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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

NO. **2:18–CV–00490-JAM-KJN**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE TO THE NORTHERN DISTRICT OF CALIFORNIA

Judge: Hon. John A. Mendez

NO HEARING NOTICED

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INTRODUCTION

The United States of America hereby opposes the Motion to Transfer Venue filed by California and the other State Defendants (ECF No. 18) (hereinafter, "Defendants' Motion" or "Defs.' Mot."). Remarkably, California seeks to transfer consideration of this matter away from this district, where the state laws at issue were enacted and where the government officials charged with enforcing them—the Governor and the Attorney General—reside. Venue is plainly appropriate here, and transfer under 28 U.S.C. § 1404(a) is inappropriate given that this is the district with by far the strongest ties to all of the Defendants. Given that, the United States' choice to file suit challenging California's laws in its own state capital is entitled to not only great weight, but overwhelming weight. California's motivation seems to be to select a forum that it believes will be more favorable. But that will only delay consideration of the United States' preliminary injunction motion—where the United States has identified the legal flaws in, and the ongoing harm caused by, the three challenged California laws, including the provisions that require local California law enforcement agencies to release, with no notice to the Department of Homeland Security ("DHS"), removable aliens arrested for criminal violations. The laws result in the need for DHS to conduct dangerous at-large apprehensions and increase the risk of criminal recidivism by aliens who are not in the country lawfully. Defendants' Motion should thus be denied.

Tethering this case to a narrow lawsuit regarding federal law enforcement grants, Defendants' Motion contends that the purportedly related litigation in San Francisco "turn[s] on the interplay between the federal government's power over immigration and the states' police powers under the Tenth Amendment." Defs.' Mot. at 1. That is simply not correct. Instead, the San Francisco litigation, which involves claims from both California and San Francisco, concerns the scope of the Attorney General's authority to impose conditions on two federal law enforcement grants, as measured by federal grant statutes and the Spending Clause. *See California ex rel. Becerra v. Sessions*, No. 17-cv-04701 (N.D. Cal.). This case, on the other hand, asks whether three unusual and newly enacted state immigration laws violate the Supremacy Clause. It is very well established that under the Spending Clause, Congress can, with certain limitations, offer funding to the States to carry out duties set forth in federal law; making inapplicable the

types of limits the Tenth Amendment might impose on direct regulation of the States. The Supremacy Clause issues, on the other hand, have nothing to do with federal grants or Congress' Spending Clause power. Rather, this case will address whether the three *California* laws stand as an obstacle to the accomplishment of Congress' objectives. It is entirely unrelated to limits on federal enactments. The legal questions in the two cases are entirely distinct, and the premise of California's motion is incorrect.

Furthermore, the only potential legal issue in common—whether two provisions of Senate Bill 54 ("SB 54") that bar information-sharing are in conflict with 8 U.S.C. § 1373—are discrete aspects of each case and will not necessarily be resolved in either case. The two suits cannot result in conflicting obligations imposed on the parties as the San Francisco cases will at most address the conditions imposed on the specific grants at issue there, which are not at issue here. Relief in this Court would be entirely different, and the United States does not read California's motion to suggest otherwise. As Judge Orrick recognized in rejecting the effort of another plaintiff to intervene, venue "rules result in different lower courts deciding similar legal issues, sometimes with divergent results. Such differences are appropriately reconciled by higher courts." *City & Cty. of San Francisco v. Sessions*, No. 17-cv-4642 (N.D. Cal.), ECF No. 39, at 2.

BACKGROUND

I. The Procedural Background Of *Becerra*.

In 2016, the United States Department of Justice began requiring applicants for Edward Byrne Memorial Justice Assistance Grants to certify compliance with the immigration-information sharing requirements of 8 U.S.C. § 1373. *See Becerra*, No. 17-cv-4701 (N.D. Cal.), ECF Nos. 27-2 and 27-3. California certified compliance in 2016 for the upcoming grant year. In Summer 2017, the Department of Justice indicated that it would add two additional conditions to those grants, requiring grant recipients to permit DHS access to prison facilities to interview aliens and to provide "as much advance notice as practicable" before detained aliens were released.

On August 11, 2017, the City of San Francisco filed a complaint for declaratory and injunctive relief challenging these three conditions, *San Francisco*, No. 17-cv-4642 (N.D. Cal.), ECF No. 1, and Defendant Becerra filed a similar lawsuit the very next day challenging the Byrne

JAG conditions as well as a similar condition imposed on the Justice Department Community Oriented Policing Services grant, *see Becerra*, No. 17-cv-4701 (N.D. Cal.), ECF No. 1. In the introduction to its complaint, California explained that the "Administration has threatened to withhold congressional appropriated federal funds" and "faces the immediate prospect of losing $31.1 million between two federal grants." *Id.* ¶ 1. Three days after filing suit, Defendant Becerra moved to relate his case to San Francisco's. *See San Francisco*, No. 17-cv-4642 (N.D. Cal.), ECF No. 17. In that motion, Becerra explained that "both [cases are] challenging the federal government's ongoing attempts to use access to federal funds as a method of forcing states and local law enforcement into adopting federal immigration enforcement priorities." *Id.* at 2. The United States agreed that the two cases were related, and the district court issued an order to that effect. *Id.* at ECF No. 32.

On October 31, 2017, Defendant Becerra moved for a preliminary injunction, arguing that the State's potential loss of JAG and COPS grants violates the Spending Clause and the Administrative Procedure Act ("APA"). Alternatively, he sought an order enjoining the Department of Justice from finding that any of several state laws violate grant conditions relating to Section 1373 in either the Byrne JAG or COPS programs.[1] The Department of Justice opposed the motion for a preliminary injunction and moved to dismiss both complaints in mid-January 2018. *See Becerra*, No. 17-cv-4701 (N.D. Cal.), ECF Nos. 42 & 77; *San Francisco*, No. 17-cv-4642 (N.D. Cal.), ECF No. 66. The district court denied all three motions on March 5, 2018. *See San Francisco*, No. 17-cv-4642 (N.D. Cal.), ECF No. 78; *Becerra*, No. 17-cv-4701 (N.D. Cal.), ECF Nos. 88 & 89. Both cases are still at the pleadings stage.

II. The Procedural Posture Of This Case.

On March 6, 2018, the United States filed the instant lawsuit and accompanying motion for a preliminary injunction. The United States' motion and Complaint focus on three California statutes that are invalid under the Supremacy Clause: specifically, the "Immigrant Worker

[1] That is, California's "TRUST Act," Cal. Gov't Code §§ 7282-7282.5; the "TRUTH Act," Cal. Gov't Code §§ 7283–7283.2; the "California Values Act," Cal. Gov't Code §§ 7284–7284.12; California Penal Code §§ 422.93, 679.10, or 679.11; California Code of Civil Procedure § 155; or California Welfare and Institutions Code §§ 827 or 831.

Protection Act," Assembly Bill 450 ("AB 450"); Assembly Bill 103 ("AB 103"); and SB 54, which includes the "California Values Act." The United States has sought a judgment that these laws violate the Supremacy Clause, and a preliminary injunction against their enforcement due to the irreparable harm they have had upon the United States' ability to enforce immigration laws.

The United States' lawsuit has nothing to do with grants, the Spending Clause, the APA, or any of the other non-immigration related laws at issue in *Becerra*. And unlike that case, where the district court specifically ruled that further factual development of the record should proceed, factual development is not required to evaluate the three laws challenged in this litigation under the Supremacy Clause—instead, those are purely legal issues. Simply put, *Becerra* is about federal grant conditions, whether they may be imposed under specific federal grant programs and the Spending Clause, and whether California is complying with those conditions. This case is about California laws enacted to "protect[] immigrants from … federal immigration enforcement[.]" California Committee on the Judiciary Report (Assembly), Apr. 22, 2017, at 1.

LEGAL STANDARDS

Section 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Courts consider two prongs when ruling on a motion to transfer: (1) the district where transfer is sought must be one where the case might have been brought, and (2) transfer must be convenient for the parties and witnesses, as well as in the interests of justice. *Adoma v. Univ. of Phoenix, Inc.*, 711 F. Supp. 2d 1142, 1151 (E.D. Cal. 2010). Since *Jones v. GNC Franchising, Inc.*, courts consider the following convenience factors:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

211 F.3d 495, 498–99 (9th Cir. 2000). The burden is on the moving party to demonstrate that the balance of conveniences favors the transfer. *CFTC v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). "A plaintiff's choice of forum is rarely disturbed, unless the balance is *strongly* in favor of the defendant." *Adoma*, 711 F. Supp. 2d at 1151 (emphasis added) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)); *Luchini v. Carmax, Inc.*, No. 12-cv-0417, 2012 WL 2401530, at *3 (E.D. Cal. June 25, 2012) (same). Boiled down, a defendant "must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)).

Under the separate first-to-file rule, a court may "decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011) (quotation and citation omitted). This normally happens "when two *identical* actions are filed in courts of concurrent jurisdiction." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982) (emphasis added). In *Pacesetter*, "[e]xamination of the complaints filed in the[] two actions indicate[d] that the issues raised [we]re identical" because "[t]he central questions in each [we]re the validity and enforceability of three specific patents" and "permitting multiple litigation of these identical claims could serve no purpose of judicial administration." *Id.*

ARGUMENT

I. There Is No Reason Why This Case Should Be Transferred Under 28 U.S.C. § 1404(a).

The United States does not dispute that this action "might have been brought," 28 U.S.C. § 1404(a), in the Northern (or, for that matter, any other) District of California. But here the United States followed the normal, appropriate, and, indeed, predictable practice of filing suit against California in the State's seat of its government: Sacramento, in the Eastern District of California. That determination should be honored absent compelling circumstances. First, the events giving rise to this suit all took place in this District. Second, the choice of forum should be given great weight and, in these circumstances, that weight should be dispositive. Third, all of the Defendants reside in this district. Fourth, the various cost factors militate strongly toward retaining the case. And finally, the interests of justice call for maintaining the case here, as nothing

about the San Francisco litigations—which were combined before a single judge to address issues pertaining to federal grant law and the Spending Clause—justifies a transfer of this case, which concerns a Supremacy Clause challenge to California state laws which have nothing to do with federal grant law or the Spending Clause.

A. The Relevant Events Giving Rise To This Suit Occurred In This District.

The first venue factor weighs overwhelmingly in favor of retaining jurisdiction in this District, as all of the Defendants reside here and the events—the enactment and execution of the State laws at issue—also occurred here. Indeed, it is curious that Defendants would seek to transfer venue *away* from this State's capital given that "venue is proper inasmuch as Sacramento is the seat of government for the State of California, Cal. Gov't Code § 450 … [when] the named defendants are being sued in their official capacities as constitutional officers of the State of California, Cal. Gov't Code § 1060." *H.J. Justin & Sons, Inc. v. Brown*, 519 F. Supp. 1383, 1385 (E.D. Cal. 1981), *aff'd in part, rev'd in part*, 702 F.2d 758 (9th Cir. 1983). The laws were debated in Sacramento, enacted in Sacramento, and enforced in Sacramento for the express purpose of frustrating and obstructing federal immigration enforcement. This is directly related to the first of the *Jones* convenience factors—"the location where the relevant [statute] w[as] negotiated and executed." 211 F.3d at 498. As the United States explained in its Complaint, "a substantial part of the acts or omissions giving rise to this Complaint arose from events occurring within this judicial district." ECF No. 1 ¶ 9. That is undeniable, and Defendants' Motion makes no argument against this critical first factor weighing in favor of the United States.

B. The United States' Choice Of Forum Is Entitled To "Great Weight."

The next relevant (third) *Jones* factor concerns a plaintiff's choice of forum. "In this circuit, a plaintiff's choice of forum is generally granted great weight[.]" *DeFazio v. Hollister Emp. Share Ownership*, 406 F. Supp. 2d 1085, 1089 (E.D. Cal. 2005) (citing *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)); *accord McCormack v. Medcor, Inc.*, No. 13-cv-02011, 2014 WL 1934193, at *4 (E.D. Cal. May 14, 2014) (Mendez, J.) ("As is always the case, Plaintiff's choice of forum is entitled to consideration."). California argues that the United States' Complaint "contains no allegations indicating a particularized interest of either the parties or subject matter

in the Eastern District." Defs.' Mot. at 10. Not so. In reality, the United States sued California in its state capital, where the challenged laws were enacted, where the state official Defendants—the Governor and the Attorney General—reside, and where state officials have spoken on the laws, described their purpose, and discussed how they would be enforced. The choice of venue here—the Defendants' home jurisdiction, is indisputably the jurisdiction where the challenged acts occurred and that is most closely tied to every Defendant—is a choice that shows the utmost of intergovernmental comity. Moreover, the U.S. Attorney in this District and his staff have expended significant resources in this matter; the Northern District, on the other hand, has had no involvement. This factor weighs strongly in favor of retaining jurisdiction in the Eastern District.

In arguing to the contrary, California appears to misunderstand this Court's decision in *Stay-Dri Continence Mgmt. Sys., LLC v. Haire*. No. 08-cv-1386, 2008 WL 4304604, at *2 (E.D. Cal. Sept. 10, 2008) (Mendez, J.). In *Stay-Dri*, this Court discounted the plaintiffs' choice of forum because "only one of the Plaintiffs resides permanently in the Eastern District … and because Plaintiffs have not demonstrated that significant [contract] negotiations took place in the District[.]" *Id.* Neither of these concerns are present here because (1) the United States has had a permanent presence in Sacramento since 1850, and (2) the three challenged laws were each conceived, enacted, and are enforced by state government officials *within this very district*. These are exceptionally strong ties to the Eastern District—and no discounting of the choice of forum as occurred in *Stay-Dri* is therefore justified. And even there, this Court ruled that "Plaintiffs' choice of forum weighs against transfer." *Id.* Defendants have thus failed "to present strong grounds" on this factor and the United States' choice of forum is entitled to deference. *Wordtech Sys., Inc. v. Integrated Network Sols., Corp.*, No. 04-cv-1971, 2014 WL 2987662, at *5 (E.D. Cal. July 1, 2014) (internal quotations omitted).

C. This Case's Contacts Are Strongest In This District.

The fourth and fifth *Jones* factors concern the contacts of the respective parties and the plaintiff's cause of action in the chosen forum. As previously explained, the parties' strongest contacts are in this District, given that it contains the seat of California's government. Moreover, the cause of action arose within this district because it is undisputed that California legislators

wrote, debated, voted upon, and eventually passed AB 450, AB 103, and SB 54 within Sacramento—not San Francisco. And the state officials charged with putting these laws into execution—the Governor and Attorney General—reside here. In other words, "the operative facts have … occurred within the forum and the forum has [a strong] interest in the parties or subject matter." *DeFazio*, 406 F. Supp. 2d at 1088. That is clearly the case here, in particular, given that the United States challenges the constitutionality of three California laws enforced *from this District* in buildings blocks from this courthouse. It is therefore most appropriate that the constitutionality of California's laws be decided in their own "home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). Defendants' Motion completely ignores these factors—both of which weigh in favor retaining jurisdiction.

D. The Other* Jones *Factors Weigh In Favor Of This District.

The final three *Jones* factors, "(6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof," 211 F.3d at 498–99, also weigh in favor of retaining jurisdiction. Although Defendants' Motion states that these convenience factors "weigh in favor of transfer," they fail to identify a single party or witness to support that assertion. That "does not bear [Defendants'] heavy burden of showing a strong balance of convenience" to justify a transfer. *E & J Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 467 (E.D. Cal. 1994).

These convenience and cost factors strongly suggest retaining jurisdiction. The named Defendants, Governor Brown and Attorney General Becerra, can hardly argue that it is more convenient or less costly for them and their employees to travel some 90 miles to San Francisco rather than walk a few city blocks to this courthouse for proceedings. It is likewise inexplicable for Defendants to claim that "[t]he federal government is located in the District of Columbia and has alleged no significant contacts with the Eastern District[.]" Defs.' Mot. at 10. It is true that the seat of the federal government is located in the District of Columbia, and this might be of importance if this suit had been filed in Washington, D.C., rather than in the *Defendants'* seat of government. The federal government, of course, is also located within the Eastern District—evidenced, for example, by the presence of the U.S. Attorney, the work his office has already

done on this case, and the work of other federal officers.

Additionally, Defendants' Motion completely fails to identify which witnesses, if any, would be inconvenienced by the United States' choice of the Eastern District. *See, e.g.*, *Wordtech*, 2014 WL 2987662, at *6; *Adoma*, 711 F. Supp. 2d at 1151 ("The party moving for transfer must demonstrate, through affidavits or declarations containing admissible evidence, who the key witnesses will be and what their testimony will generally include."); *see also Johnson v. Experian Info. Sols., Inc.*, No. 12-cv-0230, 2012 WL 5292955, at *3 (C.D. Cal. Sept. 5, 2012) (same); *Cal. Writer's Club v. Sonders*, No. 11-cv-02566, 2011 WL 4595020, at *14 (N.D. Cal. Oct. 3, 2011) (denying a defendant's transfer motion when it provided only "vague and conclusory assertions regarding the inconvenience of participating in litigation"). The same point is true regarding Defendants' assertion that "the documentary evidence in both cases will likely be located in the District of Columbia and in various locations throughout California." Defs.' Mot. at 11. Defendants do not propose a transfer to the District of Columbia, and the fact that there is documentary evidence "throughout California" supports keeping the case here. If anything, venue in this Court is the most convenient for all parties. The documents concerning the creation and enforcement of AB 450, AB 103, and SB 54 are controlled by offices within this district and many of the Defendants' witnesses are already here for governmental business. *See Safarian v. Maserati N.A, Inc.*, 559 F. Supp. 2d 1068, 1072 (C.D. Cal. 2008); *Adoma*, 711 F. Supp. 2d at 1151. The *Jones* convenience factors weigh in favor of this district.

E. The Interests Of Justice Favor Venue In This District.

Defendants' assertion that transfer is "in the interests of justice … because it involves the same parties and overlapping issues" as the cases filed in San Francisco is similarly meritless. Defs.' Mot. at 8. In evaluating the interests of justice, courts consider factors such as the existence of a pending related action in the forum to which transfer has been proposed and the differences in litigation in each forum, including court congestion and time to trial. *See Tittl v. Hilton Worldwide, Inc.*, No. 12-cv-2040, 2013 WL 1087730, at *5–6 (E.D. Cal. Mar. 14, 2013). Defendants argue that there would be cost savings if this lawsuit were consolidated with *Becerra* because it involves "the same fundamental legal issue." Defs.' Mot. at 9. But as California itself

explained just a few weeks ago to Judge Orrick, *Becerra* is about the Spending Clause and Byrne JAG grants: "This case is fundamentally about [the Attorney General of the United States'] attempt to legislate from the Executive Branch. These are not conditions that were imposed by Congress. And here—and in three different respects—[he] ha[s] attempted to insert [his] own immigration-enforcement preferences into [a] federal [grant] statute." Plaintiff's Exhibit A at 20.

> Likewise, when California sought to relate *Becerra* to *San Francisco*, the State explained: Both San Francisco and California are challenging the constitutionality of the access and notification conditions [included in Byrne JAG grants] on substantially similar grounds. ... California alleges the same causes of actions, and makes substantially similar constitutional arguments that Defendants exceeded the statutory authority given to the executive branch in imposing the access and notification conditions. ... Both cases name as defendants United States Attorney General Jefferson B. Sessions, Acting Assistant Attorney General Alan R. Hanson, and USDOJ. Both San Francisco and California are asking the Court to declare the access and notification conditions unconstitutional and to enjoin the Defendants from using the conditions as a funding restriction for JAG awards.

San Francisco, No. 17-cv-4642 (N.D. Cal.), ECF No. 17 at 3. Critically, *none* of the factors California itself identified as justifying related case treatment in that case is present here: this case does not "challenge ... the ... conditions" on Byrne JAG grants. *Id.* This case does not include "similar ... arguments that [the Department of Justice] exceeded ... statutory authority given to the executive branch in imposing" the conditions. *Id*. This case does not involve the "Attorney General[.] ... Acting Assistant Attorney General, and USDOJ" as parties. And this case does not involve a request that the Court "declare the ... [grant] conditions unconstitutional." *Id.*

Unlike *Becerra*'s central focus, this case has nothing to do with Byrne JAG grants or the Spending Clause; it is exclusively focused on whether three California laws are invalid under the Supremacy Clause. The legal questions are not the same. In the Byrne JAG case, the court must decide whether (1) Congress authorized the Attorney General to impose immigration-related conditions on the Byrne JAG grants, (2) the Attorney General acted arbitrarily and capriciously

under the APA in imposing those conditions, and (3) the Spending Clause permits imposition of the conditions under its four-part test. Under that test, the court will ask whether the conditions (a) are "in pursuit of 'the general welfare,'" (b) are "unambiguous[] ... enabl[ing] the States to exercise their choice knowingly," (c) are "[]related 'to the federal interest'" furthered by the program, and (d) do not violate a separate constitutional provision. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987). The financial inducement also cannot be "so coercive as to pass the point as which 'pressure turns into compulsion.'" *NFIB v. Sebelius*, 567 U.S. 519, 580 (2012) (quoting *Dole*, 483 U.S. at 211). These questions are entirely distinct from those asked when applying the Supremacy Clause—which asks whether state laws stand as an obstacle to the accomplishment of Congress' objectives—or the defenses that California might raise under the Tenth Amendment, which are not implicated in Spending Clause cases. *See Dole*, 483 U.S. at 210 ("conditions legitimately placed on federal grants" do not implicate "Tenth Amendment limitation[s] on … regulation of state affairs" because "the State could … adopt the simple expedient of not" accepting the grant (internal quotation marks omitted)).

Judge Orrick's recent preliminary injunction ruling underscores these differences. In that ruling, the Court concluded that it had jurisdiction over the case based solely on the potential loss of grant funds under the Byrne JAG and COPS programs. *See* Order at 17 (the "State claims that the federal government threatens to penalize it ... by withholding the COPS grant and the Byrne JAG Program grant" and this potential "'loss of funds ... satisfies Article III's standing requirement'"). And in declining to grant relief, Judge Orrick further explained that "the question I decide is narrow: is the State entitled to a preliminary injunction to require the federal government to fund a $1 million law enforcement grant that it has held up because it appears likely to decide that the State is not complying with 8 U.S.C. § 1373." Thus, while California seeks to expand the scope of that litigation through the instant motion, it has up to now been focused on the lawfulness of, and compliance with, Department of Justice grant conditions.

Even disregarding these overarching differences in the two cases, only one of the three California laws being challenged here overlaps with any of the laws at issue in *Becerra*—SB 54—and even there, the question is whether the law precludes California from qualifying for a Justice

Department grant that has been conditioned on compliance with 8 U.S.C. § 1373. Moreover, in *Becerra*, California asks the Court to hold that it qualifies for a Justice Department grant even though it enacted *seven* laws addressing law enforcement information-sharing—among them SB 54. The United States has not challenged six of those laws here, but is challenging two other California laws—AB 450 and AB 103—that have no relevance to *Becerra*. With so little overlap in the underlying legal issues, Section 1404(a)'s purpose of "prevent[ing] the waste of time, energy and money" and "protect[ing] litigants, witnesses and the public against unnecessary inconvenience and expense" will not be served. *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

The only potential legal issue in common—how to square two provisions of SB 54 that bar information-sharing with Section 1373, which bars policies limiting information-sharing—are discrete aspects of each case and will not necessarily be resolved in either case. And even if the Courts reach different answers to that question, there will be no conflicting obligations imposed upon the parties and the parties will not face anything different than is commonly faced by large institutional litigants like the State and the United States where policies are regularly tested and evaluated by multiple courts. Importantly, a ruling cannot impose conflicting obligations on either party. At most, given the basis for their Article III injury, the San Francisco litigation will result in an order that either dismisses the case or precludes the Department of Justice from imposing certain immigration-related conditions on Byrne JAG or COPS grants. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (a court order that went beyond remedying party's "injury in fact" would "fly in the face of Article III's injury-in-fact requirement"). This case, on the other hand, will either be dismissed or result in a judgment that one or more of the three newly-enacted California laws violate the Supremacy Clause. As Judge Orrick recognized, if venue rules call for a case to be litigated elsewhere, as they do here, those "rules result in different lower courts deciding similar legal issues, sometimes with divergent results. Such differences are appropriately reconciled by higher courts." *San Francisco*, No. 17-cv-4642 (N.D. Cal.), ECF No. 39, at 2.

Finally, adding an entirely distinct set of constitutional issues to the litigation in San Francisco will not promote judicial economy, but will be hitching a new set of issues onto cases

that are far down the road toward addressing the scope of the Justice Department's grant-making authority. If anything, it will only further serve to bog down cases where a plaintiff other than California—San Francisco—is seeking judicial resolution. This district court recently reaffirmed that "'[a]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled *at its origin*.'" *Huddleston v. John Christner Trucking, LLC*, No. 17-cv-00925, 2017 WL 4310348, at *11 (E.D. Cal. Sept. 27, 2017) (emphasis added) (quoting *Gulf Oil*, 330 U.S. at 508). Defendants contest this maxim by pointing to the "average pending actions per judgeship" between the two districts. Defs.' Mot. at 9 n.3. That consideration is relevant, of course, but is only part of the analysis. It is not merely the "average pending actions per judgeship" that should be assessed, but, as this Court has stated, "[t]he interest of ensuring … *this matter* proceeds speedily to trial[.]" *Stay-Dri*, 2008 WL 4304604, at *4 (emphasis added).[2]

II. The First-To-File Rule Also Does Not Support Transfer.

As an alternative, Defendants raise the first-to-file rule as another reason favoring transfer. "Under that rule, when cases involving the same parties and issues have been filed in two different districts, the second district court has discretion to transfer … the second case in the interest of efficiency and judicial economy." *Cedars-Sinai Medical Ctr. v. Shalala*, 125 F. 3d 765, 769 (9th Cir. 1997). This is a rule of equity that requires two matters to exhibit chronology, identity of parties, and similarity of issues. *See Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625–27 (9th Cir. 1991). Factors such as bad faith, anticipatory suits, and forum shopping are also weighed. *Id.* at 628; *Xoxide, Inc. v. Ford Motor Co.*, 448 F. Supp. 2d 1188, 1992 (C.D. Cal. 2006).

A. The Issues In Becerra *Are Distinct*

The issues in the two cases are not similar enough for the first-to-file rule. Critically, the cases where the Ninth Circuit has approved application of that rule to override a plaintiff's choice

[2] Where congestion statistics differ only marginally, this interest will not favor transfer. *Roling v. E*Trade Secs.*, LLC, 756 F. Supp. 2d 1179, 1187 (N.D. Cal. 2010). Reviewing the statistics cited by Defendants bears this out—as the median time from filing to disposition for civil cases differs by only three months. *See* ECF No. 19-1 at 175 & 177. And when other factors do not favor transfer, court congestion is not a reason to transfer. *See Hendricks v. Starkist Co.*, No. 13-cv-0729, 2014 WL 1245880, at *6 (N.D. Cal. Mar. 25, 2014).

of forum have involved *identical* issues. *See Pacesetter*, 678 F.2d at 95 (applying "when two identical actions are filed in courts of concurrent jurisdiction"); *Apple Inc.*, 658 F.3d at 1161 (courts may "decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district"); *Cedars-Sinai*, 125 F. 3d at 768. California makes no such claim here, and the United States has described above why the issues are distinct. Defendants want to have this Supremacy Clause case transferred to the Northern District to relate it to their case regarding the Spending Clause. But even if *Becerra* fully resolves all legal issues surrounding SB 54 with respect to the grant condition, it will not address the Supremacy Clause issues or the two other California laws that the United States is challenging. *See Cedars-Sinai*, 125 F.3d at 769 (first-to-file rule does not apply when some of the issues are different).

B. Principles Of Equity Counsel Against Defendants' Forum Shopping.

Principles of equity are also relevant to a first-to-file inquiry. *See Pacesetter*, 678 F.2d at 95. Two aspects are relevant to Defendants' Motion: anticipatory suits and forum-shopping. Regarding the former, this district court has explained how "[a]nticipatory suits are generally not entitled to deference under the 'first to file' rule and are disfavored[.]" *Lighting Sci. Grp. Corp. v. U.S. Philips Corp.*, No. 08-cv-2238, 2009 WL 10694995, at *3 (E.D. Cal. Feb. 3, 2009). When a litigant files an action almost instantly after a predicate event, such a filing "smack[s] of forum shopping." *Knapp v. Depuy Synthes Sales, Inc.*, 983 F. Supp. 2d 1171, 1178 (E.D. Cal. 2013). In *Knapp*, for example, Judge Nunley was confronted with a litigant who filed for a declaratory judgment action against his former employer regarding a non-compete clause. *Id.* This use of the first-to-file rule "as a sword" was therefore rejected. *Id.* The same should hold true here in relation to *Becerra*. California filed suit in *Becerra* before the United States took any action with respect to California's grant compliance, and now seeks to expand that suit beyond the grant context as a "sword" to override the United States' choice to sue California in its own state capital over three state laws. Indeed, California's qualification for specific grants was the only basis for the district court's jurisdiction in *Becerra*, and any effort to describe the case as having a broader sweep should not be credited in applying the rule. "[W]here a declaratory judgment action has been triggered by a[n action that] notifies the party of the possibility of litigation upon collapse of

negotiations, equity militates in favor of allowing the second-filed action to proceed to judgment rather than the first." *Xoxide*, 448 F. Supp. 2d at 1193 (internal citations and quotation marks omitted). That principle rings true here—the United States should not be penalized for prudently waiting until California's laws became effective in 2018. The United States was compelled to file this suit only after seeing the concrete impediments AB 450, AB 103, and SB 54 wrought upon immigration enforcement. This is evidenced by the multiple declarations filed alongside the United States' Motion for a Preliminary Injunction (ECF No. 2).

The same principle is true where a movant requests transfer to a court that "just issued a favorable ruling." *Miller v. Cal. Dep't of Corr. & Rehab.*, No. 12-cv-0353, 2016 U.S. Dist. LEXIS 145072, at *9 (E.D. Cal. Oct. 19, 2016). When that occurs, this district court has noted how "motion[s] to transfer [can be viewed a]s an attempt to forum shop and have … claims in this case transferred to a judge … believe[d] [to be] more inclined to support the [movant], rather than a genuine concern for the convenience of the witnesses and judicial economy." *Id.* at *10. That is evidenced here by two points: (1) this case, as previously described, is focused on the Supremacy Clause and whether three California laws are preempted—not the Spending Clause that is at issue in *Becerra*; and (2) two of the laws challenged by the United States (including SB 54) came into effect just this year—months after Defendants filed their Amended Complaint in front of Judge Orrick. *See Becerra*, 17-cv-04701 (N.D. Cal.), ECF No. 11 (Oct. 13, 2017).

Two weeks ago, Judge Orrick denied the *Becerra* defendants' motion to dismiss. *See id.*, ECF No. 88. Judge Orrick has previously held that the Executive Order issued by the President concerning funding for sanctuary cities was unlawful and issued a nationwide injunction. *See Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017). But judicial selection based on rulings in other cases is not a proper reason to transfer under the first-to-file rule. *See Miller*, 2016 U.S. Dist. LEXIS, at *10. "[W]hile it would have been possible … to file one complaint in one forum covering all claims and time periods, there is no overwhelming reason to combine them [all] now, nor to prefer one jurisdiction over another." *Id.* at *11.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Transfer Venue.

DATED: March 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2018, I electronically transmitted the foregoing document to the Clerk's Office using the U.S. District Court for the Eastern District of California's Electronic Document Filing System (ECF), which will serve a copy of this document upon all counsel of record.

By: */s/ Joshua S. Press*
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Civil Division

PLAINTIFF'S EXHIBIT A

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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. JEFFERSON B. SESSIONS III, Attorney General of the United States, *et al.*, Defendants.	**NO. C 17-04642 WHO**
STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, Attorney General of the State of California, Plaintiff, VS. JEFFERSON B. SESSIONS III, Attorney General of the United States, *et al.*, Defendants.	**NO. C 17-04701 WHO**

San Francisco, California
Wednesday, February 28, 2018

TRANSCRIPT OF PROCEEDINGS

Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

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Wednesday - February 28, 2018 **2:00 p.m.**

P R O C E E D I N G S

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THE CLERK: We're calling the combined Cases 17-4642, City and County of San Francisco versus Sessions, *et al.*, and 17-4701, State of California versus Sessions, *et al*.

Counsel, if you would please come forward and state your appearance for the record. Here, to the podiums.

THE COURT: Let's start with the State.

MS. EHRLICH: Lisa Ehrlich, for the State of California.

MS. BELTON: Sarah Belton, for the State of California.

MR. SHERMAN: Lee Sherman, for the State of California.

THE COURT: All right. How about for the City?

MS. MC GRATH: Good afternoon, Your Honor. Aileen McGrath, for the City and County of San Francisco.

MS. EISENBERG: Sara Eisenberg, for the City and County of San Francisco.

MS. LEE: Mollie Lee, also for the City and County of San Francisco.

THE COURT: Welcome.

MR. READLER: Good afternoon, Your Honor. Chad Readler, on behalf the United States.

THE COURT: Mr. Readler, welcome back to San Francisco.

MR. READLER: Thank you.

MR. FLENTJE: August Flentje, on behalf of the United States.

THE COURT: Mr. Flentje, what a pleasure to see you.

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

THE COURT: Welcome.

All right. So let's start. We'll do this one at a time. And let's start with the State's motion. So Mr. Readler.

MR. READLER: Well, good afternoon again, Your Honor. Chad Readler, on behalf of the United States.

For our presentation I'm happy to sort of talk about the joint issues together, so maybe we can save a little bit of time. There are some differences when it gets to specific aspects of the State and local laws that are at issue, but even there, there's quite a bit of overlap. So I will --

THE COURT: But --

MR. READLER: -- try to address the issues together, if that makes sense.

THE COURT: That sounds great.

MR. READLER: And there are two key substantive issues I'd like to address regarding -- in support of our motion to dismiss.

The first is that for a cooperative federal law enforcement grant, certainly the United States is authorized to require the sharing of information regarding criminal aliens that are being held by the grantees. And so we think that any claim regarding a lack of authorization should be dismissed. There's clear statutory authority for that.

And, second, both the City and the State, based upon the face of their ordinances and State laws, appear to be not in compliance with 1373. And so any claim that seeks a declaration that they are in compliance, we think, should be dismissed, as well.

There are a couple of threshold ripeness issues that I think we can sort of dispense with right away. One is that the State has cited a number of statutes that it's asked for declaratory judgment on, and asked for a judgment on in this case. And there was only one, as we discussed at the last hearing -- the Values Act -- where the Government has contended that the State may not be in compliance with 1373. So we think the Court should dismiss claims as to any other statute, because the Government's not contended that the State might not be in compliance with 1373.

Also, both the State and the City have suggested that there should be a ruling that, on its face, there's facial compliance with 1373 with respect to the local ordinance and the State law at issue. And we think that's not the right

test. It's certainly possible that the -- and we think that the plaintiffs are not in compliance on their face; but even if the face of the ordinance suggests they might be, we also need to look at the actual conduct, and how the policies are being implemented and followed. So we also don't think there would be a basis to sort of grant judgment on the facial issue.

And, third, I just want to remind the Court there's still an administrative process going on with respect to the 1373 compliance. The Department has written to both of the plaintiffs. The plaintiffs have provided information. And they're still in the process of, at the administrative level, assessing whether there is compliance. So again, we think that this case has really sort of gotten out in front of that administrative process, and that there is no final agency determination yet on 1373 compliance.

THE COURT: So with respect to the standing issues and justiciability issues, what impact do you think I should consider from the statements of the President last week, threatening to take ICE enforcement out of the State, or the Acting ICE Director's threat to prosecute criminally public officials whose view about Section 1373 differs from his?

MR. READLER: Well, I'm familiar with the statements. I really don't think those have anything to do with the grants that are at issue.

We're really talking about a narrow issue here, which is

one federal grant administered by the Department of Justice that places conditions that the City -- City and State can voluntarily agree to, or they don't have to accept. And I think those are really sort of separate issues.

But I would acknowledge that immigration issues have been in the news a lot recently locally, nationally. And there's certainly been a lot of debate.

But I think it's worth keeping in mind that historically the immigration system has really been built on cooperation between the Federal Government and the State Government. And that's true, I think, from the perspective of the Federal Government, of every branch of Government.

Of course, the Congress puts in lots of schemes in lots of areas -- not just immigration; but health care, education -- where it requires information sharing back and forth between the State and Federal Government to administer programs. And the Congress has done that here with respect to immigration.

Perhaps the most significant area is with respect to the holding of criminal aliens, where it allows aliens who are sentenced by a local government to serve their time before they're then turned over to the Federal Government to be removed. And that's a cooperative procedure.

The Executive, of course, embraces the cooperative aspects, too, because it's certainly less expensive for the Federal Government to detain a criminal alien when they're

released from prison, as opposed to having to find them out in the community. And it's also much safer.

And I think the courts also have embraced the idea of a cooperative immigration system, that the Court, of course, is very familiar with the *Arizona* decision from the Supreme Court. And Justice Kennedy wrote that consultation between federal and state officials is an important feature of the immigration system.

And what we're talking about here is a cooperative law-enforcement grant, where the Federal Government provides money to the State and local governments for law-enforcement issues. And the Federal Government is authorized to determine what priority purposes it would like to include in those grants, and to place conditions on those grants. And it's placed conditions regarding information sharing; information sharing about criminal aliens held by the grantees.

And we think that's both authorized by statute, and constitutional. And I'd like to take that issue up first, which is the statutory authorization for the grant conditions --

THE COURT: Okay.

MR. READLER: -- in the Byrne JAG grant.

In 2006 when the grant was created, the Congress authorized the Assistant Attorney General who oversees this grant program to do two things. Authorized him or her to place

special conditions on these grants. And every year there are dozens of conditions; 40 or 50 conditions on grants.

And, second, the Assistant Attorney General is also able to determine the priority purposes for formula grants like the Byrne JAG grant. And that's a really key aspect that the plaintiffs have not addressed much in their papers; but what the Congress said is that for a formula grant like this, the Assistant Attorney General still has the discretion to determine the priority purpose for that grant, and further that priority purpose by placing conditions, among other things, to encourage certain kind of behavior.

For non-formula or discretionary grants, that's an inherent ability that the grant maker has, to use their discretion. And Congress said here that for this formula grant, it also wants the grantors to have the ability to determine priority purposes each year, annually.

So certainly these conditions are very consistent with the statutory authority granted by Congress. And I think it's no surprise that they would authorize the Attorney General and the Assistant Attorney General to utilize these types of conditions. They're both Senate-confirmed officials. The Attorney General is the chief law-enforcement officer responsible for law enforcement around the country. And the Assistant Attorney General has the express duty to maintain liaison with local governments on law-enforcement issues. And

so certainly through these cooperative, information-sharing grant conditions, that's one way the Assistant Attorney General can honor that obligation.

And I think it's worth noting that of the, you know, dozens of conditions that fall under these grants each year, many of those are about information sharing. So it's very common not only in the immigration area, but whether it's DNA evidence or certain purchases made by a grantee with money, there are a whole host of information-sharing conditions that go back and forth. So in that sense, this is not unusual at all.

And these conditions, of course, further the Federal Government's interests in a lawful immigration system, specifically with respect to criminal aliens in custody by the grantees.

Two problems with the plaintiffs' interpretation of this provision. You know, they say this doesn't authorize the Department to place these conditions, but there are two significant problems with their reading. The first is that what they say is when it says "special conditions and priority purposes," that's just superfluous language, because you actually have to find that power somewhere else in the statute, which doesn't make a lot of sense, because if that's the case, there's no reason to list these powers, to begin with, if you actually sort of have to find them somewhere else.

And if that's also their view, then these are sort of meaningless powers, because they tell you that you actually have to look somewhere else for these authorizations, but they don't point to anywhere else in the statute where it authorizes the special-condition and priority-purpose power. So they have made these terms both superfluous and meaningless in their reading of them.

And so we think by far the better interpretation is to give them their natural effect, and that they would authorize conditions like those imposed on the Byrne JAG grant.

THE COURT: So, Mr. Readler, don't you think -- or do you think that there is a bona fide dispute at the moment between the Federal Government, and the State and local jurisdictions, that is formed by the Government -- on the one hand, the Federal Government's undoubted powers with respect to immigration, and the states' and local jurisdictions' constitutional rights under the Tenth Amendment to have the police powers?

Don't you think that the clash is going to be what the Federal Government actually interprets 1373 to be; specifically, what does "regarding" mean?

MR. READLER: Sure.

THE COURT: And isn't that the entire guts of the issue that we're going to have to deal with in this case?

And if that's the case, isn't this the wrong time to be

dealing with that? Shouldn't we be dealing with the merits of the case with a record?

MR. READLER: Well, certainly at the motion-to-dismiss level, the Court is naturally limited in what it can do.

The argument I gave was with respect to the authorization, particularly to the Notice and Access Conditions which the plaintiffs have challenged; and we think there's authority for those.

There's also authority for the 1373 condition. And the plaintiffs have not really challenged the authority to impose it, as opposed to -- I think they've made the arguments you suggest: A Tenth Amendment argument, and some other concerns.

With respect to the 1373 provision, as a matter of law the governing analysis here is the Spending Clause line of cases; not the Tenth Amendment line of cases.

In other words, this is not direct regulation by the Federal Government. This is a voluntary grant program that the plaintiffs are able to enter into. And if they opt to do that, then there are conditions they have to comply with, including 1373.

So the analysis here is really governed by the *Dole* case, and that line of cases. And these conditions clearly satisfy all the requirements of *Dole*. They're not requiring unconstitutional conduct.

Certainly, whether we could directly force the City to give us information -- they can certainly agree to policies where they don't restrict information.

This is not coercive in the sense that the dollar amount here is significant. A few million dollars, but -- but not so significant that it would be anywhere near the sort of the coercion line.

So I think -- and germaneness. I think there's a natural tie between law enforcement, criminal justice, criminal aliens being held by the City. So the germaneness requirements are met here, too. So I think all of the constitutional questions are answered in that respect.

With respect to the Tenth Amendment analysis, to the extent the Court takes that up, of course, the Second Circuit has already held that -- in the *City of New York* case, that 1337 does satisfy any Tenth Amendment concern.

THE COURT: Not any Tenth Amendment concern, Mr. Readler.

MR. READLER: Well, certainly -- well, I suppose hypothetically there could be some interpretation of it; but certainly there are ways in which 1337 is interpreted that it would satisfy the Tenth Amendment. And so if it is a facial challenge, certainly there are applications of the statute that would apply.

And the Northern District of Illinois, of course, also

revisited -- visited this issue, and upheld the application of 1373.

So it's not an instance where the cities are being compelled to perform background checks to help employ the regulatory scheme, and are sort of a critical part, in terms of affirmative obligations to go out and perform duties that would further the federal scheme.

What they're doing voluntarily, because they agreed to the condition, is to not restrict certain information.

And I'd be happy to talk about, then, our interpretation of 1373, and what we think it requires. We discussed a little bit of this in December. So -- and I think maybe one before --

THE COURT: Well, I'm happy to hear it. I'm not sure that it's going to be useful in the analysis on the motion to dismiss; but I'm very interested in knowing what the Government thinks with respect to the term "regarding"; how far the definition is stretching; and whether the Department's sort of come to ground on that.

MR. READLER: Well, I think the Court is correct to focus on the word "regarding," because in the plaintiffs' papers they talk about immigration status, but that's not the test. The test is information regarding immigration status; obviously, a broader term.

1373, in another place in Section C, uses the more narrow phrase "immigration status"; but in the key provision here,

1373(a), it talks about "information regarding," so beyond just information that would be the course of immigration status.

And in our view, what the Congress had in mind here was that the cities would not be foreclosed from providing information to the Federal Government -- to DHS -- that lets it do its job. They're not on a fishing expeditions where they're trying to get all kinds of information, but what they're trying to get is the core information they need to do their jobs.

And the two areas that we've identified -- very narrow, but the two areas we've identified are, one, personal information, which would be name and address, primarily; and also the release date when the individual's released from incarceration, so the Federal Government and DHS can detain those individuals and deport them, as appropriate. So --

THE COURT: And so if I -- when I look at 1373, I can just focus on those two things; and the Federal Government is not asserting that 1373 requires anything else, besides those two pieces of information?

MR. READLER: In this case, no. I'm not going to foreclose us from some future opportunity. If there's a statute at issue that we think might run afoul of 1373, somebody would raise that to a locality that we think might be in violation.

But with respect to the California and San Francisco statutes and ordinance at issue, the issues that we've

identified -- and we've written to them in the administrative process -- as violating 1373 are the personal information, and the release date. And my friends on the other side have not identified anything that they think "information regarding immigration status" means, other than immigration status. And it obviously can't be that narrow.

We've identified two things that we think naturally fall within the definition. And I'm happy just to talk about those briefly.

Personal information helps DHS further the immigration regulatory scheme in a couple of ways. Sometimes your immigration status includes a residency requirement. So for certain statuses -- and I think the B-2 nonimmigrant visitor status is one -- you're required to have a permanent address outside of the United States, because that's a temporary visitation period in the country. And if you have established a permanent address in the United States, that could be evidence that you've violated the status of your immigration; of your permission to be in the country. So your place of residence might qualify an alien as a nonresident visitor under certain aspects of the immigration laws.

Second, obviously, address is critical information for the Federal Government to find a criminal alien. If they have been already released from incarceration by a local or state government, and they weren't detained at that time, then the

address is obviously the best possible way for the Federal Government to find those individuals. So in that sense, the address is critical to your immigration status, because if you're removable, the Federal Government has an obligation to do that. They obviously can only do that if they can locate you.

THE COURT: That's enforcement -- that's not status -- isn't it?

MR. READLER: The definition of "status" includes presence. And whether your presence is legal or illegal, I think, is bound up in the question of your immigration status. And your presence is partially determined by the address that you're staying at, and that you've disclosed to the Government. So I think all of those issues are closely tied, in terms of the immigration system, and appropriate notice, and execution of the system by the United States.

And second is release dates. And release dates, I think, is a natural component of information regarding your immigration status, for a couple of reasons.

One, historically, cities have shared that information. And I think I mentioned this point when I was here last time; but the *City of New York* case was not about -- was not about the City not complying with disclosing information regarding criminal aliens. Their ordinance made it clear that the City should disclose that information.

It was other information that they were not disclosing that helped prompt 1373 and led to the litigation there; but historically this information has been shared by localities. This is more sort of a recent trend of some communities not sharing that information; but the INA, I think, pretty clearly contemplates that information would be shared, for a couple of reasons.

One, it defines your immigration status of any individual to include that an alien is not lawfully present in the United States.

And certainly 1373 then covers information regarding presence, as I said earlier. And your presence and your removability is determined by -- partly determined by if you're incarcerated, because, as we discussed a bit before and as I mentioned earlier, it's a cooperative system, where oftentimes the Federal Government will detain someone, but then will voluntarily turn them over to a local government so that they can further their prosecutorial interests and prosecute someone if they've violated a local or state law.

And the other part of that bargain is that when the individual is released, that the federal would expects notification, so that they can detain that person and deport them, if appropriate, because they can't do -- under federal law, they can't do it while they're incarcerated. And their 90-day removal period starts once they've been released.

And the Ninth Circuit has addressed this issue in sort of a related context, and has made the point that that 90-day period starts immediately upon release or very soon thereafter. So the release date is a critical component of the information regarding immigration status, because your status is significantly impacted by whether you're incarcerated or if you've been released by the local government.

And so in that respect both -- and unless the Court wants me to, I won't walk through all of the specific aspects of the California and San Francisco law, but each of them have components that restrict that kind of information, especially with respect to San Francisco.

They also have a number of other requirements that suggest that the City may be violating 1373, in that City employees are not being properly instructed on what 1373 means; and they're strongly encouraged, up to -- by reporting requirements and other potential disciplinary actions that could be taken when they don't follow their local law.

So we have the concern, which -- I think you're right -- we will develop more on the record, about whether City employees are actually understanding the obligations under 1373, and how those work in conjunction with local requirements.

But we do think the Court can dismiss aspects of the claim regarding authorization for these -- for those conditions. And

we're happy to develop more of a record on whether the City and State are complying with them at a future time.

THE COURT: All right. Thank you.

So let's start with the State.

MR. SHERMAN: Sure. Good afternoon. Lee Sherman, for the State of California.

THE COURT: Mr. Sherman.

MR. SHERMAN: This case is fundamentally about defendants' attempt to legislate from the Executive Branch. These are not conditions that were imposed by Congress. And here -- and in three different respects -- defendants have attempted to insert their own immigration-enforcement preferences into federal statute.

The first is that although the JAG authorizing statute does not provide a basis for defendants to add immigration-enforcement conditions, they seek to use a narrow administrative statute to justify adding the Notification and Access conditions -- what they call "special conditions" -- to basically justify imposing any condition that they want.

Second, they seek to inject into the criminal justice purpose area of JAG civil immigration enforcement, although that has never been a contemplated purpose area for JAG.

And, third, they take 8 U.S.C. 1373, where Congress has used precise terminology of "regarding immigration or citizenship status," to transform it into a massive prohibition

against jurisdictions restricting exchange of any information which touches upon their identity, which here Mr. Readler described as "personal information."

Since this is a motion to dismiss, all the State has to do is show that it has alleged facts to support a cognizable legal theory.

The State's done much more than that. In fact, two Federal Courts have already determined that the Notification and Access Conditions are likely to be unconstitutional, under the separation of powers.

And with respect to the condition regarding compliance with 1373, as you know, Your Honor, the Northern District Court has already determined that defendants' interpretation of 1373 is too broad. So the State therefore has alleged viable claims, and defendants' motion should be denied.

Let me start off with the separation-of-powers argument. There are four reasons why the conditions cannot be supported by the JAG authorizing statute, taking aside for a moment this special-condition statute the defendants rely on.

First, the text of the statute circumscribes what conditions defendants may impose. This is a formula grant, so the formula grant sets out who gets the funds. And then within the confines of that formula, defendants can impose conditions on what the grants can be used for. And those conditions are set out in 34 U.S.C. 10153. And in that statute it sets out

that defendants can impose conditions to comply with requirements of this part; programmatic and financial reporting requirements, and the requirement to comply with applicable law. So that is what are the conditions that the authorizing statute allows.

Second, the purpose of JAG --

And, by the way, those -- none of those conditions contemplate a -- the Notification and Access Conditions, which are not tied to the use of the funds. They are tied on to -- imposed on all of the jurisdictions, regardless of how they use the funds.

Second, the purpose of JAG is to provide more flexibility to jurisdictions. Throughout the legislative history -- in 2006 when JAG was reorganized, Congress said that this was -- these grants are to provide jurisdictions so they don't have to do a one-size-fits-all strategy to local law enforcement.

And in fact, at the same time the legislative history shows that in order to achieve more flexibility, when JAG was reorganized, Congress repealed the only condition that had ever existed in the decades' history of JAG that was related to immigration enforcement, and that was a condition that required the Chief Executive Officer of the State to provide certified criminal records to the Federal Government.

So the fact that that condition was repealed -- the defendants are seeking to revive that condition, and more --

suggests that they are acting contrary to congressional intent.

And, fourth, since the reorganization of JAG, Congress has specifically and repeatedly rejected attempts to add immigration enforcement to JAG. They've rejected conditions requiring compliance with 1373 in JAG. So right now defendants are acting at the lowest ebb of their power.

So that leads to this special-condition statute, 34 U.S.C. 10102. Defendants read that statute as if they can impose any conditions they want, so long as it complies with the Spending Clause; but they are instead -- they are, in fact, using the word "special," and imagining that "any" is in the statute.

And, in fact, they cite one case: ***DKT Memorial Fund v. Agency for International Development***. And that case involved a challenge to the President's authority to add conditions on foreign assistance grants; but there Congress authorized the President to furnish assistance on such terms and conditions as he may determine, so that it gives very broad authority; while here congress limited it to special conditions. So that "special conditions" has to mean something.

So we do not -- defendants suggest that we say that "special conditions" -- that the statute is superfluous.

That is not the argument which we are making. What we are saying, though, is that "special conditions" is a term of art. At the same time that JAG was reorganized in 2006, USDOJ had a regulation that identified special conditions: 28 C.F.R.

66.12. And that regulation identified special conditions as pertaining to high-risk and low-performing grantees.

So here you have a statute which is about USDOJ's ability to impose conditions. You have a regulation that was in existence at the same time about USDOJ's ability to impose conditions. So those should be looked at in the same context as each other -- as each other.

And the case that they cite, ***U.S. v. Yeats***, supports that view, because it says -- it warns that -- to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.

So what that case instructs is to look at the terms in the statute in the same -- and look at other statutes where that term is used in the same context.

In addition, the special-conditions statutes cannot be interpreted to mean -- give this broad authority, for two other reasons; that it is an ancillary provision that is not found in the -- in the JAG authorizing grant.

And in ***Whitman v. American Trucking Associations***, the Supreme Court has said that Congress does not hide elephants in mouseholes. And here, to interpret this special-condition statute as giving it untrammeled authority to add any conditions would be doing just that.

THE COURT: Don't you agree, though, that the threshold to add a condition is a pretty low bar for the

Department to get over?

And the relationship between immigration enforcement --

Well, there is a relationship between criminal law and immigration throughout the INA. It's stated throughout the INA. So can't they get over that low bar, and say you just -- when you have to comply with all applicable laws, that's one that clearly applies?

MR. SHERMAN: Right. So that is a Spending Clause argument.

So we're focusing on the separation of powers. And the State is not alleging or has not brought a cause of auction with respect to the applicable laws language. And I know San Francisco will discuss that. There are good arguments regarding that.

But focusing on the Notification and Access Condition, this -- this --

THE COURT: I don't have much trouble with the Notification and Access Conditions.

MR. SHERMAN: You have no trouble with them?

THE COURT: I think those claims will survive the motion to dismiss.

MR. SHERMAN: Okay. Sure, sure.

So then to shift the focus away from that, then, so going to the Spending Clause -- and I would like to take our arguments with respect to the Spending Clause and the APA

together, because there's a lot of overlap there.

And under the Spending Clause, the standard is that there has to be a sufficient nexus between the purpose of the federal interest in the grant, and the -- and condition at issue. And again, this is not a grant that is found in the INA. This is a grant that is for local criminal-justice purposes.

So, like you pointed out last time, Your Honor, in the *Philadelphia* case it talks about the relationship between criminal justice and immigration enforcement. While there are in some instances a relationship between criminal justice and immigration enforcement to determine whether certain individuals -- their status has changed, there's not any relationship between immigration enforcement and local criminal justice.

In fact, the conditions the defendants are imposing here seek to place requirements on State and local jurisdictions of individuals that have no intersection with the criminal justice system. The 1373 condition, as defendants have interpreted it, applies to every person in the United States; so that includes in it people who have not been at all convicted or even suspected of a criminal offense. So in that, there's no intersection between criminal justice and immigration enforcement, in addition to which the definition for criminal justice that is used talks about the apprehension of criminals.

And here defendants are seeking to impose this condition on State and local jurisdictions that are for people who are just even suspected of criminal offenses. And that also is antithetical to our notion of criminal justice here in the United States that people have a presumption of innocence; but that is not what these conditions contemplate.

So I hope that answers your question, Your Honor.

But -- so that's our Spending Clause argument.

With respect to the APA, first of all, this is a straightforward case of final agency action under ***Bennett v. Spear***. The standard is --

(Reporter requests clarification.)

MR. SHERMAN: -- final agency action under ***Bennett v. Spear***, in which there is a consummation of the decision-making process, and that rights and obligations flow from that.

And here you have -- they have imposed these conditions in the solicitation. They've included these conditions in awards to other jurisdictions. And they've represented to this Court that the State will receive a substantively identical condition. So -- and because of that, that impacts the State's ability to receive these grant funds. So you have clear agency action here.

And then under the arbitrary and capricious standard is that a defendant's action has to do all three of these things. It must -- sorry -- that it must not consider factors that

Congress did not intend. It must -- it must -- it must consider -- it cannot fail to consider important aspects of the problem. And it cannot offer an explanation for its decision that runs counter to the evidence before this -- before it. And here, they failed to do all three.

With respect to the first, for what we just discussed, that Congress did not anticipate or contemplate that this grant would include immigration-enforcement conditions, because it repealed immigration-enforcement conditions. It has never, in the history -- in the decades-long history of this grant, identified immigration enforcement as a purpose area of this grant, and it has repeatedly rejected attempts to do that.

And with respect to the failure to consider important aspects of the problem, the agency -- the State is not saying that the defendants have to agree with the State that these sorts of policies and laws are beneficial to the public safety; but in the agency record it must show that they are contemplated; that they considered this important aspect of the problem. And so far, defendants have not identified any documents in the agency record that shows that they considered this to be -- as -- when they were imposing these conditions.

So we should look at that record to see if they considered this to be an aspect of the problem as of the time they imposed these conditions. And for that reason, alone, this should survive a motion to dismiss.

THE COURT: And what's the status today of the DOJ's consideration of the State and the COPS grant?

MR. SHERMAN: Sure. So since the motion for preliminary injunction, defendants and the State agreed that the clock on states -- the State having to accept the COPS grant would be stayed until a decision was reached on the motion for preliminary injunction. So we were able to reach an agreement on that.

However, the State faces some very serious programmatic concerns, which I've been informed by our Bureau of Investigations in our office that if they are not able to draw down on the funds soon, that they may have to remove the agents that they've put towards this task force, which, again, has seized $60 million of drugs over the past two years. So it does really important public-safety work for the State. And in one instance, they may have to terminate someone who -- an employee. And they will have to be facing that decision rather soon, in April or May.

So that is a current -- so the State still cannot draw down on the COPS funds, to answer your question.

THE COURT: And -- but there's no sort of final determination on what the Department's perspective is with respect to the grant? Everything's just in stasis?

MR. SHERMAN: So that's inquiry into the State's compliance. And right now the defendants have -- defendants,

in their original letter to the State, said that if you interpret 1373 or you interpret the Values Act as not allowing the sharing of release dates or addresses, that they have determined that this is a violation of 1373.

And the State responded that it does interpret the Values Act as restricting sharing of information.

And then defendants responded to the Board of State and Community Corrections, which is a State entity that gets JAG funds, that they want more documents from the BSCC regarding its practices. The BSCC's not a law-enforcement agency.

So it made that production of documents last week. It didn't have many documents to produce; but we anticipate that the Bureau of Investigations in the California Department of Justice, which is the only entity -- the State entity that -- State law-enforcement entity that receives JAG funds -- will be making a production of documents. And that, incidentally, is the same entity; that COPS grant is frozen right now.

THE COURT: Okay.

MR. SHERMAN: So that goes to the 1373 issues regarding issues of standing and ripeness.

With respect to standing and the other statutes, as we discussed in your motion for preliminary injunction, that even before the Values Act, defendants had made statements about the State's compliance with 1373. And so I won't rehash through all of that, but that has raised a credible fear that the State

would face enforcement under -- from that.

With respect to the Values Act, the defendants concede that the State does have standing to challenge that. They have concerns about ripeness, but ripeness and standing are often looked at in the same vein. And here, the State -- all the State has to show is the constitutional standard for ripeness, which is that there has -- that the State has articulated a concrete plan to violate the statute at issue; that there's been a threat of prosecution; and that there -- and that the defendants have sought to enforce the statute in the past.

And here we have all three. As I just mentioned, the State has articulated a plan to not comply with defendants' interpretation of 1373 in its original response letter to defendants.

Defendants have said that they will withhold funds as a result of that.

And they have now enforced 1373 35 times against jurisdictions all across the country, including us in San Francisco, over the past several months. So this clearly meets the constitutional-standard test.

Prudential ripeness is something that -- the Supreme Court has questioned its vitality; but the State meets that, too. That's a question of balancing hardship and fitness. And here the State has shown a hardness -- a hardship because of the fact that its COPS grant has been frozen. It has to certify

under -- as defendants have represented before, under defendants' interpretation of 1373, under penalty of perjury.

And that -- and if this goes through an administrative process, the regulation governing that, 28 C.F.R. 18.5(i) -- that would allow defendants to suspend the State's JAG funds for the -- for the duration of that.

So there is a hardship that January 24th letter only illustrates, because now, although they have determined that the State's law on its face does not comply with 1373, they are prolonging this administrative process to indefinite length.

And I think we all know here that -- based on how we've stated our positions, where this is going to turn out. And the Ninth Circuit has found, under the firm prediction rule, that the -- that having a firm prediction that a jurisdiction or entity or person will apply for benefits, and that will be denied to them -- that is enough to satisfy ripeness.

THE COURT: All right. So would you take on the --

I understood Mr. Readler to tell me that I should not be looking at this case with any sort of Tenth Amendment lens. So tell me what the State's position is with respect to that.

MR. SHERMAN: Yeah. We absolutely disagree with that.

The defendants' -- if this was a matter of Congress adding a grant condition, and then attaching, saying, *Jurisdictions must comply with not restricting assuring of immigration status*

or citizenship status, that would be a different question.

That's not what we have here. Defendants are relying on the fact that 1373 is an independent statutory obligation, as applicable law, as they refer to it. So from there, all defendants can do is ask the jurisdictions to comply with the law; no more -- and nothing more than that.

So this should look -- so what we should be looking at is: What does 1373 allow defendants to require State and local jurisdictions, both on its plain test, and as the Constitution allows?

And, in fact, if you look at their proposed conditions, Condition 53 of the grant -- it refers to the definitions in 13. It refers to immigration status, as defined in 1373. So they are referring to the independent statutory authority all over -- all over the condition. So that is what you should be looking at; not the Spending Clause analysis with respect to that -- the compliance piece.

And the State's -- and as we -- I'm happy to go through again our argument for preliminary injunction, but the State's position is that the Values Act complies with 1373 --

THE COURT: I see.

MR. SHERMAN: -- and -- and that -- because 1373 covers what is squarely immigration or citizenship status information.

And the fact that "regarding" is in 1373(a) does not mean

that it encompassed all of these other pieces of information that is not unmistakably clear on the face of the statute. And, in fact, in numerous other cases within the same legislative act that allowed -- that spawned 1373, Congress was clear. In 8 U.S.C. 1367 they refer to the information contained in there as any information relating to an immigrant, which would have been the language that defendants would have wanted them to put into 1373.

And in 8 U.S.C. it says permitting immigration officers to ask applicants, quote, "about any information regarding the purposes and intentions of the applicant."

8 U.S.C. 1231 requires an immigrant to give information about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate.

And 8 U.S.C. 1360(c)(2) requires the Social Security Commissioner to provide information regarding the name and address of the -- of the alien.

So these are Congress -- when Congress wants to be clear about something, it is.

And the fact that it doesn't include immigration and citizenship status is very telling. And the fact that the information -- addresses, and immigration -- I'm sorry -- addresses and release dates is not -- is information that may be useful for federal immigration authorities, that is not

relevant to what is in 8 U.S.C. 1373, because the -- as -- the Court in *Steinle* looked at this. And it looked at the fact that the legislative -- what -- the legislative intent does not matter; that what is important is looking at the plain text of the statute. I'm sorry.

THE COURT: No. The word "regarding" means something.

MR. SHERMAN: Sure.

THE COURT: And I don't know what it means, but Mr. Readler has just defined it in a very narrow way, which I'm sure will be more expansive as -- when it's necessary, but he's only carrying it with respect to this lawsuit these two --

MR. SHERMAN: Right.

THE COURT: -- relatively small issues.

MR. SHERMAN: Well, let me posit an alternative definition of "regarding" -- is that "regarding" -- that in 18 -- in 8 U.S.C. 1373(c), "regarding" is about the information that immigration authorities have; and presumably, that they have definitive information about someone's immigration status. And that's not information -- the State or local law enforcement may have additional information, but they don't have what is the official record of a person's immigration status.

So there was no need in 8 U.S.C. 1373(c) to put the word "regarding"; whereas in (a), it was necessary, because State

and local governments don't have the official record of a person's immigration status, but it does allow them to have information that it does have that would, on its face, show immigration or citizenship status. And that could happen in a couple of instances.

First of all, the Federal Government does not have information of every person that is in -- every person who's currently in the United States in their databases. So it is -- it is conceivable, and it happens -- the State cites one case to it -- where State and local law enforcement may have information about a person that's not in the hands of the Federal Government.

And the information in the Federal Government's database may not be correct. And there are other cases that are on that -- on that topic, but -- so it is not --

But the State's -- State's definition of "regarding immigration or citizenship status" does not mean that the provision is meaningless; that there is information that the states and localities would have in its possession that could be useful to federal immigration authorities.

THE COURT: Okay.

MR. SHERMAN: And then I do want to touch upon the substance of the Tenth Amendment claim.

THE COURT: Okay.

MR. SHERMAN: This is information that --

And here *Printz* is most informative; that *Printz* governed the information that was in the custody and control of law enforcement, and only in the custody and control of law enforcement.

So applied here to the Values Act -- that is what we're dealing with here. This case is not like the *City of New York*. The *City of New York* was about an Executive Order that only limited the sharing of information to immigration authorities.

Here, the information, both with respect to the personal-information provision in the Values Act, and with respect to the release dates information -- the information is only being restricted to any immigration authority if the information is not available to the public. So it's treating immigration authorities in the same manner as it would be treating entities or individuals in similar-situated circumstances.

And *Reno* -- and *Reno*, which I'm sure the defendants will point to, does not cover this point, because that is a -- that only applied to generally applicable statutes.

Well, here, this is a statute that's directed at the State, that is saying that State and local jurisdictions have to -- have to comply with this provision. And because the defendants have had such a broad reach of 1373, then that -- then that only exacerbates the Tenth Amendment problem that we have here.

THE COURT: All right. Great.

MR. SHERMAN: And one other thing, too, about release dates is that, regarding connecting it to immigration-status information, just because someone -- again, defendants say that this is an important purpose, but just because someone is released from custody does not make them more -- unlawfully present in the United States. And they use this definition of "presence." And that is not the right definition to use.

In 8 U.S.C. 1182, this is defined as unlawful presence; and that is whether you're present outside the authorization of -- that was granted by the Federal Government. And that should be what we're looking at. Not present anywhere in the United States. The question is just whether the person is present -- is present in the United States, outside the authorization period. And that does not go into release dates. And addresses are also not relevant in that regard.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Sherman.

All right. For the City.

MS. MC GRATH: Good afternoon, Your Honor. Aileen McGrath, for the City and County of San Francisco. I'm here with my colleague, Sara Eisenberg. And, with the Court's permission, Ms. Eisenberg and I would like to divide the City's argument time. I don't think either of us has an enormous amount to add to what Mr. Sherman has already said. I plan to

address the separation of powers statutory authorization issues about all three conditions. And Ms. Eisenberg will discuss any questions the Court has about the City's claim for declaratory relief.

THE COURT: All right.

MS. MC GRATH: The only thing I would like to add to what Mr. Sherman has already said concerns a small area where the City and the State differ somewhat, and it relates to an earlier point that Mr. Readler made about the claims that are at issue in this case. The City does contend that the Federal Government lacks the statutory authority to impose all three of these conditions, including the Section 1373 condition.

The only source of authority that the Federal Government invoked in their motion to dismiss was 34 U.S.C. 10102(a)(6), the same special-conditions priority-purposes language that we've already been discussing. It may be that at some future point we will need to discuss other potential sources of statutory authority, but for purposes of this motion that's the only statute that's at issue.

I don't have anything to add to Mr. Sherman's description of why that statute doesn't provide the Federal Government the authority that it needs, and certainly why it doesn't provide a basis for dismissing the City's claims here.

Other than that, I'm happy to answer any questions that the Court might have.

THE COURT: I don't think I need any. Thank you.

MS. MC GRATH: Thank you, Your Honor.

MS. EISENBERG: Good afternoon, Your Honor.

I think I can be as brief as my colleague.

THE COURT: Excellent.

MS. EISENBERG: I think there seems to be very little question that there is a live controversy over whether or not San Francisco complies with Section 1373, as Your Honor indicated before. Unless you have questions for us in that regard, I'm happy to leave that be.

THE COURT: That seems quite obvious to me, Ms. Eisenberg.

MS. EISENBERG: Okay. Thank you.

And similarly, this is a motion to dismiss. There have been some comments today and in the briefs that we haven't established our right to a judgment on our compliance with 1373, but we're not here on a motion for summary judgment. It's a motion to dismiss. And there seems to actually be very little disagreement even from defendants at this point that dismissal is not the appropriate result on this claim at this time.

So although I have a page of notes prepared to talk to you about the proper interpretation of "regarding immigration status," I'm happy to save that for another day, unless Your Honor has specific questions.

THE COURT: No. I do think there will another day when we come to the merits.

MS. EISENBERG: I welcome that day.

THE COURT: Thank you.

MS. EISENBERG: Thank you, Your Honor.

THE COURT: Mr. Readler.

MR. READLER: Just a couple of points. First of all, on the ripeness question, I think my friend from California confirmed that the administrative process is not yet complete. And that's one of the reasons why we say this dispute is actually not ripe. And I think he confirmed that there are still negotiations going on with respect to that issue. So we agree, and we would dismiss the case on that ground.

But we'd also, again, dismiss the authorization claims; that we weren't authorized to administer these conditions.

And I know the Court suggested that maybe it doesn't agree with our position, but one thing I'd certainly like to highlight. In my presentation I spent a fair amount of time talking about the priority-purpose aspect of the Government's powers to impose restrictions and limitations on grants to identify a priority purpose, which they did -- immigration -- and impose those.

And my friend said nothing about that provision this morning. I don't think they have an answer to that aspect.

We heard a lot about the special conditions, which we

agree about; but these are justified also by the priority-purpose language.

With respect to the conditions, just a couple of additional points. My friend said that this is a criminal justice grant, and so that somehow would preclude the restrictions at issue here; but 34 U.S.C. 10251 defines "criminal justice" to include activities of corrections. And what these conditions go directly to is the activities of correctional facilities by the grantees, and whether they're sharing information about their inmates. So it's clearly covered by statute.

My friends invoked the reg. that the DOJ has issued about high-risk grantees. And it is true that there's a reg. that addresses conditions that can be imposed on high-risk grantees; but there's nothing in the statute that suggests that Congress meant that the Assistant Attorney General was limited by that reg. In fact, it would be sort of odd for the Congress to even say that the AG has the power to follow the reg. Of course, it does. So the Congress obviously meant something else when it said "special conditions."

And I just want to point out again that there are dozens and dozens of conditions imposed every year. Many of those don't come from statute. They come from places like Executive Orders.

President Obama signed an Executive Order regarding

prohibited and controlled expenditures. For example, President Obama's Executive Order prohibited the use of federal dollars to purchase military-style equipment. And so that condition was included in the Byrne JAG grant in prior years. Again, that's a condition that comes straight from the Executive Branch, we think, appropriate with the authority granted to the Department to impose; but their argument would knock out that condition and a whole host of other conditions, including some conditions about body armor which -- the Department had included the conditions regarding body-armor standards if you buy body armor, and a requirement that you wear it if you purchase it. They started doing that in 2012.

And in 2016, Congress actually included those conditions, itself. So it liked the idea so much that it made it mandatory, rather than leaving it to the discretion of the Department, which just confirms that they were obviously -- had no problem with the Department doing it, and wanted to make it actually a formal requirement rather than a discretionary one. So there's no doubt that the Department has broad authority here, and these conditions are clearly authorized. And that part of the case should be dismissed.

I just want to address my friend's point from San Francisco. We certainly do think -- and we contested in every single case -- that 1373 is an applicable law. It's a law that applies to cities and states. And it's certainly a

law that would then be applicable to a grant to cities and states.

And if we didn't mention it, it's only because they did not expressly argue in their motion that the condition was not justified. They certainly argued that they think they comply with it, but we did not read their motion to suggest that we didn't have the authority to impose the 1373. So if they do, we obviously contest that. And we've contested that in a whole host of cases.

And I'll just close with a couple of points about 1373 compliance. One of the main points I made during my presentation was that "information regarding" must mean more than just immigration status.

And my friends from California said they at first didn't agree; but I think they then did agree, and said this covers information that the grantees may have that the Federal Government doesn't have. And that's exactly what we're talking about. We're talking about the address, which the Federal Government might not have --

THE COURT: Regarding status, I mean, the whole --

MR. READLER: -- and release date.

THE COURT: The whole issue is going to boil down, it seems to me, here, on the difference between what "regarding status" and "regarding enforcement" is, and how far you take the definition of what "regarding status" is, because there is

a point at 1373 where it runs directly, it seems to me, into the Tenth Amendment. And so that's part of what I'm looking forward to sorting out --

MR. READLER: Sure.

THE COURT: -- with the parties on a motion for summary judgment.

MR. READLER: Right. A couple of thoughts.

First of all, it has to be more than just immigration status. And I think, as proven this morning, it's difficult for my friends on the other side to tell you what they think it means. And it obviously means more than that. And we have articulated exactly what this we think it means.

THE COURT: Those two things?

MR. READLER: Yes. And there's no Tenth Amendment problem here, for a couple of reasons.

(Reporter requests clarification.)

MR. READLER: Yes. There's no Tenth Amendment problem here, for a couple of reasons. One is that, again, this is a grant that they're entering into. They're not compelled to do that. This is not directly regulation.

And, two, this is not compelling conduct. This is a prohibition on barring information sharing. And again, information sharing is done throughout the Government. And the Second Circuit already recognized that information sharing doesn't run into Tenth Amendment problems. So I think those --

those issues are answered.

And I'll just close. With respect to the Tenth Amendment, we cited the *Richardson* case in our papers from the Ninth Circuit. That was a case that addressed a limitation on grants regarding SORNA; that the State must share sex-offender information with the Government, or they risk losing 10 percent of their grant funds. And the Ninth Circuit said expressly there, *That didn't create a Tenth Amendment problem, because it's part of a grant; and if they don't want to share the information, they just don't accept the grant.*

So we appreciate Your Honor's time, and we look forward to our next opportunity.

THE COURT: Well, I'm looking forward to it, as well, Mr. Readler. And you always bring a fine team with you; at least, half of them.

MR. READLER: Happy to be here today. Thank you.

THE COURT: So what I want to do is I'll get an Order out pretty quickly. And I'll get an Order -- I've got the -- I'd decided to hold on to the preliminary injunction until I heard this argument; but what I will do is set and what I will do is a case-management conference on March 27th.

And between now and then, I would like the parties to discuss what discovery they need to complete a record in this case, and what a good briefing schedule then would be for what I assume will be cross-motions for summary judgment. And the

time frame that I'm thinking about for hearing there is in the sort of six-months-from-now range.

That may be too fast. It may be too long from now. You can tell me on March 27th. I'll ask you to give me a joint status statement on the 20th. If you've agreed on what the schedule is, then we don't need to have the case-management conference, unless somebody has an issue that they want to raise with me. And we'll proceed that way. And I'll get an Order out promptly.

All right. Good to see you all.

MR. SHERMAN: Thank you, Your Honor.

MS. BELTON: Thank you, Your Honor.

(At 3:08 p.m. the proceedings were adjourned.)

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

March 2, 2018

Signature of Court Reporter/Transcriber Date

Lydia Zinn