post hoc* re-interpretation of the Executive Order is not only at odds with the Executive Order's text and purpose, but is also "nothing more than [the] 'convenient litigating position'" of a named defendant. *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1077–78 (9th Cir. 2016) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)); *see also Safe Air For Everyone v. EPA*, 488 F.3d 1088,

[5] For example, according to the law review article defendants cite, "the question of whether (and in what sense) the opinions of the Attorney General, and, more recently, the Office of Legal Counsel, are legally binding within the executive branch remains somewhat unsettled." Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318 (2000). Nor does the Immigration and Nationality Act, 8 U.S.C. 1103(a)(1), provide the Attorney General with authority to rewrite an executive order, or undo a federal district court's reasoned interpretation by fiat. The Attorney General is neither interpreting the INA, nor issuing any determination or ruling "relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1).

1099 (9th Cir. 2007) ("We owe no deference to these *post hoc* litigating positions, adopted by counsel for EPA.").

B. The AG Memorandum provides no basis for reconsidering the PI Order because it contradicts the Executive Order's plain text and stated purpose.

Even if the Court were to forgive defendants' numerous and admitted violations of Local Rule 7-9 and nonetheless consider the AG Memorandum as a possible basis for reconsideration, that memorandum does nothing to undercut the Court's ruling. Because the AG Memorandum advances the same interpretation of the Executive Order in a new package, it is just as incompatible with the plain text and stated purpose of the Executive Order as the position defendants offered at oral argument.

As before, defendants argue that they will interpret the Executive Order (for the time being) as reaching only DOJ and DHS grant programs, which they contend are subject to express congressional conditions regarding compliance with 8 U.S.C. § 1373. Notably, defendants say nothing about which or how many DHS grants are in play, and they offer no declaration from any DHS official in support of their now-memorialized interpretation. Instead, they focus on three DOJ-issued grants: SCAAP, JAG, and COPS grants. As the Court previously and properly ruled, the Executive Order cannot be squared with defendants' crabbed reading. *See Santa Clara*, 2017 WL 1459081, at *9 ("[I]t is not reasonable to interpret the directive as applying solely to law enforcement grants that the Attorney General and Secretary are specifically given authority to exempt from the Order."). The Court's existing PI Order remains fundamentally sound and correct for the following eight reasons.

First, Section 2 of the Executive Order (titled "Policy") sets forth the policy justifications for the Order. Among them is the unqualified purpose of ensuring "that jurisdictions that fail to comply with applicable Federal law ***do not receive federal funds***." EO § 2(c) (emphasis added). This is the broadest possible statement of intent to defund, and it clearly speaks, without limitation, in terms of "federal funds," not three specified DOJ grant programs. Likewise, Section 9(c) instructs the OMB Director to assemble a list of ***all*** federal grants received by ***any*** sanctuary jurisdiction, *see* EO § 9(c), which again demonstrates that the Executive Order was

intended to apply to all federal funding.

Second, nothing in the enjoined Defunding Provision of Section 9(a) limits the definition of affected "Federal grants" in any way. Neither does the text of that section leave it up to the Attorney General or DHS Secretary to determine which "Federal grants" are subject to defunding, or indicate that any executive branch official will need to make a further determination about the scope of affected federal funds. Certainly there is nothing in Section 9(a) that limits defunding to only DOJ and DHS grants expressly conditioned on compliance with section 1373.

Third, as the Court has already noted in rejecting the Administration's interpretation, "the Government can already enforce [SCAAP, JAG, and COPS] grants by the terms of those grants and can enforce 8 U.S.C. 1373 to the extent legally possible under the terms of existing law." *Santa Clara*, 2017 WL 1459081, at *1. If this were truly the intended scope of the Executive Order, it would be a legal nullity. Rather than issuing repeated proclamations about stripping federal funds from targeted jurisdictions, the President simply could have made telephone calls to cabinet members, directing them to enforce existing law. The Executive Order was obviously intended and clearly drafted to do more than this; as the Court reasoned in its order granting preliminary relief, defendants' "interpretation renders the Order toothless." *Id.*

Fourth, the Administration's limiting construction of Section 9(a)'s Defunding Provision directly contradicts the lone exception included in that provision. Section 9(a) directs the Attorney General and DHS Secretary to ensure that "sanctuary jurisdictions" are "not eligible to receive Federal grants, ***except as deemed necessary for law enforcement purposes*** . . . ." EO § 9(a) (emphasis added). There is no dispute here that the three grant programs defendants identify as subject to defunding—SCAAP, JAG, and COPS—are all law enforcement programs. Nothing in the AG Memorandum suggests that anyone in the government has made any determination that these law enforcement grants are not "necessary" for local law enforcement, thus taking them outside the Defunding Provision's law enforcement carve-out. In other words, under the Administration's tortured reading, the Defunding Provision ***applies*** only to grants that the text of that provision clearly ***exempts***. The Court already considered and properly rejected this strained reading for just this reason. *Santa Clara*, 2017 WL 1459081, at *9.

Fifth, the AG Memorandum's creation itself violates the plain text of Section 9(a). That section gives the ***DHS Secretary***, not the Attorney General, "the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction." EO § 9(a). Defendants acknowledged this provision at oral argument, describing the DHS Secretary's role as a threshold issue that made the County's claims unripe. As defendants' counsel explained, "the Order just directs the Secretary to look into the issue and to make the designation." Tr. at 27:3–9; *see also id.* at 26:8–10 ("The second sentence is a directive to the Secretary—separate from the first sentence, to the Secretary of DHS to identify sanctuary jurisdictions."). The Court likewise concluded that the Executive Order's "structure and language make clear" that "the Secretary will eventually define" the phrase "sanctuary jurisdiction." *Santa Clara*, 2017 WL 1459081, at *9; *id.* at *13 (noting "Section 9(a)'s broad grant of discretion to the Secretary to designate jurisdictions as 'sanctuary jurisdictions'").

But as the AG Memorandum makes clear, the Attorney General, not the DHS Secretary, has now defined "sanctuary jurisdictions" as "only . . . jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'" AG Memo at 2. By promulgating this definition, Attorney General Sessions has usurped the DHS Secretary's delegated role under Section 9(a). Again, this shows the AG Memorandum is an on-the-fly, litigation-driven redrafting of the Executive Order, not a reasoned interpretation.[6]

Sixth, much like defendants' opposition to the County's preliminary injunction motion did, the AG Memorandum ignores Section 9(a)'s separate Enforcement Provision, which instructs the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." EO § 9(a). Nothing in the Enforcement Provision—or the AG Memorandum purporting to interpret it—limits "appropriate enforcement action" to withdrawing three kinds of DOJ grants for alleged refusal to comply with section 1373. To the contrary, by referencing actions that "prevent or hinder the enforcement of Federal law" generally, the

[6] It is also worth noting that other sections of the Executive Order direct executive branch officials to issue guidance or promulgate regulations to carry those provisions into effect. *See* EO §§ 6, 10(b). Section 9 includes no such directive.

Enforcement Provision plainly contemplates punishment of "sanctuary jurisdictions" for any perceived hindrance of federal law enforcement, whether or not related to section 1373. To have meaning, the Enforcement Provision must enable some action beyond what the Defunding Provision already authorizes, but neither the Executive Order nor the AG Memorandum sets any limits on what the Enforcement Provision permits. Moreover, unlike the Defunding Provision, the Enforcement Provision does not contain the usual perfunctory savings clause directing that it be applied "to the extent consistent with law."

In their motion, defendants attempt to make up for this admitted deficiency in the AG Memorandum, arguing that the Enforcement Provision "limits the Attorney General to taking 'appropriate' action," and that the County could challenge such an action if and when it is taken. Mot. at 18. That is no limit at all; rather, it is a concession that the Enforcement Provision is unconstitutionally vague, just as the Court concluded in its PI Order. *See Santa Clara*, 2017 WL 1459081, at *25.

Seventh, the AG Memorandum fails to clarify whether a jurisdiction's refusal to comply with ICE civil detainer requests would constitute a "willful refusal to comply" with section 1373. If anything, the memorandum muddies the waters still further. In one breath, defendants concede that the AG Memorandum is silent on whether the refusal to comply with civil detainer requests from ICE would constitute "willful refusal to comply" with section 1373. Mot. at 11 ("The Memorandum does not mention detainer requests"). Then, in the next breath, defendants turn 180 degrees to argue that "the AG Memorandum clarifies that the grant-eligibility provision does not create a retroactive grant condition requiring compliance with federal civil detainer requests." *Id.* at 11:18-19. The AG Memorandum says no such thing; it avoids any discussion of detainer requests at all.

Other provisions of the Executive Order, however, suggest that the Administration is—mistakenly—reading section 1373 to require compliance with detainer requests. Section 9(b) explicitly directs the government to compile a list of states or localities that "ignore[] or otherwise fail[] to honor" detainer requests, in order "[t]o better inform the public regarding the public safety threats associated with sanctuary jurisdictions." EO § 9(b). This confirms that the

Administration equates failure to comply with detainer requests with "sanctuary jurisdiction" status and the associated penalties under the Executive Order. And the Administration's reference to "retroactive" grant conditions leaves open the prospect that the Attorney General will demand compliance with civil detainer requests as a condition for receipt of future grants.

Eighth, as discussed in Part II.A, *supra*, the many public statements of the President and his subordinates regarding the intended scope of the Executive Order directly refute the AG Memorandum's after-the-fact attempts to narrow its broad sweep. There can be no question that the President and his Administration intended the Executive Order to mean what it says on its face. The Court partially enjoined that Order, and its language remains unchanged.

Defendants' revisionist interpretation of the Executive Order fails for all these reasons. In response, defendants repeat another argument they advanced previously: the Executive Order must be constitutional, because it limits its enforcement "to the extent permitted by law." Mot. at 9–10. Of course, as just noted, the Enforcement Provision in section 9(a) does not contain this (or any) limitation. But in any event, defendants' reliance on these boilerplate savings clauses elevates form over substance and should be rejected.

Defendants cite only one out-of-circuit case in support of their rehashed savings-clause argument: the D.C. Circuit's decision in *Building & Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). But *Allbaugh* provides no support for defendants' position. *Allbaugh* related to the scope of the executive branch's authority under a federal statute—the Federal Property and Administrative Services Act (the "Procurement Act")—and how the exercise of that authority meshed with the National Labor Relations Act. Unlike Executive Order 13,768, which lacks any statutory basis, the executive order in *Allbaugh* did not announce a facially unconstitutional presidential policy, and a lawful interpretation of that order was possible given its plain language and stated purpose. In *Allbaugh*, the executive order "establish[ed] the policy of the Government with regard to the use of PLAs [project labor agreements] in federal and federally funded construction contracts." 295 F.3d at 30. It was uncontested that Congress, via the Procurement Act, had expressly authorized a role for the President. *Id.* at 32. The court explained that because the President directed his subordinates to

proceed "[t]o the extent permitted by law," they were "duty-bound to give effect to the policies embodied in the President's direction," but only insofar as legally permitted. *Id.* at 32–33.

Allbaugh cannot save this Executive Order. That case in no way held that a boilerplate "to the extent permitted by law" savings clause can rescue an executive order like this one, which is unconstitutional on its face. Defendants essentially conceded this at oral argument. *See* Tr. at 23:22–24:2 ("THE COURT: . . . so, for example, if there is an Executive Order that prohibited the sale of excess federal property to African Americans to the extent consistent with law, that would be an unconstitutional order, wouldn't it? MR. READLER: That would be hard to defend, Your Honor, correct."). Neither does *Allbaugh* authorize a subordinate executive branch official to reinterpret—or, more accurately, rewrite—an executive order in a manner that is inconsistent with the plain language of the order, the express purpose of the order, and the President's repeated public statements about the order.

Because the AG Memorandum, like defense counsel's statements at the April 14 hearing, are a wholesale redrafting of a patently unconstitutional Executive Order rather than an interpretation of that Order, defendants fail to provide any legitimate basis for this Court to reconsider its April 25, 2017 ruling.

C. The AG Memorandum, even if credited, fails to remedy the Executive Order's constitutional infirmities.

For the foregoing reasons, the Court should disregard the AG Memorandum as a basis to revisit its order. But even if taken at face value as new controlling authority rather than a warmed-over written version of a previously rejected oral argument, the AG Memorandum fails to salvage the Executive Order from its inherent unconstitutionality.

First, to carry the force of law, an executive order must be supported by some statutory or constitutional authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952). The AG Memorandum cannot and does not provide any such authority. Indeed, the President's recent budget document urged Congress to provide him with the statutory authority he admittedly lacked when he issued the Order. *See* Appendix to Budget of the U.S. Gov't, Fiscal Year 2018, at 544, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/appendix.pdf.

Because the President had no such statutory or constitutional authority to issue the Executive Order, it remains an unconstitutional violation of the separation of powers. *See Santa Clara*, 2017 WL 1459081, at *21–22.

Second, the Administration's focus on SCAAP, JAG, and COPS grants raises as many questions as it answers. The parties have never briefed, and the County does not concede, that SCAAP, JAG, or COPS grants have ever been subject to an express congressional condition that grant recipients comply with section 1373. In fact, nothing in any act of Congress approving those programs mentions section 1373, much less conditions those grants on compliance with that statute. Indeed, defendants' own declarant, Mr. Martin, confirms that JAG grants are ***not*** expressly conditioned on compliance with section 1373. *See* Dkt. 113-2, Martin Decl. ¶ 15. And Congress has repeatedly considered and rejected tying those funds to compliance with section 1373. *See, e.g.*, Protecting American Lives Act, S. 1842, 114th Cong. (2016) (died in committee); Protecting American Lives Act, H.R. 3437, 114th Cong. (2016) (same); Protecting American Citizens Together Act, S. 1764, 114th Cong. (2015) (same); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (2015) (same). Instead, the current congressional enactment generically refers only to "all other applicable federal laws." *See* 42 U.S.C. 3752(5)(D)(certification that "the applicant will comply with all provisions of this part and all other applicable Federal laws"). It was not until 2016 that DOJ first interpreted the SCAAP and JAG grant programs as requiring compliance with section 1373, despite Congress's silence on the matter. The County neither concedes that DOJ's expansive position on section 1373's scope or the grant conditions at issue is correct, nor that Congress expressly or validly conditioned any funds on compliance with section 1373 under controlling spending clause jurisprudence.

Third, the AG Memorandum's silence on which DHS grants are affected is similarly problematic. DHS's discretionary grants to state and local jurisdictions—such as the pre-disaster mitigation and emergency preparedness grants the County receives, *see* Dkt. 32, Decl. of Dana Reed ¶¶ 5–6—plainly have no nexus to immigration enforcement. Even an attempt by ***Congress*** to tie such grants to compliance with Section 1373 or civil detainer requests would likely violate the Constitution. *See National Fed. of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2602–

04 (2012); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *Santa Clara*, 2017 WL 1459081, at *23 (noting there is no nexus between section 1373 and "emergency preparedness" grants).[7]

Fourth, the AG Memorandum's big reveal is its definition for "sanctuary jurisdictions," supposedly limiting the term to "jurisdictions that 'willfully refuse to comply with 8 U.S.C. 1373.'" AG Memo. at 2. But this definition ignores this Court's conclusion that this same language is unconstitutionally vague:

> The Order clearly directs the Attorney General and Secretary to ensure that jurisdictions that "willfully refuse to comply" with Section 1373, "sanctuary jurisdictions," are not eligible to receive federal grants. The Government repeatedly emphasizes in its briefing that it does not know what it means to "willfully refuse to comply" with Section 1373. Past DOJ guidance and various court cases interpreting Section 1373 have not reached consistent conclusions as to what 1373 requires. In the face of conflicting guidance, and no clear standard from the Government, jurisdictions do not know how to avoid the Order's defunding penalty.

Santa Clara, 2017 WL 1459081, at *25 (citation omitted). In other words, the AG Memorandum provides a key term with a definition that this Court has previously—and correctly—concluded makes "it impossible for jurisdictions to determine how to modify their conduct, if at all, to avoid the Order's penalties." *Id.* By providing no further explanation of what it means to "willfully refuse to comply" with Section 1373, the Attorney General has doubled down on a definition that this Court has already ruled is too vague to be enforced consistent with constitutional due process.

Fifth, Section 9(a)'s Enforcement Provision remains as unconstitutionally vague as it was the day the Court ruled. The AG Memorandum ignores it completely. It does not, for example, limit the scope of permissible "enforcement" to alleged violations of section 1373. The AG Memorandum leaves in place the Executive Order's broadest possible threat of reprisals for any act the Administration contends hinders federal law enforcement. Because the Administration remains unable to explain what sorts of punishments the Attorney General may mete out, or what

[7] Moreover, even the narrow categories of grants that the Administration seeks unlawfully to tie to section 1373 suffice to justify preliminary injunctive relief. Not only do the constitutional violations themselves support the injunction, but as discussed in the PI Order and the County's briefing, irreparable harm is also independently supported by the Executive Order's coercive impact on state and local governments, even if the total dollar amount in question is diminished. *See Santa Clara*, 2017 WL 1459081, at *26-27 (finding irreparable harm because "the Order improperly seeks to coerce [the plaintiffs] into changing their policies in violation of the Tenth Amendment"); *see also Texas v. United States*, 201 F. Supp. 3d 810, 819 (N.D. Tex. 2016); *Texas v. United States*, 86 F. Supp. 3d 591, 673–74 (S.D. Tex. 2015).

state and local governments would have to do to avoid such unspecified punishment, the Enforcement Provision (still) violates the Fifth Amendment and must be struck down. *See United States v. Williams*, 553 U.S. 285, 304 (2008).

Sixth, nothing in the two-page AG Memorandum suggests that it is and must be the Administration's final word on the Executive Order's interpretation and application. On the contrary, the memorandum's failure to mention affected DHS grants, or to clarify the Executive Order's application to declined civil detainer requests, suggests additional guidance may be forthcoming. Accordingly, notwithstanding defense counsel's assurances that the AG Memorandum is "conclusive," "authoritative," and "binding," there is no reason to suppose that the Attorney General may not decide to revise, supplement, supplant, or revoke that guidance if and when he sees fit. If the Administration believes it can displace a Court order—and rewrite an Executive decree—merely by issuing a memo, there is every reason to suspect it may do so again. In other words, whether or not the AG Memorandum binds the executive branch as a whole (it doesn't) or this Court (it can't), it certainly doesn't bind the Attorney General who issued it.

Finally, by leaving the door open to enforcing the Order against jurisdictions that refuse to comply with civil detainer requests, the AG Memorandum does nothing to cure the Executive Order's Tenth Amendment problems. The County continues to have every reason to expect that the Administration will withhold appropriated federal funds unless the County is prepared to violate its residents' Fourth Amendment rights and incur civil liability for doing so. The federal government may not commandeer local officials to implement a federal regulatory program in that way. *See Printz v. United States*, 521 U.S. 898, 925 (1997).

In sum, the AG Memorandum says little and changes nothing. Even if it were a binding statement of law that overrules the President's Executive Order (which it is not), it falls far short of remedying the constitutional flaws the County identified in its moving papers. Consequently, it provides no basis for the Court to revisit its holding that the County's claims are likely to succeed, that they are justiciable, and that the County faces irreparable harm. The constitutional harms, budgetary uncertainty, and reasonable fear of enforcement are just as compelling as they were when the Court issued its preliminary injunction.

D. There is no reason for the Court to "clarify" the preliminary injunction.

The Court should likewise reject defendants' alternative request to "clarify" the scope of the preliminary injunction. Under the Court's existing order, the Administration is not enjoined from "exercising legal authority independent of the Executive Order to impose conditions on grant programming for future DOJ or DHS-administered grants." Mot. at 20. There is no reason for the Court to issue any "clarification." Indeed, the Court's preliminary injunction order distinguished Section 9(a) of the Executive Order, which is unlawful, from other provisions of federal law that might theoretically give the Administration the power to withdraw or modify grant funding. The Court took pains in its order to make clear that the injunction "does not impact the Government's ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. 1373." *Santa Clara*, 2017 WL 1459081, at *29. This could hardly be clearer, and defendants do not explain the source of their apparent confusion about the scope of the injunction, or present a specific hypothetical case where the applicability of the Court's order might be in doubt.

V. CONCLUSION

Only one document at issue in this lawsuit has the force of law, and that is Executive Order 13,768. The County challenged Section 9 of that Order, and that is what the Court enjoined. The Executive Order remains in place and unchanged. Yet in a transparent effort to override this Court's preliminary injunction order, defendants have issued a two-page memorandum that lacks the force of law and merely reduces to writing the same arguments this Court has already considered and rejected. Defendants now ask this Court to ignore the challenged Executive Order, which is binding law, and focus instead on the memorandum, which is not.

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The Court should decline defendants' invitation. Defendants have failed to show reasonable diligence, failed to point to any material change in the law that could justify reconsideration, and failed to put forward a plausible interpretation of the Executive Order that cures its many constitutional defects. In short, defendants' arguments fare no better the second time around. The Court should deny defendants' motion for reconsideration.

Respectfully submitted,

Dated: June 6, 2017

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FILER'S ATTESTATION

I, John W. Keker, am the ECF user whose identification and password are being used to file this PLAINTIFF COUNTY OF SANTA CLARA'S OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION. Pursuant to Rule 5-1(i)(3), I hereby attest that the other above named signatories concur in this filing.

/s/ John W. Keker
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