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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK, JUDGE

CITY AND COUNTY OF SAN )  
FRANCISCO, )

Plaintiff, )

vs. )

DONALD J. TRUMP, President of )  
the United States, et al., )

Defendants. )

NO. C 17-0485 WHO

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CITY AND COUNTY OF )  
SANTA CLARA, )

Plaintiff, )

vs. )

DONALD J. TRUMP, President of )  
the United States, et al., )

Defendants. )

NO. C 17-0574 WHO

San Francisco, California  
Friday, April 14, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

(Appearances continued on next page)

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Official Reporter - U.S. District Court

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**By: Sara Winslow, Chief**

1 Friday - April 14, 2017

9:00 a.m.

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

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4 **THE CLERK:** We are here in cases 17-485, City and  
5 County of San Francisco versus Donald J. Trump, et al., and  
6 Case Number 17-574, County of Santa Clara versus  
7 Donald J. Trump, et al.

8 Counsel, please come forward and state your appearance for  
9 the record.

10 **MR. KEKER:** Good morning, Your Honor. For the County  
11 of Santa Clara, John Keker of Keker Van Nest & Peters.

12 With me at counsel table, from my firm, is Cody Harris.  
13 And our co-counsel is James Williams, County Counsel with Santa  
14 Clara.

15 **MR. WILLIAMS:** James Williams, County Counsel for the  
16 Santa Clara. With me is Chief Assistant County Counsel, Greta  
17 Hansen, and also the other attorneys on the papers from my  
18 office.

19 **THE COURT:** Welcome, all.

20 **MR. KEKER:** Thank you.

21 **MS. LEE:** Good morning, Your Honor. Mollie Lee for  
22 the City and County of San Francisco.

23 **MS. EISENBERG:** Good morning, Your Honor. Sara  
24 Eisenberg, also from the City and County of San Francisco.

25 **MR. FLYNN:** Good morning. Ron Flynn from the City and

1 County of San Francisco.

2 **MS. MERE:** And Yvonne Mere -- good morning, Your  
3 Honor -- with the City and County of San Francisco.

4 **THE COURT:** Welcome.

5 **MS. MERE:** Thank you.

6 **MS. WINSLOW:** Good morning, Your Honor. Sara Winslow  
7 from the U.S. Attorney's Office. And I have with me Acting  
8 Assistant Attorney General Chad Readler, who will be presenting  
9 the federal government's argument today, and also Scott  
10 Simpson, who is an attorney from the Department of Justice.

11 **THE COURT:** I recognize Mr. Simpson.

12 Mr. Readler, it is a pleasure to have you here. And I  
13 hope you will both convey my regards to my former colleagues in  
14 Main Justice.

15 **MR. READLER:** A privilege to appear before a  
16 predecessor in the Department. Thank you.

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

18 So the plaintiffs seek to enjoin Section 9 of Executive  
19 Order 13768, titled "Enhancing Public Safety in the Interior of  
20 the United States," because it's unconstitutional. That's what  
21 I want the arguments to focus on today.

22 The Plaintiff San Francisco also argues that 8 U.S. Code  
23 Section 1373 is unconstitutional. And I'm going to defer  
24 argument on that to a later day to consider it independently  
25 from the Executive Order.

1           The briefing, particularly the federal government's,  
2 intermingled the arguments with the merits of the Executive  
3 Order. And my consideration of this issue would benefit from a  
4 more comprehensive and isolated record.

5           So I'm going to hold a case management at 1:30 p.m. on  
6 April 25th, to discuss what's necessary. The government can  
7 participate by phone if that's what you wish to do.

8           So I've read the papers. I've also reviewed the amicus  
9 briefs. I received 16 of them, representing a variety of city  
10 and counties in California and 12 other states, public school  
11 districts, teachers, the Superintendent of Instruction of  
12 California, the State of California, sheriffs and police chiefs  
13 from 11 states, the SEIU, a variety of nonprofits, academics,  
14 and the Southern Poverty Law Center.

15           I'm not allowing the amici to speak today -- all of whom  
16 support the plaintiffs -- but I appreciated reading their  
17 perspectives.

18           There are a number of facts that aren't in dispute, that  
19 don't need further explication, I think.

20           First, the federal funding that the counties contend is in  
21 jeopardy because of the Executive Order.

22           With respect to Santa Clara, in the 2015-2016 fiscal year,  
23 it received \$1.7 billion in federal or federally-dependent  
24 funds. That's 35 percent of the County's total revenues. It's  
25 used for a variety of safety-net programs.

1           The Valley Medical Center, the only public safety-net  
2 healthcare provider in the county, gets \$1 billion in federal  
3 funds, which is 70 percent of its expenses.

4           The County Social Services Agency, which provides child  
5 welfare and protection, aid to needy families, support for  
6 disabled children, and the like, receives 300 million, which is  
7 40 percent of its budget.

8           Public Health Department and Office of Emergency Services  
9 also receives significant federal funds.

10          For San Francisco, it received \$1.2 billion of its budget,  
11 plus 800 million in multiyear grants which are primarily for  
12 public infrastructure.

13          The funds are used for core social services such as  
14 medical care, meals to vulnerable citizens, 100 percent of  
15 Medicare, 30 percent of the Department of Emergency Management,  
16 33 percent of Human Services Agency, and 40 percent of the  
17 Department of Public Health.

18          So that's with respect to federal funding. And then there  
19 is no dispute concerning the existence of policies that the  
20 counties contend put them in the crosshairs of the Executive  
21 Order.

22          So for the County of Santa Clara, the ordinance -- there's  
23 an ordinance that prohibits employees from providing ICE with  
24 information collected while providing critical services or  
25 benefits, from initiating inquiry or enforcement action based

1 on immigration status. And it doesn't honor detainer requests  
2 since ICE does not agree to reimburse costs.

3 For San Francisco, there's an ordinance that prohibits the  
4 use of funds or resources to assist in enforcing federal  
5 immigration law and prohibits law enforcement from detaining an  
6 individual solely because of a detainer request. That does not  
7 provide advance notice to ICE about release unless certain  
8 conditions are met.

9 So those facts are not in dispute. I don't need argument  
10 on those.

11 But I'd like to start with Santa Clara's argument, and  
12 really ask you to focus on the two central arguments that the  
13 government is making. First, that the Executive Order doesn't  
14 change the law because the Attorney General and Secretary of  
15 the Department of Homeland Security are directed to enforce  
16 existing law. And their second argument, that the plaintiff's  
17 injuries are not sufficiently concrete or imminent because the  
18 government hasn't designated either county as a sanctuary  
19 jurisdiction.

20 So I'll start with Santa Clara, and then have  
21 San Francisco, and then have the government's response.

22 **MR. KEKER:** Thank you, Your Honor. And I will be --  
23 John Keker for the County of Santa Clara.

24 I'll be addressing legal issues. If there are further  
25 factual issues that come up, Mr. Williams is going to address

1 those.

2 **THE COURT:** Excellent.

3 **MR. KEKER:** But I think what you asked about falls  
4 right into what I was planning to talk about.

5 And this is, as far as we're concerned, an extraordinary  
6 case in the sense that the government is not seriously  
7 contesting whether they waive it or whatever, but they're not  
8 contesting the constitutional arguments' likelihood of success  
9 on the merits except in the area of justiciability.

10 Rather, they are arguing that there should be no  
11 injunction because of this savings clause that you mentioned,  
12 where everything that they do is going to be according to law.

13 Our position, as made very clear in the brief, is that  
14 that's -- that's just boilerplate and it means nothing.

15 This unconstitutional order cannot be enforced, cannot be  
16 applied, cannot exist consistent with law. The President  
17 doesn't have the power to do it. The Tenth Amendment forbids  
18 it. The Fifth Amendment forbids it.

19 This claim that existing -- all they're doing is following  
20 existing law ignores the plain text of the statute. Section  
21 2 -- in Section 9, we talked about -- 9(a) talks about ensuring  
22 the jurisdictions that willfully refuse to comply with 8 U.S.C.  
23 1373 are not eligible to receive federal funds.

24 That can't be squared with something that is consistent  
25 with law because the President has no power to do that.

1           The -- what we call the enforcement clause of 9(a), where  
2 it talks about the Attorney General taking appropriate action  
3 either to enforce 1373 or take appropriate action against any  
4 jurisdiction that has a practice or a policy, that, quote,  
5 hinders federal law enforcement is further indication that that  
6 can't be in force according to federal law.

7           The people who wrote it, or at least the people who  
8 promulgated it, the President and now the Attorney General,  
9 have made absolutely plain what this order is about. And  
10 what -- and what they plain is that it's a weapon to deprive  
11 jurisdictions of the money they need to operate. It's a weapon  
12 to cancel all funding to sanctuary cities. They said it  
13 recently.

14           Mr. Sessions, the Attorney General, who tried to do this  
15 in Congress and failed, and now as Attorney General has said  
16 that he is going to claw back this -- this Executive Order  
17 allows him to claw back any funds awarded to a jurisdiction  
18 that willfully violates 1373.

19           And he is going around asking jurisdictions to -- and in  
20 this case, California, to rethink their policies and to change  
21 their local policies and so on.

22           We've seen it. In the *Chronicle* today there was a story  
23 about Lansing, Michigan. We cited the -- the events in Miami,  
24 Florida, in our brief. So all around the country, including  
25 here, people are having to deal with this right now.

1           And I'm going to get to irreparable harm in a minute. But  
2 this notion that it doesn't change existing law simply cannot  
3 be squared with the language of the -- of the Executive Order.  
4 It puts all federal funds at risk. That's Article 2(c). It  
5 ties 1373 compliance to detainers in 9(b).

6           It gives the Attorney General the power, without any  
7 notice or due process or anything, to designate sanctuary  
8 jurisdictions. It gives the AG the powers I've just mentioned  
9 to take appropriate actions to anybody that he thinks hinders  
10 federal law enforcement.

11           And then it orders, in 9(c), the Office of Management and  
12 Budget, Mr. Mulvaney, to gather up information about all  
13 grants -- not some grants -- all grants that a sanctuary  
14 jurisdiction, so designated, is getting from the government.

15           Mr. Mulvaney -- I've got to mention, too, Mr. Mulvaney, as  
16 we pointed out in our supplemental submissions, is going to  
17 Congress urging them to do what this Executive Order purports  
18 to do, which we think is further admissions that the President  
19 can't do it. If something happens, it has to go to Congress.

20           So this idea that this can be read consistent with law, we  
21 think, is wrong.

22           We have had some discussions, both this morning and last  
23 night, with the government about what I think you're going to  
24 hear is a new interpretation of this order, that it's limited  
25 to this or limited to that.

1           We have a few things to say about that. First of all,  
2 they should have said it in their brief. And they should have  
3 said it in a declaration. And they shouldn't just say it here.

4           This is not a TRO. There was plenty of opportunity to put  
5 forth, if they wanted to reinterpret the statute or -- excuse  
6 me, the Executive Order, they could have done it.

7           And then, second, it's just -- it's not binding on  
8 anybody. The -- what we're worried about is the President,  
9 we're worried about the Attorney General. What a -- with all  
10 deference, what a Justice Department lawyer down the food chain  
11 says, without a declaration, without an affidavit, without any  
12 binding effect, is not something that you should consider, we  
13 believe.

14           If they want to withdraw this Executive Order and craft a  
15 new one according to what they say this one should be  
16 interpreted as, they can certainly do that.

17           **THE COURT:** So get to the standing issue for Santa  
18 Clara, because the -- let's assume for the moment that the  
19 Executive Order is riddled with unconstitutionality.

20           **MR. KEKER:** Okay.

21           **THE COURT:** But tell me about the harm that Santa  
22 Clara is going to face as a result of the order, which does not  
23 define what a sanctuary jurisdiction is. So how do you know  
24 that you're in the crosshairs?

25           **MR. KEKER:** It couldn't be more clear that we're in

1 the crosshairs because of the way the President has described  
2 the purpose of the order, the way the Attorney General has  
3 described the purpose of the order, and the way these DDORs,  
4 which are coming out, are identifying.

5 The most recent one identified Santa Clara as one of  
6 the -- one of the counties that had the most detainers. In  
7 Section 1 and in Section 3, identified Santa Clara as a county  
8 that had policies that were inconsistent with federal law,  
9 exactly what the Attorney General is supposed to go after.

10 But the irreparable harm exists now, before the Attorney  
11 General acts, because of this overhang, this coercive overhang  
12 of a Federal Executive Order, that has the force of law,  
13 threatening and coercing local governments all over the  
14 country, but particularly in Santa Clara's case with 35 percent  
15 of its budget.

16 What are you going to do? You're either going to do  
17 something that we believe is unconstitutional, knuckle under to  
18 what the Executive Order says you should do, or you're going to  
19 do something that violates County policy and that -- that the  
20 County believes is unconstitutional.

21 For example, start keeping people -- honoring detainers  
22 that have no basis, American citizens being held with no basis  
23 except that ICE wants them held. That's exactly the conundrum  
24 that happened in Miami.

25 And that coercion, that Hobson's choice, is a gun to your

1 head. I mean, there's a million metaphors for it. But it  
2 exists right now in Santa Clara and in San Francisco, we think  
3 all around -- all around the country.

4 We've argued four things for irreparable harm. The first  
5 one is that a constitutional violation is per se irreparable  
6 harm. And we've cited cases.

7 The one that the Ninth Circuit seems to be most on point,  
8 that gets away from structural, personal, all that, is this  
9 *American Trucking* case; that that Hobson's choice per se is --  
10 between doing something that's unconstitutional or not is  
11 per se irreparable harm.

12 We've cited the Texas cases for the coercion, and the  
13 District Court cases that you're aware of.

14 And this is -- this is a lot worse than the Texas cases.  
15 In the Texas cases, the amount of money that was involved was  
16 much less. The stream of funding was much less.

17 Here, the Hobson's choice of, on the one hand, acquiescing  
18 to an unconstitutional order and, on the other hand, violating  
19 detainees' Fourth Amendment rights, is fairly drastic.

20 And, as you've pointed out in reciting the undisputed  
21 facts, what the Hobson's choice involved is -- is cuts to the  
22 most financially vulnerable citizens. It's not like it's just  
23 some small amount of money.

24 And, I guess, that's -- that's our point. It can't be  
25 emphasized enough that there's no way to comply with this order

1 without creating constitutional injury. That's -- that's  
2 what's happened in other parts of the country. That's what the  
3 President and the Attorney General say they're trying to do.

4 The -- the Executive Order's failure to provide notice and  
5 an opportunity to be heard means that months from now the  
6 County can find that it's been designated a sanctuary city; the  
7 money that they're spending now is being clawed back. Those  
8 are -- those are decisions that the Board of Supervisors has to  
9 deal with right now, and it's current harm.

10 This notion that it's not self-executing completely  
11 ignores the declarations, which obviously you've read, of nine  
12 county officials.

13 In short, we don't have to wait. Attorney General  
14 Sessions has made plain his willingness to use the Executive  
15 Order to pressure California cities and counties. He's done it  
16 to the chief justice, and he's done it in a way that he never  
17 could do as a legislator.

18 So that's -- that's fundamentally the argument about  
19 irreparable harm.

20 **THE COURT:** All right.

21 **MR. KEKER:** And with irreparable harm, we believe  
22 standing and ripeness take care of themselves.

23 **THE COURT:** All right. I agree with that argument, if  
24 it's borne out.

25 Do you have anything else that you wanted to add?

1 Or, Mr. Williams, was there anything that you wanted to  
2 add?

3 **MR. WILLIAMS:** So, Your Honor, I just wanted to add  
4 one point, emphasizing the reimbursement nature of these funds.

5 Every single day the County has to expend general fund  
6 money to the tune of an average of \$4- to \$5 million per day in  
7 the expectation of subsequent reimbursements.

8 And so the threat of clawback -- and, as Mr. Keker noted,  
9 the Attorney General specifically referenced clawback in his  
10 statements on March 27. The threat of clawback, but also the  
11 threat of not receiving those reimbursements, is very real,  
12 very serious, and is occurring each and every day right now to  
13 the County.

14 **THE COURT:** So I saw that. So with respect to the  
15 reimbursements, is it true that every day you are owed millions  
16 of dollars by the government for services that you have already  
17 provided?

18 **MR. WILLIAMS:** Yes.

19 **THE COURT:** Every day?

20 **MR. WILLIAMS:** Yes, every day.

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

22 **MR. WILLIAMS:** Thank you, Your Honor.

23 **MR. KEKER:** Thank you, Your Honor.

24 **THE COURT:** All right. Let's hear from San Francisco.

25 **MS. LEE:** Good morning, Your Honor. Mollie Lee for

1 the City and County of San Francisco.

2 Happy to address the Court's questions, but I do want to  
3 first tell the Court that we did have conversations with  
4 counsel for the Department of Justice last night.

5 And in those conversations we said that we would not  
6 object if the Department of Justice wanted to speak about some  
7 of the issues that they raised, in order to better inform the  
8 Court's conversation today.

9 **THE COURT:** All right.

10 **MS. LEE:** With that, we're happy to proceed.

11 **THE COURT:** Do you think it's better for the  
12 government to raise those now, before you argue? Or do you  
13 want to argue?

14 **MS. LEE:** We're happy to argue --

15 **THE COURT:** Go ahead.

16 **MS. LEE:** -- and then we can continue our argument  
17 after the government speaks.

18 **THE COURT:** Right.

19 **MS. LEE:** Just wanted to raise that for the Court.

20 I will be addressing the merits of our argument. My  
21 colleague, Ms. Eisenberg, will be addressing questions about  
22 ripeness and irreparable harm.

23 **THE COURT:** Okay.

24 **MS. LEE:** So, as I heard the Court's questions, you  
25 have two questions for us right now. The first is whether the

1 Executive Order changes existing law. And the answer to that  
2 is yes, it does.

3 San Francisco agrees with the points that counsel for  
4 Santa Clara made. I don't want to repeat those points, but I  
5 do want to focus in on one specific thing.

6 And that is that requiring cities and counties to comply  
7 with detainer requests does change existing law, and it changes  
8 it in a way that violates the constitution. The Administration  
9 is using the Executive Order and 1373 to try to force  
10 jurisdictions to comply with detainer requests.

11 We see that in the plain text of the Executive Order where  
12 Section 9(a) directs withholding funds from sanctuary  
13 jurisdictions, and Section 9(b) equates sanctuary jurisdictions  
14 with those that don't comply with detainers. We also see that  
15 in statements by the Attorney General.

16 And, as you noted, San Francisco does not comply with  
17 detainer requests. And that is because San Francisco has made  
18 a policy determination that when local government officials  
19 enforce federal immigration law, it undermines the trust that  
20 residents have. It makes it less likely the victims of crime  
21 will call the police. It makes it less likely that parents  
22 will take their children to get vaccinated. And makes it less  
23 likely that parents will feel safe taking their children to  
24 school.

25 This is a policy decision that San Francisco has made and

1 that the Administration disagrees with. And the  
2 Administration, in this Executive Order, is seeking to  
3 unconstitutionally coerce San Francisco into changing its  
4 policies.

5 There is no question that the Administration views  
6 San Francisco as a sanctuary jurisdiction. We see that in  
7 repeated statements by Attorney General Sessions, most recently  
8 in an op ed published in the *San Francisco Chronicle* a week  
9 ago.

10 He has specifically identified San Francisco as a  
11 sanctuary city, and he has also specifically equated sanctuary  
12 city policies with policies that don't require compliance with  
13 detainer requests.

14 So as we stand here today, we have an Executive Order that  
15 threatens to withhold all federal funds from sanctuary  
16 jurisdictions, and we have an administration that has  
17 determined that San Francisco is a sanctuary jurisdiction.

18 We're seeking an order that removes that unconstitutional  
19 threat from San Francisco and from the hundreds of  
20 jurisdictions around the country that have similar laws.

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

22 Ms. Eisenberg.

23 **MS. EISENBERG:** Good morning, Your Honor. I wanted to  
24 talk a little bit about some of the San Francisco-specific  
25 facts about why San Francisco believes that it too has a target

1 on its back.

2 And, in addition to the Declined Detainer Outcome Reports  
3 that were referenced by Mr. Kecker, we also have the comments  
4 from Attorney General Sessions on March 27th. And those were  
5 his remarks on sanctuary jurisdictions.

6 And in those comments he specifically singled out  
7 San Francisco and referenced San Francisco's, quote, sanctuary  
8 policies. And in his op ed that was filed on April 7th, he  
9 again specifically referred to San Francisco as a, quote,  
10 sanctuary city.

11 So I think the idea that San Francisco is not targeted  
12 is -- strains credulity.

13 And under the case law, we don't have to wait for the  
14 arrow to hit that target to come into court and show that we  
15 have harm and standing. We just have to show a credible threat  
16 of prosecution, which I believe we can certainly show with the  
17 express statements of the Attorney General.

18 I guess the only other point that I would like to flesh  
19 out a little bit more is the idea that, in addition, we also  
20 have current injury because we are being pressured to change  
21 our local laws.

22 Jurisdictions and states under Supreme Court case law --  
23 and this is the *Alfred L. Snapp & Son* case that we cite in our  
24 brief -- have sovereign power to create and enforce their own  
25 laws. And we have standing to come into court and challenge

1 federal laws that seek to hinder our ability to do this.

2 And that's the *Texas vs. United States* case out of the  
3 Fifth Circuit, and several other cases that they cite in there,  
4 including out of the Fourth Circuit and the Tenth Circuit.

5 So, in addition to the fact that we believe they are  
6 coming for San Francisco's funds, there is this pressure and  
7 coercion that San Francisco is facing to change its laws. And  
8 that, in and of itself, is a harm that gives us Article III  
9 justiciability.

10 **THE COURT:** All right.

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

12 **THE COURT:** Thank you.

13 Mr. Readler.

14 You have a new interpretation of the Executive Order?

15 **MR. READLER:** Thank you, Your Honor. May it please  
16 the Court.

17 No, that's not correct. But I do want to walk through the  
18 terms of Section 9, because I think, when plainly read, they  
19 disarm many of the arguments that we've seen on the other side.

20 And I'd just like to start by noting that, consistent with  
21 his constitutional duty to take care of our current laws and to  
22 be faithfully executed, the President issued this Executive  
23 Order which reflects the policy directives of the United States  
24 with respect to the enforcement priorities of existing  
25 immigration law.

1           And a couple of key points at the outset. The Order does  
2 not rewrite the law. It does not invoke new powers, and does  
3 not instruct the Department of Justice or Department of  
4 Homeland Security to engage in unconstitutional activity.

5           The Court is very familiar with the interpretive rule that  
6 laws are read narrowly, typically, to try to avoid  
7 constitutional problems.

8           My friends on the other side have read the order as  
9 absolutely broadly as possible and have followed that with lots  
10 of constitutional arguments, which, if the order actually  
11 extended that far, may well raise constitutional issues.

12           So I think we can pretty quickly walk through Section 9  
13 and explain its application just by its plain terms, not taking  
14 my word for it, but just looking at the plain terms of Section  
15 9.

16           **THE COURT:** All right.

17           **MR. READLER:** So, first, Section 9 is directed to two  
18 agencies. It's directed to the Department of Justice and  
19 directed to the Department of Homeland Security.

20           Those are the only two agencies in Section 9(a) -- excuse  
21 me -- Section 9(a) that are directed to do anything. So  
22 there's no direction -- happy to give the Court a moment.

23           **THE COURT:** No, no, no. I'm quite familiar with this.

24           I was just going to the policy section of Section 2, that  
25 says that it's the policy of the executive branch to ensure

1 that jurisdictions that fail to comply with applicable federal  
2 law do not receive federal funds except as mandated by law.

3 **MR. READLER:** Correct, which is a pretty vanilla  
4 statement about the fact that people have to comply with the  
5 law.

6 **THE COURT:** It's a broad statement, Mr. Readler, but  
7 go ahead.

8 **MR. READLER:** It's certainly a broad policy statement.  
9 And, certainly, executives and all political leaders use the  
10 bully pulpit to encourage compliance with policy directives  
11 that they think are important.

12 I think the real operative terms here are Section 9,  
13 which, again, don't create new law. But with respect to  
14 Section 9, this is not 9(a). It's not a direction to HHS or to  
15 Treasury or any other agency. It's a direction to two  
16 agencies.

17 The Attorney General doesn't control Medicare dollars. It  
18 doesn't control infrastructure dollars. And so those dollars  
19 are controlled by other agencies that are not invoked here in  
20 Section 9(a).

21 And even more narrowly, Section 9(a), the first sentence  
22 is addressed specifically to federal grants. So now the  
23 impact -- the financial impact of Section 9(a) is with respect  
24 to federal grants issued by the Department of Homeland Security  
25 and the Department of Justice. That is the absolute plain

1 reading of that section.

2 And that, again, dramatically -- I'm not sure there are  
3 any grant dollars. Santa Clara may have one -- one or two  
4 small grants, with less than a million dollars, that it  
5 receives from the Department of Justice, that might be at  
6 issue.

7 Otherwise, I'm not sure of any other grant that the -- or  
8 dollars that the -- my friends on the other side would point to  
9 that would be impacted by those -- by the requirements there in  
10 Section 9(a).

11 And, again, the -- 9(a) and, I think, at least in eight or  
12 nine other parts throughout the Executive Order require  
13 compliance with law. DOJ --

14 **THE COURT:** So you would agree that if there was a  
15 clearly unconstitutional order, just dropping the language to  
16 the extent provided by -- consistent with law wouldn't save  
17 that unconstitutional policy, would it?

18 **MR. READLER:** Well, assuming there was a ripe dispute  
19 or there was actually going to be enforcement steps taken under  
20 the law, then that might be a fair question. And we don't even  
21 have -- we're not even at that point here.

22 **THE COURT:** But I do -- so, for example, if there is  
23 an Executive Order that prohibited the sale of excess federal  
24 property to African Americans to the extent consistent with  
25 law, that would be an unconstitutional order, wouldn't it?

1           **MR. READLER:** That would be hard to defend, Your  
2 Honor, correct.

3           And so that's why I think it's important to walk through,  
4 again, what Section 9(a) does. And, also, 9(a), again, applies  
5 to federal grants where it's made clear to the grantee that  
6 they must require 1373. And my friends on the other side  
7 acknowledge that in their briefs.

8           The San Francisco brief, at Exhibit A, attaches one of the  
9 documents that was issued, actually, last year by the prior  
10 administration with respect to these issues, the Inspector  
11 General and the Office of Justice Programs. These issues were  
12 put on their radar last year.

13           In 2016, OIG identified a number of jurisdictions that  
14 potentially could be violating 1373. And following that, the  
15 Office of Justice Programs issued a memo to any grantee  
16 recipients that, going forward, they would be required -- with  
17 respect to three specific DOJ grants, they would be required to  
18 comply with 1373.

19           That's acknowledged in footnote 6 of the Santa Clara  
20 complaint. And in footnote 3 of their complaint, they  
21 acknowledge these new requirements.

22           So there's no mystery to my friends on the other side  
23 about the fact of which grants are at issue and the fact that  
24 there will be express requirements, as part of those grants,  
25 that you have to comply with 1373 to be eligible.

1           **THE COURT:** Are you arguing that the Executive Order  
2 is targeting three grants that were conditioned a year ago? Is  
3 that the argument?

4           **MR. READLER:** Well, the Executive Order is directed to  
5 only grants issued by DHS and DOJ. And it's -- and it's  
6 expressly to grants. It would have to be grants where there is  
7 notification to the grantee that they have to require 1373. So  
8 in many ways that's correct.

9           There are -- there are some grants from the past year --  
10 again, starting fiscal year 2016, after the OIG and OJP reports  
11 came out, there were some grants that were expressly  
12 conditioned where the grantees had to comply with that  
13 language.

14           Going forward, I think it's certainly natural to expect  
15 that there will be DOJ and, potentially, DHS grants that have  
16 express requirements. Those will be known to the parties.  
17 There is no ambiguity about that. But that's the range of  
18 dollars that Section 9(a) is speaking to.

19           **THE COURT:** Then what would the purpose of this  
20 Executive Order be then?

21           **MR. READLER:** The purpose of the Executive Order is to  
22 highlight to the country -- and, again, perfectly permissible  
23 use of the bully pulpit. Executives do this all the time to  
24 highlight issues they care about.

25           This is obviously one the Administration has highlighted,

1 and they have instructed their agencies to carry out the law.  
2 This is a priority, certainly, to the Administration in terms  
3 of law enforcement, and that's what this accomplishes.

4 And I think you can see that by -- then the next  
5 sentence -- we've now explained the first sentence applies only  
6 to a limited range of grants and applies to only dollars where  
7 the recipient is on notice.

8 The second sentence is a directive to the Secretary --  
9 separate from the first sentence, to the Secretary of DHS to  
10 identify sanctuary jurisdictions. There are no direct legal  
11 consequences attached to that declaration. First of all, the  
12 Secretary does not even determine what -- in its view, how it  
13 will carry this out or what jurisdictions might comply.

14 I think the other important point, in terms of today's  
15 purposes, is there's no direct legal consequences associated  
16 with that section.

17 The first part of 9(a) talks about federal grants, and the  
18 last part talks about potential preemption enforcement actions  
19 if there's a dispute.

20 But that middle sentence, again, is authorization or  
21 request that the DHS carry out this determination. But we  
22 don't know what the criteria are. No one's been designated.  
23 And there's no direct loss of dollars associated with that  
24 declaration.

25 **THE COURT:** There's no process at all here; right?

1           **MR. READLER:** Well, there certainly --

2           **THE COURT:** In the order.

3           **MR. READLER:** Well, the order just directs the  
4 Secretary to look into the issue and to make the designation.  
5 We don't know how the Secretary is going to do that.

6           So there's certainly no ripe dispute in terms of there's  
7 been no declaration or even any explanation of how the  
8 Secretary is going to reach the sanctuary jurisdiction  
9 designation, if at all.

10           And, again -- and, again, the consequences of that, the  
11 order does not state any direct monetary or other, you know,  
12 injury that might flow from that.

13           And, in fact, my friends on the other side essentially  
14 both acknowledge themselves to be sanctuary jurisdictions. I  
15 mean, this is a term of multiple interpretations. And they  
16 have embraced that -- that term.

17           So to say if DHS makes that declaration that that's an  
18 injury of any kind, is awfully difficult to say at this point  
19 for a number of reasons.

20           **THE COURT:** Well, don't you think that the Attorney  
21 General has also embraced that definition? Particularly with  
22 respect to the City and County of San Francisco.

23           **MR. READLER:** Well, certainly, again, with the use of  
24 the bully pulpit, there's a lot of discussion about sanctuary  
25 jurisdictions, encouraging communities -- governments do this

1 all the time. They want to encourage different communities,  
2 states, to comply with certain laws and to engage in certain  
3 policy perspectives.

4 With respect to actual consequences, I discussed those --  
5 and let me go back to General Sessions' from March 27th,  
6 because that was mentioned this morning.

7 General Sessions then said exactly what I'm saying now.  
8 He said:

9 "Today I'm urging all states and local jurisdictions  
10 to comply with all federal laws, including Section 1973.  
11 Moreover, the Department of Justice will require  
12 jurisdictions seeking or applying for department grants to  
13 certify compliance with Section 1373 as a condition for  
14 receiving those awards."

15 He goes on to say:

16 "This policy is entirely consistent with OJP's  
17 guidance issued last July under the previous  
18 administration. The guidance requires state and local  
19 jurisdictions to comply and certify compliance with  
20 Section 1373 in order to be eligible for OJP grants. It  
21 also made clear that failure to remedy violations could  
22 result in withholding of grants, termination of grants,  
23 and disbarment or ineligibility for future grants."

24 That's exactly what I'm saying today. That's how Section  
25 9(a), the first sentence, is being interpreted. It's wholly

1 consistent with the plain terms.

2 I would also like to, then, talk about the last sentence  
3 in Section 9(a), because that is -- that is an important  
4 sentence as well. But it -- it targets enforcing the law, as  
5 it currently exists, where states or communities are in  
6 violation of Section 1373.

7 Now, it doesn't direct specific action as to any agency --  
8 or, excuse me -- as to any locality, and there haven't been  
9 any -- there's no pending enforcement action against any  
10 locality.

11 But this would be your standard preemption suit that the  
12 federal government brings all the time. *Arizona vs.*  
13 *United States* is one example where it thought that local --  
14 state was --

15 **THE COURT:** I remember that case.

16 **MR. READLER:** I know you do.

17 -- was in violation with federal law.

18 And I think there's two important things about that case.  
19 One, of course, is that that was a natural assertion of federal  
20 preemption power.

21 But, too, there's actually one aspect of that where,  
22 you'll recall, the Supreme Court didn't enjoin it, and said it  
23 needed further development because it wasn't clear how the law  
24 was going to be interpreted with respect to the request for  
25 immigration status for people who were detained.

1           That's very much like this case, where we have -- we don't  
2 know yet how exactly a policy is going to be applied. And we  
3 have some examples, but we don't -- we don't know exactly  
4 whether there will be any enforcement actions, and, if so, what  
5 they'll look like.

6           **THE COURT:** So related to that --

7           **MR. READLER:** Yes.

8           **THE COURT:** -- and I think this is what you're  
9 saying -- there's no definition in the Order of what it means  
10 to willfully refuse to comply or what it means to hinder or  
11 prevent the enforcement of federal law, which I assume it's  
12 just -- and there's no actual definition of whether the federal  
13 law is just 1373 or something else.

14           Would you agree with that?

15           **MR. READLER:** A couple of responses to that. I mean,  
16 those terms should be given their ordinary meaning.

17           But, also, this is a facial challenge to the law. So what  
18 they're saying is there's no theoretical instance in which this  
19 law -- in which 1373, essentially, could be applied  
20 constitutionally. I think that's clearly wrong.

21           Ordinarily, these disputes are resolved on specific facts  
22 and specific instances. So if the Court should reject a facial  
23 challenge to the Order, if there's a prosecution brought to the  
24 Court under 1373, then we have an actual policy of the federal  
25 government to match against a policy of the state government,

1 and we can weigh whether there's a violation of 1373.

2 The other important thing to point out is, that first  
3 sentence also uses the word "discretion." In other words, the  
4 Attorney General has, as always, discretion whether to enforce  
5 this.

6 So, again, there's no, at all, ripe concrete dispute  
7 before the Court about an actual enforcement action. And we  
8 certainly can't say that there's no possible application of  
9 this -- of 1373 that would be constitutional. Obviously, the  
10 Second Circuit has already resolved that it can be applied in  
11 many instances.

12 I'd also like to address the point about immigration  
13 detainer requests. There's no mention of immigration detainer  
14 requests in section (a). I know Your Honor is very familiar  
15 with how those work.

16 The federal the government has acknowledged repeatedly  
17 that the requests are not mandatory; that they're voluntary.  
18 Sometimes they're complied with; sometimes they're not.

19 Obviously, the federal government has an interest in  
20 having as many of those complied with as possible so it can  
21 carry out its function.

22 **THE COURT:** The Attorney General has equated failure  
23 to comply with detainer requests with sanctuary jurisdictions,  
24 hasn't he?

25 **MR. READLER:** Well, in a broad -- "sanctuary

1 jurisdiction" is not a defined -- precisely defined term. It's  
2 used in many ways, in many instances. So one definition of a  
3 sanctuary jurisdiction could be one that doesn't comply.

4 Now, the question is, is there an injury that flows to a  
5 city or a community from that? And the place you look there  
6 is -- is in section (a), where we walk through the different  
7 potential enforcement actions. And those -- there's -- there's  
8 no mention there or discussion there of the ICE detainer  
9 request.

10 Section (b) is a request to Homeland Security that it  
11 identify communities that it thinks is not complying. But  
12 there's no -- other than, sort of, publicly disclosing this --  
13 this is something governments do routinely. And they issue  
14 reports and they identify communities that they think are doing  
15 well with something, or not doing well with something, to  
16 encourage them to do other things. But there is no other --  
17 there is no other penalty or anything associated with section  
18 (b).

19 So, again, we'd have to think what are the actual  
20 consequences other than the encouragement to comply with  
21 certain policies. Those are listed in 9(a). And I think I've  
22 talked about those. Those are pretty standard, either  
23 prosecuting people who have violated an express term of a  
24 federal grant, or finding exact laws that are in violation of  
25 Section 1373 and then bringing an enforcement action.

1           With respect to that, Santa Clara is not seeking a  
2 declaration about 1337, itself, as constitutional. I know you  
3 tabled this issue, but San Francisco says it's in compliance with  
4 1373. So neither of those would seem to be an especially ripe  
5 candidate for an enforcement action.

6           And I'll also note that in the OIG and OJP reports from  
7 last year, they identified, sort of, a Top Ten List of  
8 jurisdictions. You could call it sanctuary jurisdiction or  
9 jurisdictions that seemed to have policies that were resistant  
10 to 1373. And none of the plaintiffs were on that list. Those  
11 ten actually, I think, had special requirements put into some  
12 grants that they got last year.

13           Again, there's been no enforcement action. If there would  
14 be an enforcement action, certainly those ten have been  
15 highlighted as communities that could potentially be subject --  
16 be subject to one. But even that has not yet happened.

17           So those -- those are the points I really wanted to make  
18 about Section 9(a) to, sort of, run through that.

19           I had some other points on standing and merits, which I'm  
20 happy to discuss briefly in answering any other questions.

21           **THE COURT:** Okay. I do have --

22           **MR. READLER:** Sure.

23           **THE COURT:** Given this argument, I assume that you  
24 would agree that the Attorney General and the Secretary of  
25 Homeland Security don't have the authority to put new

1 conditions on federal funds that have been appropriated by  
2 Congress?

3 **MR. READLER:** I think that's just generally true.  
4 With respect to a grant, if there's discretion afforded to the  
5 agency in terms of how --

6 **THE COURT:** If congress has given that discretion --

7 **MR. READLER:** Correct.

8 **THE COURT:** -- then they have it.

9 **MR. READLER:** Correct, correct.

10 **THE COURT:** But, otherwise, they don't.

11 **MR. READLER:** Correct.

12 **THE COURT:** You would agree with that?

13 **MR. READLER:** Yes.

14 **THE COURT:** Because that would violate the separation  
15 of powers; right?

16 **MR. READLER:** Yes.

17 **THE COURT:** Then, also, if -- I assume that you would  
18 also agree that if Congress, which does have the spending  
19 power, wants to condition grants under the spending power, they  
20 can do so only in ways that are reasonably related to the  
21 purpose of the program. The nexus requirement. Do you agree  
22 with that?

23 **MR. READLER:** That's correct, Your Honor.

24 And that's why, with respect to those issues, I've  
25 highlighted the fact that the order talks about expressly

1 federal grants issued by these specific agencies.

2 And then, again, it's three -- it's three grants that DOJ  
3 identified. DHS has not, as far as I know, identified any  
4 grants yet. But DOJ has identified three that expressly relate  
5 to criminal justice issues or immigration issues: The SCAPP  
6 grant; the JAG grant; and the COPS grant. And those are the  
7 three where they put these express conditions, given the  
8 Department's authority to do so, regarding the compliance with  
9 1373.

10 So I think that would answer the constitutional questions  
11 that the Court has raised.

12 **THE COURT:** Okay.

13 **MR. READLER:** Just let me return, then, to our  
14 threshold standing and ripeness arguments which were certainly  
15 made in the briefs.

16 But, again, there's been no action threatened or taken  
17 against the cities.

18 Certainly, San Francisco says it's in compliance with  
19 1373.

20 And Santa Clara -- I'm not sure what their position is and  
21 whether they're in compliance with it. I think they're in  
22 compliance with 1373. But, certainly, the law has been -- 1373  
23 has been in effect for 20 years. They've had an ordinance that  
24 they spoke about this morning that's been in effect for at  
25 least seven years. And there's been no enforcement action or

1 other actions taken to suggest that that is in violation.

2 **THE COURT:** Right. But now you've got this new  
3 Executive Order that is -- that targets sanctuary  
4 jurisdictions. You have the comments that the Attorney General  
5 has made specifically with respect to San Francisco. And I  
6 think both the President and the Attorney General have said  
7 things about the State of California.

8 So why don't they have standing to bring a pre-enforcement  
9 action?

10 **MR. READLER:** Pre-enforcement actions are typically  
11 quite limited. Sometimes they occur in the First Amendment  
12 context or when there's an actual threat of criminal penalties.

13 We don't have that here. We have -- we have -- I mean, we  
14 certainly have lots of statements, whether they were during the  
15 campaign or otherwise, about a focus on sanctuary  
16 jurisdiction --

17 **THE COURT:** I'm not talking about -- the campaign, I  
18 think, is separate from what's happened since the President has  
19 taken office.

20 **MR. READLER:** But usually that's when you -- but  
21 pre-enforcement actions are allowed. At a minimum, there has  
22 to be a direct policy that's in contravention with a federal  
23 policy. And we haven't even identified whether that's clear  
24 here at all.

25 This use of the term "sanctuary jurisdiction" is, again, a

1 broad term. And it can mean different things to different  
2 people. And, importantly, in Section 9(a) it's used after the  
3 sentence "failure to comply with 8 U.S.C. 1373."

4 So there the reference is -- sanctuary jurisdiction is  
5 with respect to a city that violates 1373. We know that's how  
6 it's being used there. But it can be used in lots of other  
7 ways and lots of different contexts. And it could include  
8 certain things or other things.

9 But, again, we have no -- other than this very heated and  
10 joined political dispute about what proper immigration policy  
11 should be, there's no actual enforcement action on the table or  
12 that's even been -- even been formally threatened to the city.

13 So I think I'm not aware of a case where -- where there's  
14 a lack of actual joined dispute about whether a local policy  
15 violates -- violates a federal policy, whether there a  
16 pre-enforcement action would be allowed. I think it would be  
17 awfully unusual.

18 And, again, usually they're allowed where there is either  
19 a First Amendment in which there's a pretty broad chilling  
20 concern, where we do sometimes allow them, or criminal actions  
21 where there's an immediate criminal penalty about to be  
22 imposed. And neither of those facts are in existence here.

23 I'll discuss a couple of cases on ripeness because I think  
24 there are a number that would speak to the issue.

25 One is *Texas vs. The United States*. There are a number of

1 those cases. I'm referring to the Supreme Court decision from  
2 1998. That involved Texas -- a new Texas law where they were  
3 going to impose sanctions against certain school districts if  
4 those school districts had acted in a way that the state -- in  
5 terms of performance and other standards the state had put  
6 forward.

7 The Attorney General asserted that some of those actions  
8 would require preclearance by the Justice Department under  
9 Section 5 of the Voting Rights Act. Texas disagreed with that  
10 interpretation and filed suit.

11 And the Supreme Court ultimately held that that case was  
12 not ripe because there had been no actual sanctions issued  
13 against the community which would then tee up the issue for the  
14 Justice Department whether those were in violation of Section 5  
15 of the Voting Rights Act. And so the Court dismissed the cases  
16 as not being ripe.

17 **THE COURT:** They couldn't articulate who it was who  
18 was going to be challenged in the *Texas vs. The United States*;  
19 right?

20 **MR. READLER:** I think that's right. And I think -- I  
21 think, again, we have the same issue here.

22 **THE COURT:** Think it's the same --

23 **MR. READLER:** Same issue we have here.

24 There's been no specific identification of any actual  
25 sanctuary jurisdiction, as you've used that, for example, for

1 the federal grant or for a preemption action.

2 Those actions may well come in the future. Certainly  
3 those could come to the Court's attention right away. If  
4 there's a potential imminent harm to the cities from that, they  
5 could ask for some kind of injunctive relief. Lots of ways to  
6 deal with those cases.

7 This is a facial challenge, again, to the Executive Order,  
8 which, one, just instructs the current law be followed. But,  
9 second, there are certainly numerous applications where we  
10 would say it's absolutely constitutional -- or there's  
11 absolutely constitutional application of the -- of the law.

12 The other case I want to just point out briefly is the  
13 Ninth Circuit's *en banc* decision. I don't think this is in our  
14 papers. It's from 2000. It's *Thomas vs. Anchorage Equity*  
15 *Rights Commission*. Sorry, *Thomas vs. Anchorage Equity Rights*  
16 *Commission, en banc* Ninth Circuit 2000.

17 And that involved a fair housing law, I think Alaska and  
18 Anchorage had both passed, that barred discrimination on  
19 marital status in housing. And there was, I think, a Christian  
20 organization that sued because they wanted to rent out housing,  
21 and they wanted to give preference to married couples as  
22 opposed to those that were unmarried.

23 And that case made its way to the Ninth Circuit. And the  
24 Ninth Circuit *en banc* held that that action was not ripe  
25 because there was not an actually identif- -- there had not

1 been actual action taken by a potential landlord that then had  
2 been penalized under the state law. So there was no actual  
3 ripe action there.

4 I think that reasoning, in that case, applies perfectly to  
5 the one before you.

6 **THE COURT:** Usually when somebody has an  
7 interpretation that they want to make, with respect to the  
8 challenged Executive Order or cases that they want to bring to  
9 the Court's attention, they do that in their briefing.

10 **MR. READLER:** Well, yes, Your Honor. A couple of  
11 responses on that.

12 First -- first of all, there were a number of threshold  
13 ripeness issues that really flow from a lot of the same  
14 arguments that we wanted to identify.

15 But, also, certainly, this Executive Order, which  
16 encouraged, again, the Department of Justice and Homeland  
17 Security to look at these issues, they needed time to do that.  
18 They needed time themselves to interpret how -- what these  
19 provisions mean.

20 The Department of Justice is a big place. And so I can  
21 say that I have consulted with members of the Department of  
22 Justice to make sure that they read this statute the same way I  
23 am today. And they do.

24 So I think that was just a result of, one, there were some  
25 very strong primary threshold arguments; and, two, to make sure

1 that everyone at the Department of Justice is reading the  
2 Executive Order the way I am.

3 I think, again, this is the proper reading of -- a very  
4 fair reading of these terms. DHS, and Attorney General,  
5 federal funds.

6 And my friends on the other side have taken a  
7 dramatically -- the broadest possible reading you could take of  
8 this and identified constitutional concerns. But that's not  
9 the standard interpretive practice that courts usually use.  
10 And I would encourage this court, again, to -- to read this  
11 narrowly and to avoid reading constitutional problems into the  
12 Order where possible.

13 Now, certainly, again, if there's enforcement action where  
14 there's a live dispute and we have certain application of 1373,  
15 or a preemption action, then those issues would be ripe for the  
16 Court's resolution, and we would know exactly the record that  
17 we're -- we're speaking of.

18 And I'll just briefly, just a couple -- a couple of the  
19 constitutional issues. And I would note, in the San Francisco  
20 brief we did -- we did cite the *City of New York* case, where  
21 the Second Circuit upheld 1373 a number -- a number of years  
22 ago. So there's certainly support for the constitutionality  
23 for the statute.

24 A couple of points. First, on the spending clause issues.  
25 This is not anything like *NFIB vs. Sebelius*, where 10 percent

1 of the state's total budget was at issue if those -- if those  
2 Medicaid rules were allowed to go forward.

3 Again, this Section 9(a) applies to a very narrow range, a  
4 very narrow range of funding. I'm not sure any San Francisco  
5 dollars are even at issue here. There may be less than a  
6 million dollars for Santa Clara. I'm not sure. They can  
7 probably help clarify that. But it's a very, very small money.

8 So we're not even -- one, we have an unambiguous  
9 requirement in these grants that you have to comply with 1373;  
10 and, two, the dollar value is extremely low when compared to  
11 the amounts where a spending clause or, really, a Tenth  
12 Amendment problem might -- might arise.

13 On the Tenth Amendment issue, the courts, *New York,*  
14 *Printz*, those kinds of cases, those are cases where, of course,  
15 the local government is commandeered and had been forced to  
16 carry out federal law.

17 That's not what's at issue here. The most that a state or  
18 locality would be asked to do is to not bar the sharing of  
19 citizenship or immigration status. That's, of course, at the  
20 heart of 1373. That's far different than the -- the actual  
21 enlisting and compulsion of state officials to carry out a  
22 federal regulatory regime that was at issue in *Printz* and in  
23 the state of New York.

24 And then, again, I guess I would just return to, finally,  
25 the *City of New York* case where 1373 was upheld as

1 constitutional. Again, that's been a law for 20 years. The  
2 cities have been operating under it. San Francisco says they  
3 comply with it. Santa Clara complies with it. They have,  
4 again, a law that's been on the books for at least seven years,  
5 that's not been challenged.

6 So there's really not a ripe dispute over 1373 today, but  
7 there's also an ample authority for it being constitutional.

8 **THE COURT:** All right. So, I guess, the bottom line  
9 of your argument is that the \$1.7 billion in federal funds that  
10 Santa Clara has is completely safe under the government's  
11 interpretation of the Executive Order, as is the 1.2 billion  
12 for San Francisco, plus the 800 million in multiyear grants?  
13 That's what you've just been telling me?

14 **MR. READLER:** Yes, Your Honor. I -- I've been  
15 interpreting Section 9(a) the way a very fair -- extremely fair  
16 reading of those terms complies. It doesn't -- it doesn't, on  
17 its terms, apply anywhere to these -- to these broader  
18 financial concerns.

19 **THE COURT:** All right. Okay. Thank you, Mr. Readler.

20 **MR. KEKER:** May I respond briefly, Your Honor?

21 **THE COURT:** Yes, of course.

22 **MR. KEKER:** With all due respect, the government's  
23 argument boils down to the hope that President Trump and  
24 Attorney General Sessions won't do what they say they are doing  
25 with this Executive Order, which is to, quote, ensure that

1 jurisdictions that fail to comply with applicable federal law  
2 do not receive federal funds. 2(c), as the Court pointed out.

3 Mr. Readler just read you Mr. Session's March 27th press  
4 conference. And he stopped right before the sentence that says  
5 "We will claw back all federal funds."

6 The reading that they are giving is something I'm sure  
7 that some very wise lawyers who know the Constitution in the  
8 Department of Justice Civil Division say, "Here's something  
9 that maybe we could defend if somebody ever did it." But it is  
10 not this Executive Order. And what we're dealing with -- I  
11 think we can agree on this, we are dealing with this Executive  
12 Order.

13 The text talks about "all funds." The -- the -- the  
14 section that we're talking about, Section 9 talks about  
15 sanctuary jurisdictions, and then it works through powers that  
16 the Attorney General is going to have. And in (b) it very  
17 explicitly says anybody that doesn't deal with detainers, and  
18 just above is a sentence that says anybody that hinders and so  
19 on.

20 And then section (c), if you need icing on the cake, tells  
21 Mr. Mulvaney, at OMB, gather up all -- not DHS, not Department  
22 of Justice -- all federal funding and provide information only  
23 under this rubric of sanctuary jurisdictions. They're not  
24 going around finding out what all jurisdictions are getting.  
25 They are finding out what sanctuary cities are getting.

1           So we believe, as the Court pointed out, as I said before,  
2 the Justice Department had an obligation, in the briefing  
3 schedule here, to tell us what they thought about this  
4 Executive Order. They did not do what -- they've come up with  
5 a further interpretation. It won't wash.

6           *Washington vs. Trump* had the same problem in the Ninth  
7 Circuit. And the Ninth Circuit said, we're not going to accept  
8 something that the White House counsel has said in writing,  
9 because they don't really bind the people that we care about.

10           There's a case in the Eleventh Circuit called *Hunter*,  
11 101 F.3d 1565, a 1996 case that talks about, there, concessions  
12 a Department of Justice lawyer made in court, or statements  
13 that he made in court, but couldn't say that the Solicitor  
14 General or Attorney General agreed with him. And they chose  
15 just to ignore him.

16           **THE COURT:** Well, I just heard Mr. Readler say that he  
17 has taken this up through the Department. So I believe that  
18 that's been -- that box has been checked off.

19           And he's arguing just that the Order itself -- he's taking  
20 an interpretation of the Order, but he's not putting new  
21 conditions on it. He's saying this is what the Department says  
22 the Order says.

23           And whether I agree with that interpretation or not, I  
24 don't think it's quite the same situation as, say, in  
25 *Washington v. Trump*.

1           **MR. KEKER:** Or *Hunter*.

2           The -- well, I didn't hear him say that. I didn't hear  
3 that Attorney General Sessions had signed off to this new  
4 interpretation. I didn't hear that the author of the Executive  
5 Order, the President, has signed off on this new  
6 interpretation.

7           And, in any event, the interpretation -- what he said was  
8 DHS grants, Department of Homeland Security grants in the  
9 future may have conditions that will -- that will have  
10 conditions imposed. That would be unconstitutional. I mean, I  
11 don't want to litigate an Executive Order that's not before us.

12           But it's not up to them, as the Court pointed out, to make  
13 these conditions. It is the job of Congress. The spending  
14 power belongs there, not there.

15           And if this interpretation were limited to what they said  
16 in their papers, which is only Department of Justice grants  
17 that are specifically conditioned by Congress on enforcement of  
18 1373, why do we have this Executive Order? It makes absolutely  
19 no sense. And the verbiage, the language of the Executive  
20 Order that talks about all funds, sanctuary cities and so on,  
21 would make no sense. So it's not an interpretation the Court,  
22 I think, can take.

23           We have -- we have talked about the harm. I'm not going  
24 to go back over that, the harm that's happening now.

25           Mr. Williams talked about the millions of dollars a day

1 that are being spent right now and that the Board of  
2 Supervisors, if we don't get a preliminary injunction, are  
3 going to have to decide what to do about.

4 This business about standing, citing cases that weren't in  
5 the brief, the case that matters is the most recent  
6 pronouncement on standing by the U.S. Supreme Court, 2014,  
7 *Susan B. Anthony List*, which they have never responded to or  
8 mentioned, and which stands for the proposition that an actual  
9 and well-founded fear that the law will be enforced is enough  
10 for pre-enforcement action. The Texas cases stand for that.  
11 And, certainly, *Susan B. Anthony* stands for that.

12 Unless the Court has questions?

13 **THE COURT:** That's great. Thank you, Mr. Kecker.

14 **MR. KEKER:** Thank you very much.

15 **THE COURT:** Ms. Lee.

16 **MS. LEE:** Thank you, Your Honor.

17 This is not the first time that we've seen the DOJ make  
18 some statements in court and seen the Attorney General make  
19 different statements.

20 We saw that on March 27th, where in court, in the  
21 *Commonwealth vs. Lunn* case, the DOJ said that detainer requests  
22 are voluntary. On that same day, Attorney General Sessions  
23 said in public remarks, about sanctuary jurisdictions, that  
24 detainer requests are not voluntary and the failure to comply  
25 with them violates federal law.

1           So we cannot rely today on the representations that DOJ  
2 counsel is making here.

3           And the remarks of the Attorney General are not just a  
4 bully pulpit. These are remarks about a named defendant  
5 interpreting the Executive Order. And those remarks have real  
6 consequences. That's their intent and that is their result.

7           We saw this in the case of Miami. The Executive Order  
8 issued. Miami understood it to mean that it had to start  
9 honoring detainer requests even though the federal government  
10 doesn't reimburse for that, and it changed its policies.

11           There is no question that that is exactly what was  
12 intended by this Executive Order and that it has already  
13 happened.

14           I would like to make a few smaller points --

15           **THE COURT:** Okay.

16           **MS. LEE:** -- in response to counsel's argument.

17           First, there's still no clarity for San Francisco about  
18 precisely which funds are at stake.

19           I heard counsel say that, as far as he knows, no  
20 San Francisco funds are implicated. That's not my  
21 understanding even just based on counsel's representations  
22 about the pocket of funds that are implicated today. It's  
23 impossible for us to respond to that argument when we don't  
24 have clarity about the precise funds at stake.

25           Further, the Executive Order does, in fact, mention

1     detrainer requests. And so I also haven't heard with precision  
2     the counsel for DOJ state that the failure to comply with  
3     detrainer requests is not going to be the basis for withholding  
4     federal funds.

5             That is clarity that San Francisco and other jurisdictions  
6     around the country need in order to be able to make an informed  
7     decision about how they will proceed. We lack it. We lacked  
8     that clarity coming into court. And we still lack it as we  
9     stand here now.

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

11            Ms. Eisenberg, was there something else you wanted to add?

12            **MS. EISENBERG:** Just very briefly, Your Honor.

13            I think nothing in this new interpretation of the  
14     Executive Order changes the ripeness inquiry. The fact remains  
15     that there is money at stake as a result of this Executive  
16     Order.

17            As my colleague just said, San Francisco actually does  
18     receive some of the money. And that's in the Mayor's Budget  
19     Director Whitehouse declaration that we do receive some of that  
20     money.

21            There's money at stake for San Francisco and for  
22     jurisdictions around the country. And under *Susan B. Anthony*  
23     *List*, which Mr. Kecker cited, we don't have to wait for them to  
24     come and get that money if we can articulate a credible threat,  
25     which we uniquely can in these circumstances given the comments

1 made, the official comments made by the very people that the  
2 Department of Justice says are the ones that are directed to  
3 take action under this Executive Order.

4 So I don't think anything in this new interpretation  
5 changes our ripeness arguments at all.

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

7 All right.

8 Mr. Simpson.

9 **MR. READLER:** May I have rebuttal?

10 **THE COURT:** If you have something brief to say.

11 **MR. READLER:** Thank you.

12 **THE COURT:** Mr. Readler, please come up.

13 I'm looking forward to hearing from my old colleague  
14 Mr. Simpson.

15 **MR. READLER:** He may have something better to say. I  
16 will preempt him just for -- for a minute.

17 I would like to go back to the March 27th statement. And,  
18 again, we're not today offering a new interpretation. What I  
19 think that Your Honor understood is that I'm offering a plain  
20 reading of what this means, and the other side is offering a  
21 dramatic interpretation.

22 **THE COURT:** Not particularly plain. If it was a plain  
23 reading, it would have been argued earlier in the papers.

24 But I appreciate that you got this reading from the --  
25 from the Order. And that's what I'm going to be looking at

1 when I leave the bench.

2 **MR. READLER:** Thank you, Your Honor.

3 With respect to the March 27th statement, what the -- what  
4 General Sessions said is that some cities have adopted policies  
5 to frustrate the enforcement of immigration laws. And he -- he  
6 referred to detainer requests. That was one part of the  
7 speech.

8 I think it could certainly be fairly said that the federal  
9 government would prefer that the cities comply with the  
10 detainer requests, and that not doing so would frustrate the  
11 objectives of the federal government because the federal  
12 government has an objective in policing this area.

13 But that -- that had nothing to do with whether something  
14 is a sanctuary jurisdiction under Section 9(a) of the order,  
15 which goes specifically to federal grants and the requirements,  
16 and then preemption suits that could be brought against a local  
17 jurisdiction for violations of 1373.

18 That quote there says nothing about 1373. I read you the  
19 longer quote from -- from General Sessions, that went right to  
20 the 1373 issue that we're talking about. There should be no  
21 confusion about that.

22 And I appreciate my friend, Mr. Keeker, reading the last  
23 sentence there, which said the Department of Justice will take  
24 lawful steps to claw back any funds awarded to a jurisdiction  
25 that willfully violates 1373. First of all, that was tied

1 directly to the prior statements that I read with respect to  
2 enforcement of 1373 as to federal grants.

3 So this is only a clawback of funds that would have been  
4 made under a federal grant by the Department of Justice or the  
5 Department of Homeland Security and identified for the Court  
6 that the only -- it -- it was just last year when the  
7 Department first started including express requirements about  
8 complying with 1373. So that's the -- the clawback reference  
9 is only to that limited range of funds.

10 And Santa Clara has not identified any funds that would be  
11 subject to that. Neither has San Francisco. So I think  
12 that's -- that's a little bit -- bit of a strawman that's been  
13 put up for the Court.

14 Just very briefly, one, with respect to OMB, it's  
15 certainly OMB's job to collect information and collect reports.  
16 OMB is not the one who would enforce federal immigration law.  
17 They don't enforce federal grants that are administered by DOJ  
18 and DHS.

19 **THE COURT:** That does, then, beg the question as to  
20 whether this Executive Order was really designed, as it says in  
21 Section 2, to reach all federal funds or whether it is as  
22 narrow as you've interpreted Section 9(a).

23 **MR. READLER:** Well, Section 2 says that -- and it  
24 doesn't even tie this to immigration. Just says the general  
25 statement that, "Jurisdictions that fail to comply with

1 applicable federal law do not receive federal funds except as  
2 mandated by law."

3 So first it says we're finding out jurisdictions aren't  
4 complying with the law. I think everyone should want  
5 jurisdictions to comply with the law. And, two, it says they  
6 won't receive funds except as mandated by law. And it turns  
7 out there are a whole bunch of laws that mandate funding.

8 So this is -- this is a very broad policy directive that  
9 is not a specific new enforcement action by the President.  
10 This doesn't seek to invoke new powers.

11 I think Your Honor correctly identified Section 9 as being  
12 the one that could potentially have ramifications. And I've  
13 talked at length about that section, so I won't talk about it  
14 anymore.

15 I'll just talk briefly about the pre-enforcement cases.  
16 And the *Driehaus* case is a case where the Ohio Elections  
17 Commission had previously taken --

18 **THE COURT:** Are you bringing up, now, new cases?

19 **MR. READLER:** I'm bringing up the case that they  
20 brought up, that they said that -- that we didn't talk about  
21 enough. The *Driehaus* -- I'm only talking about it because my  
22 friends on the other side talked about it.

23 **THE COURT:** Go ahead, Mr. Readler.

24 **MR. READLER:** The *Susan B. Anthony List* case.

25 And that was a pre-enforcement action where the election

1 commission had a history of taking certain kinds of actions.  
2 And there was a potential threatened action against a political  
3 candidate there. And to stop that enforcement, the candidate  
4 brought an affirmative suit, as I recall.

5 **THE COURT:** Yeah.

6 **MR. READLER:** So I think that's a different  
7 circumstance.

8 I'll turn it over to Mr. Simpson. Thank you very much for  
9 your time.

10 **THE COURT:** Okay. Thank you, Mr. Readler.

11 **MR. SIMPSON:** Thank you, Your Honor. It's good to  
12 appear before the Court today.

13 **THE COURT:** Pleasure to see you.

14 **MR. SIMPSON:** Just a very quick scheduling issue, if I  
15 could, Your Honor.

16 The Court entered case management conference orders, in  
17 these two cases and the Richmond case, that set a case  
18 management conference for May 2nd. And I might have  
19 misunderstood. I'm not sure that's the date that I heard the  
20 Court say earlier. Is it still May 2nd?

21 **THE COURT:** So that date will still be May 2nd. But I  
22 want to speak with you specifically, or whoever from the  
23 government, and the City about the 1373 challenge and how best  
24 to tee it up so that there's a complete record before me. So  
25 that's what I want to do on whatever date I gave you.

1           **MR. SIMPSON:** I see. April 25th.

2           **THE COURT:** April 25th. And you can do that by  
3 telephone.

4           **MR. SIMPSON:** Okay. Thank you, Your Honor.

5           And that actually leads to what I had planned on bringing  
6 up. And I've talked to counsel for the plaintiffs about this.

7           The case management conference that's currently scheduled  
8 for May 2nd creates a couple of issues. We have the oral  
9 argument on Richmond's preliminary injunction motion on  
10 May 2nd.

11           If the Court could have -- could give me permission to  
12 participate in the May 2nd conference by phone, as well, that  
13 would pretty much take care of the issues.

14           One of the issues is our response to the complaint in the  
15 Santa Clara case is due on May 1st. So if I need to come to  
16 the May 2nd conference in person, then it would be a conflict  
17 with actually filing that response to the complaint in the  
18 Santa Clara case on May 1st.

19           **THE COURT:** Okay.

20           So I'm happy to have -- if you need to stay in Washington  
21 to finish your work, that's fine.

22           **MR. SIMPSON:** All right. Thank you, Your Honor.

23           **THE COURT:** If that's what you're saying.

24           **MR. SIMPSON:** The alternative, of course, would be to  
25 delay the May 2nd -- well, either delay the May 2nd conference

1 or perhaps even move the case management conferences to  
2 May 2nd, to coincide with the Richmond argument.

3 **THE COURT:** Okay. So I haven't looked at the  
4 scheduling of those things. I will look at it when I get off  
5 the bench.

6 **MR. SIMPSON:** Okay.

7 **THE COURT:** And then we'll set something out.

8 **MR. SIMPSON:** All right. Thank you, Your Honor.

9 **THE COURT:** All right. Thank you, everybody, for your  
10 arguments.

11 Mr. Readler, thank you for coming out here and making the  
12 argument for the government.

13 And I will try to get an order out as soon as I can.

14 **MS. FINEMAN:** Your Honor, I am Nancy Fineman, from  
15 Cotchett, Pitre & McCarthy, for the City of Richmond. And our  
16 preliminary hearing on the preliminary injunction is May 10th.  
17 Mr. Simpson mentioned the 2nd.

18 **THE COURT:** Okay. I'm going to look at all the  
19 scheduling with respect to these various cases when I get off  
20 the bench.

21 Thank you, Ms. Fineman.

22 And I'll just say this for the lawyers: Anybody who  
23 intends to have a press conference should go either use the  
24 media room down on the first floor or do it outside, but don't  
25 do it in the hallway here.

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All right. Thank you very much.

(Counsel thank the Court.)

(At 10:09 a.m. the proceedings were adjourned.)

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**CERTIFICATE OF REPORTER**

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

DATE: Friday, April 14, 2017

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