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10 Attorneys For Plaintiff COUNTY OF SANTA CLARA

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 COUNTY OF SANTA CLARA,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP, President of the
18 United States of America, ELAINE DUKE,
19 in her official capacity as Acting Secretary
20 of the United States Department of
21 Homeland Security, JEFFERSON B.
22 SESSIONS, in his official capacity as
23 Attorney General of the United States,
24 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

**COUNTY OF SANTA CLARA'S NOTICE
OF MOTION AND MOTION FOR
SUMMARY JUDGMENT**

Date: October 4, 2017
Time: 2:00 pm
Dept.: Courtroom 2, 17th Floor
Judge: Hon. William Orrick

Date Filed: February 3, 2017

Trial Date: April 23, 2018

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 4, 2017 at 2:00 p.m., or as soon thereafter as counsel may be heard, at the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, before the Honorable William H. Orrick, plaintiff County of Santa Clara (the “County”) will and hereby does move the Court for summary judgment on each of the four causes of actions set forth in the County’s Complaint.

This Motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, the declarations of Sara H. Cody, M.D. (County Public Health Officer), Paul Lorenz (Chief Executive Officer of Santa Clara Valley Medical Center), Miguel Márquez (County Chief Operating Officer), Robert Menicocci (Director of the County’s Social Services Agency), Carl Neusel (Undersheriff of the County), Dana Reed (Director of the County’s Office of Emergency Services), Jeffrey F. Rosen (District Attorney of the County), Jeffrey V. Smith (County Executive), and Laurie Smith (Sheriff of the County), filed concurrently herewith, and the record and files of this Court, and all other matters of which the Court may take judicial notice.

STATEMENT OF RELIEF REQUESTED

1. A declaration pursuant to 28 U.S.C. §§ 2201–02 that Section 9(a) of Executive Order 13768 is unconstitutional;
2. A permanent injunction enjoining defendants from implementing Section 9(a) of Executive Order 13768.

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Federal Cases

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County of Santa Clara v. Trump
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County of Santa Clara v. Trump
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Section 9(a) of Executive Order 13768 (the “Executive Order”) is unconstitutional. It purports to seize for the President spending powers that belong solely to Congress, then distorts and expands those powers beyond constitutional limitations. It baldly attempts to compel state and local governments to become agents of the federal government’s immigration enforcement agenda, violating core principles of federalism. The Executive Order’s plain text establishes its unlawfulness. Section 9(a) purports to render state and local governments deemed “sanctuary jurisdictions” ineligible for any federal funds, and subject to unspecified enforcement actions, unless they knuckle under to vague and standardless demands in a manner the Attorney General and Secretary of Homeland Security, in their unbounded discretion, deem sufficient. Because section 9(a) violates the separation of powers inherent in the Constitution, the Tenth Amendment, and the Fifth Amendment’s due process clause, the Court should declare it unconstitutional and permanently enjoin its implementation.

Although defendants have recently taken the position that the Executive Order is a legally meaningless internal directive that they claim they will implement narrowly, the Court has rightly rejected that argument as incompatible with the Executive Order itself. And the County of Santa Clara (the “County”) cannot depend on such an illusory promise, particularly when executive branch officials persist in making public declarations demonstrating that the Executive Order means exactly what it says. To effectively govern, meet its state-mandated duties to protect the health and safety of all its residents, and avoid drastic and widespread cuts in essential services, the County—and state and local governments across the nation—require a clear and enforceable judicial order stopping this unconstitutional power grab. Because the material facts are undisputed and the law is clear, the County moves for summary judgment and requests that the Court make its preliminary injunction permanent.

II. FACTUAL BACKGROUND

As the Court explained during the hearing on the County’s preliminary injunction motion, “[t]here are a number of facts that aren’t in dispute, [and] that don’t need further explication.”

1 Request for Judicial Notice (“RJN”) ¶ 1, Ex. A (Apr. 14, 2017 Hr’g Tr.) at 5:18–19. Having
 2 reviewed the factual record in its preliminary injunction order—and having revisited those facts
 3 when denying defendants’ motion for reconsideration of that order—the Court is well-versed in
 4 the relevant facts. *See County of Santa Clara v. Trump* (“*Santa Clara*”), -- F. Supp. 3d --, 2017
 5 WL 1459081, at *2–6 (N.D. Cal. Apr. 25, 2017), *reconsideration denied*, -- F. Supp. 3d --, 2017
 6 WL 3086064 (N.D. Cal. July 20, 2017). The material facts supporting the County’s claims
 7 remain largely unchanged and are undisputed.

8 **A. The President issues Executive Order 13768.**

9 On January 25, 2017, President Donald J. Trump issued Executive Order 13768. Exec.
 10 Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the “Executive Order” or “EO”). The Executive
 11 Order declares that “[i]t is the policy of the executive branch to . . . “[e]nsure that jurisdictions
 12 that fail to comply with applicable Federal law do not receive *Federal funds*, except as mandated
 13 by law.” *Id.* § 2(c) (emphasis added). Section 9 implements that policy by authorizing federal
 14 officials to take punitive actions against any state and local governments that the Trump
 15 Administration deems to be “Sanctuary Jurisdictions.” *Id.* § 9. Specifically, Section 9(a) gives
 16 the Secretary of Homeland Security (the “Secretary”) the authority to designate state and local
 17 governments as “sanctuary jurisdictions.” *Id.* § 9(a). Although the Executive Order nowhere
 18 defines that key term, section 9(a) uses “sanctuary jurisdiction” synonymously with state and
 19 local governments that “willfully refuse to comply with 8 U.S.C. § 1373,”¹ *id.* § 9(a), or that
 20 decline to honor Immigration and Customs Enforcement (“ICE”) civil detainer requests. *Id.* §
 21 9(b) (equating “sanctuary jurisdictions” with jurisdictions “that ignored or otherwise failed to
 22 honor any detainers with respect to such aliens”).

23 Section 9(a) contains two distinct penalty provisions, each mandatory in application. The
 24 first—the **Defunding Provision**—commands executive branch officials to strip state and local
 25 governments deemed to be “sanctuary jurisdictions” of their eligibility “to receive Federal

26
 27 ¹ Section 1373 is a federal statute that “prohibits local governments from restricting government
 28 officials or entities from communicating immigration status information to ICE.” *Santa Clara*,
 2017 WL 1459081, at *3.

1 grants.” EO § 9(a). The second—the **Enforcement Provision**—orders the Attorney General to
 2 “take appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which
 3 has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”
 4 *Id.* § 9(a). The Executive Order neither defines what it means to “prevent[] or hinder[]” federal
 5 law enforcement nor cabins or defines the phrase “Federal law” in any way.

6 **B. The President and his subordinates have repeatedly confirmed the Executive**
 7 **Order’s sweeping intended scope.**

8 As this Court has noted, “if there was doubt about the scope of the Order, the President
 9 and Attorney General have erased it with their public comments.” *Santa Clara*, 2017 WL
 10 1459081, at *2. The record contains numerous judicially noticeable statements from the
 11 President, the Attorney General, and other executive branch officials, all of which confirm that
 12 the Executive Order is intended to, and does, have the broad scope its plain language reveals.

13 **1. The Executive Order is designed to strip all federal funding from state**
 14 **and local governments deemed “sanctuary jurisdictions.”**

15 President Trump has repeatedly pledged, both on the campaign trail and after taking the
 16 oath of office, not just to punish “sanctuary jurisdictions,” but to fully and finally “end” them by
 17 denying federal funding. *See* RJN ¶¶ 2, 7, Exs. B at 8, G. As a candidate, Mr. Trump issued a
 18 “Contract with the American Voter,” which was (and remains) accessible on his campaign
 19 website. *See id.* ¶ 3, Ex. C. One promise on Mr. Trump’s very short list of actions that the
 20 administration pledged to “immediately pursue” was to “cancel *all federal funding* to sanctuary
 21 cities.” *Id.* (emphasis added).

22 After taking office, the President confirmed his intent in issuing the Executive Order was
 23 exactly that: to deny all federal funds to targeted jurisdictions. Speaking to former Fox News
 24 personality Bill O’Reilly on February 5, 2017, the President frankly described defunding as a
 25 “weapon” that he could wield to deprive jurisdictions of “the money they need to properly operate
 26 as a city or state.” RJN ¶ 4, Ex. D at 4. With the Executive Order freshly issued, the President’s
 27 then-press secretary confirmed that the Administration’s policy, and the Executive Order’s goal,
 28

1 was to ensure that “counties and other institutions that remain sanctuary cities don’t get federal
2 government funding.” *Id.* ¶ 5, Ex. E at 4–5.

3 These threats have continued during this litigation and even *after* the Court entered the
4 preliminary injunction on April 25, 2017. On March 27, 2017, Attorney General Sessions stated
5 that any jurisdiction the Department of Justice deems noncompliant with Section 1373 will suffer
6 not only “withholding [of] grants, termination of grants, and disbarment or ineligibility for future
7 grants,” but also the “claw back” of “any funds” previously awarded. *Id.* ¶ 6, Ex. F at 3. And on
8 June 28, 2017, the White House issued a press release asserting that the President “is keeping his
9 promise[.]” to “end the sanctuary cities” and to ensure that “[c]ities that refuse to cooperate with
10 Federal authorities will not receive taxpayer dollars.” *Id.* ¶ 7, Ex. G.

11 **2. The Executive Order targets jurisdictions that refuse to comply with**
12 **ICE civil detainer requests.**

13 Defendants have likewise made clear that, for purposes of the Executive Order, “sanctuary
14 jurisdictions” includes local jurisdictions that refuse to comply with ICE civil detainer requests.
15 Although defendants have taken the position—in this litigation, at least—that ICE civil detainer
16 requests are “voluntary” and that “compliance with 8 U.S.C. § 1373 . . . relates only to the sharing
17 of information,” Dkt. 136 at 8, the Administration’s public statements tell a different story.

18 On January 26, 2017, President Trump lauded the mayor of Miami, Florida, tweeting,
19 “Miami-Dade Mayor drops sanctuary policy. Right decision. Strong!” RJN ¶ 8, Ex. H. The
20 President’s tweet cited a Miami Herald article reporting that Miami’s mayor had directed his
21 corrections department “to honor all immigration detainer requests received form the Department
22 of Homeland Security.” *Id.* ¶ 9, Ex. I; *see also id.* ¶ 10, Ex. J. In light of this policy change, the
23 Department of Justice recently certified that Miami-Dade County is in compliance with Section
24 1373. *Id.* ¶ 11, Ex. K. Indeed, during a speech in Miami on August 16, 2017, Attorney General
25 Sessions confirmed that Miami-Dade’s decision to begin honoring ICE civil detainer requests had
26 persuaded him that Miami-Dade was now “in full compliance and eligible for federal law
27 enforcement grant dollars.” *Id.* ¶ 12, Ex. L. The implication is clear: to avoid being labeled a
28 sanctuary jurisdiction under the Executive Order, a local government must comply with ICE civil

1 detainer requests.

2 The Attorney General has likewise continued to link sanctuary jurisdictions with ICE
 3 detainers—even after his counsel disclaimed the argument that Section 1373 requires compliance
 4 with ICE civil detainer requests, and after issuing a supposedly clarifying Memorandum on the
 5 Executive Order that nowhere mentions such requests. *See infra* at Part II.F (discussing May 22,
 6 2017 Attorney General Memorandum). On July 12, 2017, after this Court rejected defendants’
 7 motion for reconsideration of its preliminary injunction order, Attorney General Sessions publicly
 8 lambasted “sanctuary cities” and “counties” for refusing to honor civil detainer requests, stating
 9 “I urge them to review what they’re doing, to rethink those policies,” and to “detain someone so
 10 the next jurisdiction can prosecute the case[.]” *See* RJN ¶ 13 (video of Att’y Gen. Sessions
 11 Remarks of July 12, 2017, at 32:40–33:00). Acting ICE Director Thomas Homan has made the
 12 same link, testifying in a congressional hearing that, at a minimum, DHS believes that Section
 13 1373 requires “not only sharing the information, but allow[ing] us access to the jails.” *Id.* ¶ 14,
 14 Ex. M at 45. These remarks echo previous comments Mr. Homan made after meeting with
 15 President Trump on June 28, 2017. Referencing the “executive orders signed by the President
 16 earlier this year,” Mr. Homan expressly equated “sanctuary jurisdictions” with those that “fail to
 17 honor detainees.” *Id.* ¶ 15, Ex. N at 2.

18 **3. The Administration intends to enforce the Executive Order against the**
 19 **County of Santa Clara.**

20 In addition to its general admissions about the Executive Order’s purpose and scope, the
 21 Administration has made clear that it is targeting the County specifically. In the weeks after the
 22 Executive Order was issued, ICE issued three “Weekly Declined Detainer Outcome Reports”
 23 (“DDORs”) pursuant to Section 9(b) of the Executive Order, identifying counties deemed to be
 24 “sanctuary jurisdictions.” RJN ¶¶ 16–18, Exs. O–Q. ICE called out the County by name in all
 25 three DDORs. *Id.*, Ex. O at 4; Ex. P at 8, 22; Ex. Q at 2, 22.² The Administration has not

26 ² The DDORs for February 4–10, 2017 and February 11–17, 2017 list the entire State of
 27 California as a “non-cooperative jurisdiction.” RJN, Ex. P at 8, 20; Ex. Q at 10, 21. This is
 28 consistent with President Trump’s public statement that California is, in his view, “out of control”
 and a potential target for his defunding “weapon.” *Id.*, Ex. D at 4.

1 wavered since then, despite arguing before this Court that the County lacks standing. Further, the
 2 number of requests ICE has sent to the County in 2017 has already surpassed all of those received
 3 in 2016. Decl. of Carl Neusel (“Neusel Decl.”) ¶ 6. Pursuant to the County’s policies, the
 4 County has denied all such requests. *See infra* Part II.C.

5 Defendants have made no secret that they consider California in general, and many of the
 6 state’s larger counties in particular, sanctuary jurisdictions that hinder the President’s immigration
 7 enforcement agenda. On March 29, 2017, Attorney General Sessions and then-Secretary of
 8 Homeland Security Kelly sent a letter to the Chief Justice of the California Supreme Court,
 9 asserting that “the State of California and many of its largest counties and cities, have enacted
 10 statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing
 11 immigration law by prohibiting communication with ICE, and denying requests by ICE officers
 12 and agents to enter prisons and jails to make arrests.” RJN ¶ 19, Ex. R at 2.

13 **C. To enhance public safety, the County has enacted policies and practices that**
 14 **fall squarely within the Executive Order’s ambit.**

15 It is undisputed that the County’s policies and practices regarding federal immigration
 16 enforcement stand at odds with the Executive Order. To protect public safety and provide
 17 services to all its residents, the County has adopted policies and practices that prioritize local law
 18 enforcement and public safety over participating in federal immigration enforcement. *See* Decl.
 19 of Laurie Smith (“L. Smith Decl.”) ¶¶ 4–11; Neusel Decl. ¶¶ 4–11; Decl. of Jeffrey F. Rosen
 20 (“Rosen Decl.”) ¶¶ 5–12; Decl. of Miguel Márquez (“Márquez Decl.”) ¶¶ 22–29. In 2010, the
 21 County Board of Supervisors passed a Resolution barring County employees from using County
 22 resources to transmit to ICE information collected by the County in the course of providing
 23 critical services or benefits, as well as initiating an inquiry or enforcement action based solely on
 24 an individual’s actual or suspected immigration status. Márquez Decl. ¶ 28 & Ex. H; Neusel
 25 Decl. ¶ 8; L. Smith Decl. ¶ 7. The Resolution further prohibits the use of County resources to
 26 pursue an individual solely because of an actual or suspected civil violation of federal
 27 immigration law. *Id.*

1 The County also has adopted a policy that limits compliance with ICE civil detainer
2 requests.³ Before late 2011, the County regularly responded to such requests, straining its
3 resources by housing an average of 135 additional inmates each day at a daily cost of \$159 per
4 inmate (the cost would be \$200 per inmate today). Neusel Decl. ¶ 4. ICE refused to reimburse
5 detention costs or indemnify the County for liability. Márquez Decl. ¶¶ 22–26 & Exs. C–E. A
6 County task force, which included the County Sheriff and other top law enforcement officials,
7 recommended that the County comply with ICE detainer requests only for individuals with
8 serious or violent felony convictions, as defined by California law, and the County’s final policy
9 honors such requests only if ICE agrees to reimburse the County for the costs of complying. L.
10 Smith Decl. ¶¶ 5–6; Neusel Decl. ¶¶ 5–6; Márquez Decl. ¶ 27 & Ex. G. Because ICE refuses to
11 reimburse costs associated with detainer requests, the County has declined to honor such requests
12 since the policy’s implementation in November 2011. *Id.*

13 The County’s core mission and mandate is to protect and promote public health and
14 safety. The County adopted policies and practices regarding federal immigration enforcement to
15 advance this core mission. As the County’s District Attorney, Sheriff, and Chief of Correction all
16 attest, enforcement of federal immigration law by the County has a toxic effect on the County’s
17 ability to fight crime and makes the entire community less safe. Rosen Decl. ¶¶ 3–12; L. Smith
18 Decl. ¶¶ 4–11; Neusel Decl. ¶¶ 5–11. Immigrants are no more likely to commit crimes than U.S.
19 citizens, *see* Rosen Decl. ¶ 7, and County law enforcement officials rely on all members of the
20 local community—including undocumented individuals—to assist with criminal investigations
21 and prosecutions. *Id.* ¶¶ 8–11; L. Smith Decl. ¶¶ 8–9; Neusel Decl. ¶ 9. When residents perceive
22 local law enforcement officers as cooperating with ICE, they are less willing to report crimes,
23 offer testimony, or seek basic medical care and other critical services. Rosen Decl. ¶¶ 8–11; L.
24 Smith Decl. ¶ 10; Neusel Decl. ¶ 9; Cody Decl. ¶ 13.

25
26 ³ An ICE civil detainer request asks a local law enforcement agency voluntarily to continue to
27 hold an immigrant inmate—who is in a local jail because of actual or suspected violations of state
28 criminal laws—for up to 48 hours after his or her scheduled release date so that ICE can decide
whether to take the individual into custody and initiate removal proceedings. Neusel Decl. ¶ 10;
Márquez Decl., Ex. C at 3.

1 It is not the County’s role to enforce federal immigration law, and, in any event, the
 2 County cannot change its local policies without suffering significant harms. First, as a local
 3 government accountable to its residents, the County is responsible for identifying and
 4 implementing policies that enhance and protect public health, welfare, and safety. The County
 5 has determined that its current policies, rather than those the Executive Order would force upon it,
 6 serve those objectives. *See generally* Rosen Decl.; L. Smith Decl.; Neusel Decl. Second, forcing
 7 the County to comply with ICE civil detainer requests would impose significant costs that would
 8 strain the County’s already severely impacted jail system. Neusel Decl. ¶¶ 10–11; Márquez Decl.
 9 ¶ 29. Third, complying with civil detainer requests would force the County to violate the
 10 constitutional rights of its residents and expose the County to substantial liability. Márquez Decl.
 11 ¶¶ 22, 29.⁴ Finally, even if the County decided that it must change its local policies to avoid loss
 12 of federal funds, it must still comply with state law that limits or prohibits its participation in
 13 federal immigration enforcement activities. *See, e.g.*, Transparency and Responsibility Using
 14 State Tools (TRUST) Act, Cal. Gov’t Code § 7282.5.

15 **D. The County relies on federal funding to provide critical health and safety**
 16 **services to its 1.9 million residents.**

17 It is undisputed that the County heavily relies upon federal funds to provide a wide array
 18 of essential services to its residents. In fiscal year 2015–2016, the County received
 19 approximately \$1.7 billion in federal and federally dependent funds, representing roughly 35% of
 20 the County’s revenue during that fiscal year.⁵ Decl. of Jeffrey V. Smith (“J. Smith Decl.”) ¶ 6;
 21 Márquez Decl. ¶ 8. The County uses the vast majority of this federal funding to provide essential
 22 safety-net programs and social services to its residents. Márquez Decl. ¶¶ 5–8. Without these

23 ⁴ *See, e.g., Santa Clara*, 2017 WL 1459081, at *4 (noting that several courts have held that
 24 complying with civil detainer requests violate the Fourth Amendment); *Morales v. Chadbourne*,
 25 793 F.3d 208, 215–16 (1st Cir. 2015); *Orellana v. Nobles Cnty.*, 230 F. Supp. 3d 934, 943–44 (D.
 26 Minn. 2017); *Mendia v. Garcia*, 2016 WL 2654327, at *6–7 (N.D. Cal. May 10, 2016); *Miranda-*
 27 *Olivares v. Clackamas Cnty.*, 2014 WL 1414305, at *11–12 (D. Or. Apr. 11, 2014).

26 ⁵ The County received roughly \$1 billion in federal funds not commingled with other funding
 27 sources. Márquez Decl. ¶ 8. It received an additional approximately \$680 million in revenues
 28 which included a significant federal funding component and was dependent upon the receipt of
 federal funds through a matching requirement or other mechanism. *Id.* These two funding
 streams are referred to herein, collectively, as the County’s “federal funding” or “federal funds.”

1 funds, the County would be forced to make extraordinary cuts to critical services—or even
 2 eliminate key services and functions altogether. *Id.* ¶¶ 16–19; J. Smith Decl. ¶¶ 6–10. If not
 3 permanently enjoined, the Executive Order’s threat to withdraw federal funding from the County
 4 “would decimate the County budget and cause immediate and devastating injury to the 1.9
 5 million residents who rely on the essential services that the County provides.” J. Smith Decl. ¶ 6.

6 In support of this motion, the County has submitted declarations from the County
 7 Executive, Chief Operating Officer, Director of Emergency Management, Public Health Officer,
 8 Director of the Social Services Agency, and CEO of Santa Clara Valley Medical Center detailing
 9 the Executive Order’s potentially devastating impact on the County and its residents absent
 10 injunctive relief. This undisputed evidence demonstrates that the Executive Order’s threat to strip
 11 the County of federal funding would gut the County’s ability to provide basic services to its
 12 residents.⁶ *See, e.g.*, Decl. of Paul E. Lorenz (“Lorenz Decl.”) ¶ 6 (detailing how Valley Medical
 13 Center relies on roughly \$1 billion in federal funds, comprising 70% of its annual expenses);
 14 Decl. of Robert Menicocci (“Menicocci Decl.”) ¶ 6 (explaining that the County’s Social Services
 15 Agency receives more than \$300 million in federal funding annually); Decl. of Sara H. Cody,
 16 M.D. (“Cody Decl.”) ¶ 5 (explaining that the County’s Public Health Department receives more
 17 than \$38 million in federal funding annually—nearly 40% of its expenditures—for public health
 18 services provided to residents); Decl. of Dana Reed (“Reed Decl.”) ¶ 8 (explaining that the
 19 County’s Office of Emergency Services relies on federal funding for more than two-thirds of its
 20 budget and “could not perform its current functions without it”).

21 **E. The Court’s Preliminary Injunction Order**

22 On April 25, 2017, the Court entered a nationwide preliminary injunction against section
 23 9(a) of the Executive Order. *See Santa Clara*, 2017 WL 1459081, at *29. In its order, the Court
 24 analyzed and rejected an argument that defendants had made for the first time at oral argument:

25
 26 ⁶ As discussed above, the phrase “Federal grants” in Section 9(a) of the Executive Order applies
 27 to all federal funds, whatever their source. But even if that phrase were limited to federal funds
 28 that are *not* provided through entitlement programs, the County still received more than \$338
 million in non-entitlement federal grant awards in fiscal year 2014-2015 and more than \$400
 million in federal grant awards in fiscal year 2015-2016. Márquez Decl. ¶ 21 & Exs. A & B.

1 that, despite its plain language, the Executive Order does not actually declare “sanctuary
2 jurisdictions” ineligible for “Federal funds.” *Id.* at *7–10; EO § 2(c). Instead, defendants
3 asserted, the Executive Order applies only to “federal grants issued by [two] specific agencies”—
4 DOJ and DHS—and only those DOJ and DHS grants that Congress had expressly conditioned on
5 compliance with section 1373. RJN, Ex. A at 34:24–35:9. The Administration further
6 represented that DHS had not yet identified any DHS grants that Congress had expressly
7 conditioned on compliance with section 1373. *Id.* at 35:3–4. Meanwhile, DOJ had identified
8 only three grant programs that it contended were expressly conditioned on compliance with
9 section 1373: the State Criminal Alien Assistance Program (“SCAAP”), the Justice Assistance
10 Grant (“JAG”) program, and the Community Oriented Policing Assistance (“COPS”) initiative.
11 *Id.* at 35:4–9. According to DOJ, the only federal funds subject to the Executive Order were
12 grants from these three programs.

13 The Court rejected that re-interpretation of the Executive Order as “not legally plausible.”
14 *Santa Clara*, 2017 WL 1459081 at *2. The Court based its ruling primarily on the Executive
15 Order’s plain language, while also taking notice of repeated public comments by the President
16 and the Attorney General, both of whom have consistently characterized the order as a means of
17 stripping “sanctuary jurisdictions” of *all* federal dollars. *Id.* at *14–15.

18 **F. The Court’s Order Denying Defendants’ Motions for Reconsideration and**
19 **Dismissal**

20 On May 23, 2017, defendants filed a motion for reconsideration, asking the Court to
21 revisit its preliminary injunction order. Dkt. 113. Defendants based their motion on a two-page
22 memorandum issued by the Attorney General on May 22, 2017, which merely reduced to writing
23 the same implausible interpretation of the Executive Order that the Court had considered and
24 rejected in its preliminary injunction order. *See* Dkt. 108-2 (“AG Memorandum”). On June 7,
25 2017, defendants moved to dismiss, also advancing the same implausible interpretation of the
26 Executive Order, as well as the same arguments regarding justiciability that the Court had already
27 considered and rejected. Dkt. 115.

28

1 The Court denied both of defendants’ motions on July 20, 2017. *See Santa Clara*, 2017
2 WL 3086064, at *1. Confirming its preliminary injunction order, the Court again rejected
3 defendants’ interpretation of the Executive Order as “not legally plausible,” and concluded that
4 the AG Memorandum amounted to “nothing more than an illusory promise to enforce the
5 Executive Order narrowly.” *Id.* at *4–6. Turning to the motion to dismiss, the Court reiterated its
6 earlier ruling that the County’s claims are justiciable, concluding that the County had not only
7 stated valid causes of action challenging Section 9(a) of the Executive Order, but also had shown
8 that it is “likely to succeed on all of [its] claims.” *Id.* at *9.

9 **G. Defendants’ Continuing Efforts to Punish and Coerce Targeted Jurisdictions**

10 With the preliminary injunction in place, the County could continue providing its 1.9
11 million residents with core health and safety services, preserve the local policies targeted by the
12 Executive Order, and proceed with its annual budget process based upon the expectation that it
13 would continue to receive roughly \$1.7 billion in federal funds. Márquez Decl. ¶ 20; J. Smith
14 Decl. ¶ 10.

15 But the danger inherent in the Executive Order remains. Even after this Court issued its
16 preliminary injunction, defendants have continued their attempts to coerce state and local
17 governments into changing their local policies to suit the federal government’s wishes. On July
18 25, 2017, DOJ issued new grant conditions designed to deny JAG funding to jurisdictions that
19 decline to (a) offer ICE access to local jails, and (b) provide DHS with 48 hours’ notice before
20 releasing certain individuals from local custody. RJN ¶¶ 20–21, Exs. S–T. The White House has
21 expressly tied these new conditions to the Executive Order. *See id.* ¶ 22, Ex. U. The cities of
22 Chicago, San Francisco, and Los Angeles, as well as the State of California, have challenged
23 these new conditions as unconstitutional. *See id.* ¶¶ 23–26, Exs. V–Y. What is clear is that
24 defendants are probing the outer limits of this Court’s preliminary injunction in order to continue
25 enforcing Section 9(a), including by aggressively over-reading statutory authorizations for their
26 grants. Defendants’ actions demonstrate why the Court must make its preliminary injunction
27 permanent.

1 **III. LEGAL STANDARD**

2 **A. Rule 56 Summary Judgment Standard**

3 A party may move for summary judgment on any “claim or defense” or “part of [a] claim
4 or defense,” Fed. R. Civ. P. 56(a), and a district court should enter summary judgment where
5 “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
6 matter of law.” *Id.* A dispute as to a material fact is only genuine “if there is sufficient evidence
7 for a reasonable jury to return a verdict for the nonmoving party. This requires evidence, not
8 speculation.” *Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*, 74 F. Supp. 3d 1134, 1139 (N.D.
9 Cal. 2014) (quotations omitted).

10 The primary issue presented by this motion is the interpretation and constitutionality of
11 the Executive Order. Where, as here, a “case involves interpretation of the EO as a matter of law,
12 . . . summary judgment is appropriate.” *Wong v. Ilchert*, 785 F. Supp. 822, 823–24 (N.D. Cal.
13 1991), *aff’d*, 998 F.2d 661 (9th Cir. 1993) (Orrick, J.); *see also Dalzin v. Belshe*, 993 F. Supp.
14 732, 734 (N.D. Cal. 1997) (“It is axiomatic that questions of statutory interpretation are questions
15 of law. Summary judgment is therefore the appropriate means for resolving this case” (citation
16 omitted)).

17 **B. Standard for Interpretation of Executive Orders**

18 Courts called upon to interpret executive orders begin with the order’s text. *See Bassidji*
19 *v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). “The text must be construed consistently with the
20 Order’s ‘object and policy.’” *Id.* Courts may not adopt interpretations that “require[] rewriting,
21 not just reinterpretation” of an order. *United States v. Stevens*, 559 U.S. 460, 481 (2010); *see also*
22 *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) (holding that courts may not “insert
23 missing terms into the statute or adopt an interpretation precluded by [its] plain language”).

24 As the Court has already concluded—and defendants have conceded—the Court is in no
25 way bound by the Attorney General’s interpretation of the Executive Order. *See Santa Clara*,
26 2017 WL 3086064, at *4. Nor does the Court owe any deference to an agency interpretation that
27 is neither an accurate nor a credible reading of an executive order. *See id.*; *Comite de Jornaleros*
28 *de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) (stating that

1 courts need not “adopt an interpretation precluded by the plain language of the ordinance”). In
 2 addition, when construing statutes and ordinances, courts consistently reject government officials’
 3 promises or commitments to enforce an order more narrowly than it is written. *See, e.g., Stevens*,
 4 559 U.S. at 480; *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 (1988); *Doe v.*
 5 *Harris*, 772 F.3d 563, 580–81 (9th Cir. 2014); *United States v. Nosal*, 676 F.3d 854, 862 (9th Cir.
 6 2012); *Santa Clara*, 2017 WL 3086064, at *5.

7 **IV. ARGUMENT**

8 In granting the County’s motion for a preliminary injunction, the Court concluded that the
 9 County is likely to succeed on the merits of its four constitutional claims. *Santa Clara*, 2017 WL
 10 1459081, at *21–26. Because neither the material facts nor the governing law have changed, the
 11 Court’s analysis remains sound and the County is entitled to summary judgment.

12 **A. Section 9(a) of the Executive Order violates the separation of powers inherent** 13 **in the Constitution.**

14 Section 9(a) of the Executive Order seeks to grant the executive branch spending powers
 15 that belong exclusively to Congress. Because neither the Constitution nor an act of Congress
 16 grants the President the coercive spending powers he now claims, the Executive Order is
 17 unconstitutional.

18 **1. Congress, not the President, may place conditions on federal funds.**

19 Article I of the Constitution vests the federal spending power exclusively in Congress.
 20 *See* U.S. Const. art. I, § 8, cl. 1. The President may neither dictate federal spending nor place
 21 conditions or limits on such spending. Rather, incident to its spending power, “*Congress* may
 22 attach conditions on the receipt of federal funds,” and may “condition[] receipt of federal moneys
 23 upon compliance by the recipient with federal statutory and administrative directives.” *South*
 24 *Dakota v. Dole*, 483 U.S. 203, 206 (1987) (emphasis added and internal quotation marks
 25 omitted). In our tripartite system of government, the President’s role is limited to approving a
 26 spending bill or vetoing it; he may not amend or discard certain parts of it to further his own
 27 policy objectives. *See Clinton v. City of New York*, 524 U.S. 417, 439 (1998). As this Court
 28 previously recognized, “[t]his is true even if Congress has attempted to expressly delegate such

1 power to the President.” *Santa Clara*, 2017 WL 1459081, at *21; *see also City of New York*, 524
2 U.S. at 439 (striking down the Line Item Veto Act, which sought to grant the President the power
3 to cancel certain spending and tax provisions on a line-by-line basis).

4 Once a law is in place, the President must faithfully execute that law. *See* U.S. Const. art.
5 II § 3, cl. 5. “Where Congress has failed to give the President discretion in allocating funds, the
6 President has no constitutional authority to withhold such funds and violates his obligation to
7 faithfully execute the laws duly enacted by Congress if he does so.” *Santa Clara*, 2017 WL
8 1459081, at *21 (citing *City of New York*, 524 U.S. at 439). Nor can the President simply
9 withhold or “impound” allocated funds—Congress has expressly limited his authority to do so by
10 passing the Impoundment Control Act of 1974. 2 U.S.C. §§ 683 *et seq.*

11 As this Court previously concluded, Section 9(a) of the Executive Order “runs afoul of
12 these basic and fundamental constitutional structures” by vesting authority in the President and
13 his subordinates to enact new spending conditions or to deny previously allocated funds. *Santa*
14 *Clara*, 2017 WL 1459081, at *22. The Court reasoned that “Section 9 purports to give the
15 Attorney General and the Secretary the power to place a new condition on federal funds
16 (compliance with Section 1373) not provided for by Congress. But the President does not have
17 the power to place conditions on federal funds and so cannot delegate this power.” *Id.* Section
18 9’s text has not changed. This analysis is correct and entitles the County to summary judgment.

19 What’s more, by linking eligibility for federal funds to compliance with 8 U.S.C. § 1373,
20 civil detainer requests, and other assistance enforcing immigration laws, Section 9(a) of the
21 Executive Order contravenes Congress’s repeated refusals to pass legislation doing exactly that.
22 *Santa Clara*, 2017 WL 1459081, at *22 (listing failed federal legislation that would have
23 conditioned federal funds on compliance with immigration laws). It is well-settled that the
24 President’s power, “if any,” to issue executive orders “must stem either from an act of Congress
25 or from the Constitution itself,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585
26 (1952), and that “when the President takes measures incompatible with the expressed or implied
27 will of Congress, his power is at its lowest ebb,” *id.* at 637 (Jackson, J., concurring). Such is the
28 case here: the President may not enact spending conditions that Congress has expressly rejected.

1 Nor is there any argument that the Constitution itself grants the President the spending
 2 power he now claims. Although “a President sometimes has policy reasons . . . for wanting to
 3 spend less than the full amount appropriated by Congress for a particular project or program,”
 4 “even the President does not have unilateral authority to refuse to spend the funds.” *In re Aiken*
 5 *Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013).

6 **2. Section 9(a) of the Executive Order purports to grant the President**
 7 **spending powers that even Congress lacks.**

8 The Executive Order not only attempts to seize Congress’s spending power, but it also
 9 expands that power beyond constitutional limits. Indeed, the Court has already recognized that
 10 Section 9(a) of the Executive Order violates “at least three” of the limitations the Supreme Court
 11 has recognized cabin Congress’s spending power. *Santa Clara*, 2017 WL 1459081, at *22.

12 *First*, “Congress cannot use the spending power in a way that compels local jurisdictions
 13 to adopt certain policies.” *Santa Clara*, 2017 WL 1459081, at *23; *see also Dole*, 483 U.S. at
 14 211 (holding that Congress may not offer “financial inducement . . . so coercive as to pass the
 15 point at which pressure turns to compulsion” (internal quotation marks omitted)). This
 16 requirement is rooted in fundamental notions of federalism; Congress may not use the power of
 17 the purse to “coerce[] a State to adopt a federal regulatory system as its own.” *Nat’l Fed. of*
 18 *Indep. Bus. v. Sebelius* (“*NFIB*”), 567 U.S. 519, 578 (2012). The Constitution forbids Congress
 19 from imposing spending conditions so draconian that they amount to “a gun to the head,” leaving
 20 the state or local government no realistic choice but to buckle to the federal government’s
 21 demands. *Id.* at 581.

22 The Executive Order fails this test. If the Affordable Care Act’s threat to deny Medicaid
 23 funds was an unconstitutional “gun to the head,” *id.*, then the Executive Order is a fiscal nuclear
 24 weapon, threatening not only the County’s Medicaid funding, but every federal dollar the County
 25 receives, including funding for core County programs ranging from childhood nutrition to
 26 emergency preparedness training. *See* J. Smith Decl. ¶¶ 6–7; Márquez Decl. ¶ 8. “The threat is
 27 unconstitutionally coercive.” *Santa Clara*, 2017 WL 1459081, at *23.

1 Although the Court did not reach the issue in entering its preliminary injunction, the
 2 Executive Order also violates the Constitution’s rule against imposing a spending condition that
 3 requires the recipient to take unconstitutional actions in order to receive the money. *Dole*, 483
 4 U.S. at 208. Here, Sections 9(a) and 9(b) make clear that any jurisdiction that fails to honor ICE
 5 civil detainer requests will find itself ineligible for federal funding. But state and federal courts in
 6 this District and across the country have held that detaining individuals who would otherwise be
 7 released from custody, at ICE’s request, violates the Fourth Amendment. *See, e.g., Morales*, 793
 8 F.3d at 215–16; *Orellana*, 230 F. Supp. 3d at 943–44; *Mendia*, 2016 WL 2654327, at *6–7;
 9 *Miranda-Olivares*, 2014 WL 1414305, at *11–12; *Lunn v. Commonwealth*, 78 N.E.3d 1143,
 10 1153–54 (Mass. 2017). Thus, by conditioning federal funds on honoring ICE civil detainer
 11 requests, the Executive Order is threatening to withhold promised money unless the County
 12 agrees to violate its residents’ constitutional rights. Such an approach would be unconstitutional
 13 even if *Congress* attempted it.

14 **Second**, Congress may only constitutionally impose spending conditions that bear some
 15 relation to the funds appropriated—this is the “nexus” requirement. *See Dole*, 483 U.S. at 213.
 16 Accordingly, the federal “funds conditioned on compliance with Section 1373 must have some
 17 nexus to immigration enforcement.” *Santa Clara*, 2017 WL 1459081, at *23. Here, Section
 18 9(a)’s “attempt to condition all federal grants on compliance with Section 1373 clearly runs afoul
 19 of the nexus requirement: there is no nexus between Section 1373 and most categories of federal
 20 funding, including without limitation funding related to Medicare, Medicaid, transportation, child
 21 welfare services, immunization and vaccination programs, and emergency preparedness.” *Id.*
 22 The County’s declarations make clear that virtually all of the County programs threatened by the
 23 Executive Order have absolutely nothing to do with immigration. *See* J. Smith Decl. ¶ 5;
 24 Márquez Decl. ¶¶ 10, 17–19; Lorenz Decl. ¶ 6; Cody Decl. ¶¶ 13–15; Menicocci Decl. ¶¶ 19–28;
 25 Reed Decl. ¶¶ 8, 10–17.⁷

26 ⁷ Although defendants now contend that the Executive Order targets only a subset of federal
 27 grants, that is an “illusory promise” that fails to bind agencies other than DOJ, the executive
 28 branch as a whole, the Attorney General himself, or whoever his successor might be. *See Santa*
Clara, 2017 WL 3086064, at *4–9.

1 **Third**, any condition Congress places on spending must be unambiguous and made in
2 advance. *See Dole*, 483 U.S. at 207. “The legitimacy of Congress’s exercise of the spending
3 power thus rests on whether the state voluntarily and knowingly accepts the terms of the contract”
4 at the time Congress offers the money. *NFIB*, 567 U.S. at 577 (internal quotation marks omitted).
5 By placing ambiguous, retroactive conditions on all “federal grants,” Section 9(a) of the
6 Executive Order fails this constitutional requirement. *Santa Clara*, 2017 WL 1459081, at *22.
7 The Enforcement Provision suffers from an even more glaring lack of clarity. No one can say
8 what conduct the executive branch might decide “hinders the enforcement of Federal law”—a
9 vast category that may include statutes, regulations, and international treaties. EO § 9(a).

10 Furthermore, the Executive Order’s directives are themselves unclear and ambiguous:
11 defendants have never clarified or explained what it means to willfully refuse to comply with
12 Section 1373. Department of Homeland Security officials’ congressional testimony on that
13 question was that ICE was “struggling” along with DOJ to settle on an “operational meaning” of
14 a sanctuary jurisdiction, and what Section 1373 requires. *See RJN* ¶ 14, Ex. M at 45. Former
15 DHS Secretary and current White House Chief of Staff John Kelly testified that, with respect to
16 “the Sanctuary Cities thing . . . Frankly, I don’t really know what it means.” *Id.* ¶ 27, Ex. Z at
17 16–17. If *defendants* aren’t clear on what a state or local government must do to avoid being
18 classified as a sanctuary jurisdiction subject to defunding under the Executive Order, it follows
19 that the Order itself is unconstitutionally ambiguous.

20 In sum, Section 9(a) of the Executive Order tramples over ground on which even
21 Congress may not tread. Because it violates the Constitution’s separation of powers, the County
22 is entitled to summary judgment on this claim.

23 **B. The Executive Order violates the Tenth Amendment.**

24 Section 9(a) of the Executive Order violates the Tenth Amendment’s anti-commandeering
25 principle “because it attempts to conscript states and local jurisdictions into carrying out federal
26 immigration law.” *Santa Clara*, 2017 WL 1459081, at *23. Consequently, the Court should
27 grant summary judgment on the County’s second cause of action as well.

28

1 The Supreme Court has “made clear that the Federal Government may not compel the
2 States to implement, by legislative or *executive* action, federal regulatory programs.” *Printz v.*
3 *United States*, 521 U.S. 898, 925 (1997) (emphasis added); *see also New York v. United States*,
4 505 U.S. 144, 175–76, 188 (1992). “That is true whether Congress directly commands a State to
5 regulate or indirectly coerces a State to adopt a federal regulatory system as its own.” *NFIB*, 567
6 U.S. at 578.

7 That is exactly what the Executive Order is designed to accomplish. “[T]he Order equates
8 ‘sanctuary jurisdictions’ with ‘any jurisdiction that ignored or otherwise failed to honor any
9 detainers’ and therefore places such jurisdictions at risk of losing all federal grants.” *Santa Clara*,
10 2017 WL 1459081, at *24 (citing EO § 9(b)). By strong-arming state and local governments into
11 becoming federal immigration agents, the Executive Order violates the Tenth Amendment.

12 Executive branch officials in the Departments of Justice and Homeland Security have
13 repeatedly confirmed their intent to coerce state and local governments into becoming federal
14 immigration enforcers. On March 27, 2017, Attorney General Sessions stated, “I strongly urge
15 our nation’s states and cities and counties to . . . to rethink these policies. Such policies . . . put
16 them at risk of losing federal dollars.” RJN ¶ 6, Ex. F at 3. The message is clear: enforce federal
17 immigration law, or risk insolvency. On July 12, 2017, Attorney General Sessions reiterated this
18 message, urging state and local governments to “rethink” their policies and to “detain” suspected
19 undocumented persons “so the next jurisdiction”—namely ICE—“can prosecute the case.” *See*
20 *id.* ¶ 13 (video of Att’y Gen. Sessions Remarks of July 12, 2017, at 32:40–33:00). In other
21 words, participate in federal immigration enforcement activities and transform your jails into
22 local ICE holding cells, or risk loss of federal funds and enforcement action. Acting ICE Director
23 Thomas Homan has likewise confirmed the link between “sanctuary jurisdiction” status under the
24 Executive Order and compliance with civil detainer requests. On July 12, 2017, he appeared on
25 Fox News and demanded federal access to local jails, adding, “We have to *make* these people”—
26 meaning local law enforcement officials—“cooperate with us.” *Id.* ¶ 28 (video of Fox News
27 interview with Acting Director of ICE Thomas Homan at 4:00–4:30) (emphasis added).

28

1 The Tenth Amendment, however, forbids the federal government from making state and
2 local officials implement a federal regulatory program, by coercion or otherwise. Here, the
3 County’s elected leaders and law enforcement officials have determined that the County is best
4 served when its officials decline to act as federal immigration enforcers. Accordingly, the County
5 has declined to honor ICE civil detainer requests since November 2011. Because the Executive
6 Order threatens to withhold all federal funds from “sanctuary jurisdictions” that refuse to
7 administer the Administration’s immigration enforcement agenda, the County can only avoid
8 draconian penalties by requiring its officers to act as arms of the federal immigration enforcement
9 apparatus. Such coercion violates the Tenth Amendment.

10 Moreover, the Enforcement Provision also seeks to compel state and local governments to
11 comply with civil detainer requests by directing the Attorney General to “take appropriate
12 enforcement action against any entity that . . . has in effect a statute, policy, or practice that
13 prevents or hinders the enforcement of Federal law.” EO § 9(a). As defendants’ statements make
14 clear, the Administration views a refusal to comply with civil detainer requests as a hindrance to
15 the enforcement of federal immigration law. *See supra*, Part II.B.2. Conversely, jurisdictions
16 that do change their policies to get in line with the Administration’s immigration enforcement
17 agenda, such as Miami-Dade, are deemed compliant and eligible to receive federal funds. *See*
18 RJN ¶¶ 8–11, Exs. H–K. Accordingly, Section 9(a)’s Enforcement Provision seeks to conscript
19 local officials in violation of the Tenth Amendment.

20 **C. The Executive Order is void for vagueness in violation of the Fifth**
21 **Amendment’s Due Process Clause.**

22 The Executive Order is also unconstitutionally vague under the Fifth Amendment’s Due
23 Process Clause. A federal law is unconstitutionally vague if it (1) “fails to provide a person of
24 ordinary intelligence fair notice of what is prohibited,” or (2) “is so standardless that it authorizes
25 or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285,
26 304 (2008). These constitutional vagueness standards apply with full force to executive orders.
27 *See United States v. Soussi*, 316 F.3d 1095, 1101 (10th Cir. 2002). As the Court concluded when
28

1 granting the preliminary injunction, the Executive Order fails both of these tests. *See Santa*
 2 *Clara*, 2017 WL 1459081, at *24–25.

3 **First**, the Executive Order fails to provide the County with fair notice of what conduct is
 4 required or prohibited. Indeed, the Executive Order is “so vague and standardless” that the
 5 officials charged with designating “sanctuary jurisdictions” have expressed utter befuddlement as
 6 to what the term “sanctuary jurisdiction” means, even after the DOJ issued its supposedly
 7 conclusive AG Memorandum. *See* RJN ¶ 29, Ex. AA at 3 (“I don’t have a clue.”); *id.* ¶ 27, Ex. Z
 8 at 16–17 (“Frankly, I don’t really know what it means.”). On June 13, 2017—22 days after the
 9 AG Memorandum’s release—acting ICE Director Homan reported to Congress that his agency
 10 and the DOJ were still “struggling” to define the term, and to determine what, exactly, Section
 11 1373 requires. *See id.* ¶ 14, Ex. M at 45. If the officials charged with implementing the
 12 Executive Order are so baffled, then there is no way that state and local officials have “fair notice
 13 of what is prohibited.” *Williams*, 553 U.S. at 304.⁸ Nor is it clear what the County must do (or
 14 stop doing) to persuade defendants that it has no “practice that prevents or hinders the
 15 enforcement of Federal law.” EO § 9(a). Such broad and sweeping text is beyond salvaging.

16 **Second**, the Executive Order lacks any clear standards or criteria, vesting the Attorney
 17 General and Secretary with unfettered discretion to determine which jurisdictions fall within the
 18 Executive Order’s ambit, whether they have “willfully refuse[d] to comply” with Section 1373,
 19 and whether “appropriate enforcement action” is required. *Id.* These “standardless guidance and
 20 enforcement provisions” are therefore “likely to result in arbitrary and discriminatory
 21 enforcement.” *Santa Clara*, 2017 WL 1459081, at *25. Because Section 9(a) of the Executive
 22 Order is unconstitutionally vague, the Court should grant summary judgment on the County’s
 23 void-for-vagueness claim.

24
 25 ⁸ The AG Memorandum does nothing to clarify matters. In fact, it merely repeats verbatim the
 26 definition of “sanctuary jurisdictions” offered in the Executive Order: jurisdictions that “willfully
 27 refuse to comply with Section 1373.” EO § 9(a); AG Memorandum at 2. That is the same text
 28 the Court found too vague to pass muster, especially in light of the fact that the federal
 government has conceded that “it does not know what it means to ‘willfully refuse to comply’
 with Section 1373.” *Santa Clara*, 2017 WL 1459081, at *25.

1 **D. The Executive Order deprives the County of procedural due process.**

2 Finally, the Executive Order violates the Fifth Amendment because it fails to provide the
3 County with procedural due process. The undisputed facts establish that the County (1) has a
4 protectable liberty or property interest, and (2) will suffer a denial of adequate process unless
5 Section 9(a) of the Executive Order is permanently enjoined. *See Thornton v. City of St. Helens*,
6 425 F.3d 1158, 1164 (9th Cir. 2005).

7 The County has “a legitimate property interest in federal funds that Congress has already
8 appropriated and that the Count[y] ha[s] accepted.” *Santa Clara*, 2017 WL 1459081, at *26; *see*
9 *also NFIB*, 132 S. Ct. at 2602; *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577
10 (1972); *Doran v. Houle*, 721 F.2d 1182, 1184–85 (9th Cir. 1983).⁹ The undisputed facts
11 demonstrate that the County developed its budget based on “the expectation that the County
12 would receive the federal funds to which it is entitled under its agreements with a number of
13 federal and state agencies.” Márquez Decl. ¶¶ 13–16. In doing so, the County accepted the terms
14 of a congressional contract and began performing under it. *See Pennhurst State Sch. & Hosp. v.*
15 *Halderman*, 451 U.S. 1, 17 n.13 (1981). Accordingly, the County has a protectable property
16 interest in federal appropriations previously authorized by Congress.

17 “The essence of due process is the requirement that a person in jeopardy of serious loss be
18 given notice of the case against him and opportunity to meet it.” *Mathews v. Eldridge*, 424 U.S.
19 319, 348 (1976) (internal alterations and quotations omitted). In this case, “[t]he Executive Order
20 purports to make the Counties ineligible to receive these funds through a discretionary and
21 undefined process,” that fails to provide any notice, opportunity to be heard, adjudicatory
22 procedure, or appellate rights. *Santa Clara*, 2017 WL 1459081, at *26. “This complete lack of
23 process violates the Fifth Amendment’s due process requirements.” *Id.*

24 **E. The Court should enter a nationwide permanent injunction.**

25 A party seeking a permanent injunction must show “(1) that it has suffered an irreparable
26 injury; (2) that remedies available at law, such as monetary damages, are inadequate to

27
28 ⁹ Counties are “persons” for the purpose of asserting due process claims related to payment of
federal funds. *County of Santa Cruz v. Sebelius*, 399 Fed. App’x 174, 176 (9th Cir. 2010).

1 compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and
 2 defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved
 3 by a permanent injunction.” *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir.
 4 2013) (internal quotation marks omitted). The County meets these requirements.

5 **1. The County will suffer irreparable harm without a permanent**
 6 **injunction.**

7 The undisputed material facts demonstrate that, without an order enjoining Section 9(a),
 8 the County faces both unconstitutional coercion to change its policies and extreme budgetary
 9 uncertainty. Defendants’ illusory promise that they will exercise their discretion to implement the
 10 Executive Order as set forth in the AG Memorandum—for now—leaves the Executive Order
 11 untouched and fails to allay the County’s “reasonabl[e] fear [of] enforcement under the Order.”
 12 *Santa Clara*, 2017 WL 1459081, at *27.

13 The constitutional harms the Executive Order inflicts constitute irreparable injury
 14 sufficient to justify injunctive relief as a matter of law. *See, e.g., Washington v. Trump*, 847 F.3d
 15 1151, 1169 (9th Cir. 2017); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Most
 16 fundamentally, the order attempts to “coerce the Count[y] into changing [its] local policies by
 17 imposing overwhelming financial penalties without due process.” *Santa Clara*, 2017 WL
 18 1459081, at *27. The County has enacted its policies governing local participation in
 19 immigration enforcement for sound reasons that enhance—not subvert—public safety. *See Rosen*
 20 *Decl.* ¶ 12; *Neusel Decl.* ¶ 9. The Executive Order’s attempt to strong-arm the County into
 21 undoing these local policies constitutes irreparable harm. *See Texas v. United States*, 201 F.
 22 *Supp.* 3d 810, 834–35 (N.D. Tex. 2016); *Texas v. United States*, 86 F. *Supp.* 3d 591, 673–74
 23 (S.D. Tex. 2015). Similarly, the County “must choose either to attempt to comply” with an order
 24 that violates the separation of powers and other constitutional limitations, or else “defy the Order
 25 and risk losing hundreds of millions of dollars in federal grants.” *Santa Clara*, 2017 WL
 26 1459081, at *27–28. Those structural constitutional injuries also establish irreparable harm. *See*
 27 *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009).

1 Moreover, absent a permanent injunction, the County would be “obligated to take steps to
2 mitigate the risk of losing millions of dollars in federal funding, which will include placing funds
3 in reserve and making cuts to services.” *Santa Clara*, 2017 WL 1459081, at *27. It will be
4 forced to choose between slashing services and staff, or else bowing to unconstitutional
5 directives. For example, Valley Medical Center (“VMC”) relies on roughly \$1 billion in federal
6 funding, mostly through Medi-Cal and Medicare programs. Lorenz Decl. ¶ 6. As VMC’s Chief
7 Executive Officer has stated under oath, “The Court’s April 25, 2017 preliminary injunction order
8 preserved [VMC’s] federal funding, thus preventing a massive and untenable public health crisis
9 in the County, for now.” *Id.* ¶ 7. But with the injunction lifted, and defendants free to implement
10 Section 9(a) according to its terms, VMC’s “ability to provide a broad range of quality services to
11 thousands of patients – including infants and children, those with chronic diseases, and the elderly
12 – would be greatly diminished, or at worst, potentially eliminated.” *Id.* Similarly, the County’s
13 Director of Emergency Management has explained that the Office of Emergency Service (“OES”)
14 relies on several DHS grants to fund roughly two-thirds of OES’ annual budget, with more than
15 \$1.3 million in expenditures awaiting federal reimbursement. Reed Decl. ¶¶ 8–9. Without a
16 permanent injunction, OES would again face the prospect of slashing programs that help
17 communities prepare for terrorist acts, natural disasters, and facilitate emergency preparedness.
18 *Id.* ¶¶ 10–15. The County’s Social Services Agency (“SSA”) would likely face catastrophic fiscal
19 consequences, absent a permanent injunction. *See* Menicocci Decl. ¶¶ 9–28. SSA’s director has
20 declared that the preliminary injunction “allowed the Agency to continue providing critical
21 services” to County residents, and that permanent relief will allow the Agency “to continue to
22 perform its core safety net functions without the devastating impact of the loss of federal funds.”
23 *Id.* ¶¶ 29–30. Importantly, *none* of these programs concerns federal immigration enforcement.
24 Yet all of them fall within the Executive Order’s broad and unconstitutional sweep.

25 Defendants’ recent statements and actions—several of which have come after the Court’s
26 preliminary injunction order—reinforce why the County requires permanent injunctive relief. *See*
27 *supra*, Part II.G. Defendants’ shifting and confusing statements regarding the Executive Order’s
28 meaning and reach—coupled with their ongoing attempts to deny federal funds to state and local

1 governments around the country—demonstrate why the County needs the certainty that only a
2 clear and enforceable judicial order can provide.

3 **2. The County has no adequate remedy at law.**

4 No remedy at law can compensate the injuries the Executive Order imposes. The County
5 cannot continue to spend millions of dollars per day on core health and safety programs in the
6 hopes of receiving federal reimbursement in the future, and seek redress later. *See* Márquez Decl.
7 ¶¶ 11–20; J. Smith Decl. ¶¶ 6–11. Such an approach not only courts fiscal calamity for the
8 County, but it would also likely face a sovereign immunity defense. *See Kansas Health Care*
9 *Ass’n, Inc. v. Kansas Dep’t of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Cedar-*
10 *Riverside People’s Ctr. v. Minn. Dep’t of Human Servs.*, 2009 WL 1955440, *2 (D. Minn. July 6,
11 2009). Even in the unlikely event that the County could somehow later recover unlawfully
12 withheld funds, the irreparable harm would have been done: the County would have been forced
13 to change its local policies, or lay off employees and slash critical services. No after-the-fact
14 monetary award could compensate for those injuries.

15 **3. The balance of harms and public interest support a permanent**
16 **injunction.**

17 When the federal government is a party, the balance of harms and the public interest
18 factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Both favor a permanent injunction
19 here. The government “cannot suffer harm from an injunction that merely ends an unlawful
20 practice.” *Rodriguez v. Robbins*, 715 F. 3d 1127, 1145 (9th Cir. 2013). Given that defendants
21 claim the Executive Order in no way changes existing law, an injunction limiting its
22 implementation can work no harm on defendants. *See Santa Clara*, 2017 WL 1459081, at *28.
23 The public, however, greatly benefits from an injunction alleviating the Executive Order’s
24 “facially unconstitutional directives” and “coercive effects.” *Id.*

25 **F. The County has standing and its claims are ripe.**

26 The Court has twice held that the County’s claims are justiciable. *See Santa Clara*, 2017
27 WL 3086064, at *9; *Santa Clara*, 2017 WL 1459081, at *7–21. Those decisions remain sound.
28 Defendants have repeatedly singled out the County for prospective enforcement under the

1 Executive Order, establishing “a credible threat of prosecution thereunder.” *Babbitt v. United*
2 *Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). Accordingly, the County has standing and
3 its claims are ripe.

4 **V. CONCLUSION**

5 The constitutional flaws inherent in Section 9(a) of the Executive Order are fatal. The
6 material facts, controlling law, and the Executive Order’s text remain unchanged since the Court
7 issued and reaffirmed its preliminary injunction order, and denied defendants’ motion to dismiss
8 the case. The Court should grant summary judgment, declare Section 9(a) of the Executive Order
9 unconstitutional, and make permanent the preliminary injunction issued on April 25, 2017.

11 Respectfully submitted,

12 Dated: August 30, 2017

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FILER’S ATTESTATION

I, John W. Keke, am the ECF user whose identification and password are being used to file this Notice of Motion and Motion for Summary Judgment. Pursuant to Rule 5-1(i)(3), I hereby attest that the other above named signatories concur in this filing.

/s/ John W. Keke

JOHN W. KEKER