Nos. 17-17478 and 17-17480

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Plaintiffs-Appellees,

vs.

JEFFERSON B. SESSIONS, III, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

The Criminal Justice Legal Foundation is a California nonprofit public benefit corporation. The corporation has no parents or stockholders.

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to promote the interests of actual and potential victims of crime by improving the efficacy

1. CJLF has written consent of all parties to file this brief. No counsel for a party authored this brief in whole or in part. No party, party's counsel, or anyone other than the amicus contributed money to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

of the criminal justice system in the prevention, detection, and punishment of crime.

The section of the Executive Order at issue in this case is intended to encourage state and local governments to cooperate with the federal government in the removal of criminal aliens from the United States, thereby preventing the crimes they would otherwise commit, within the limits provided by law. The injunction issued by the District Court, prohibiting any enforcement of the section in question regardless of whether the particular application is legally valid, is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Over 20 years ago, Congress enacted 8 U.S.C. § 1373 limiting the ability of government entities and officials to restrict the sharing of information regarding the immigration status of any person with the federal immigration authorities. In July 2016, the Department of Justice determined that compliance with this law was a requirement for eligibility for two law enforcement assistance programs based on an interpretation of the statutory requirements for those programs.

On January 25, 2017, shortly after his inauguration, President Donald Trump issued Executive Order 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, which is the subject of this suit. The key provision, in section 9(a), directs that the Attorney General and the Secretary of Homeland Security, "*to the extent consistent with law*, shall

ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants . . . ."

The City and County of San Francisco and the County of Santa Clara filed suit to enjoin "enforcement" of this order. The Government noted that the order was a direction by the President to cabinet officers regarding exercise of authority they already possessed, not an imposition of new requirements on federal grants, but the district court did not interpret it that way. The district court entered a preliminary injunction on April 25, 2017, and a permanent injunction on November 20, 2017. The Government timely appealed both orders in both cases.

SUMMARY OF ARGUMENT

On its face, section 9(a) of the Executive Order is a directive by the President to the Attorney General and the Secretary of Homeland Security regarding how they are to exercise authority they already possess. Contrary to the district court's view, such a directive is far from meaningless. The exercise of discretion in executing the laws is an essential element of the executive power. Other parts of the order and external statements of officials do not negate the plain and important meaning of the section itself.

By interfering with the President's supervision of his subordinates, the district court has violated the separation of powers. The Constitution vests executive power directly in the President, and this power necessarily includes the authority to supervise and direct the officers of the executive branch.

At the present time, the Government has not indicated an intent to impose a condition of compliance with section 1373 on any grant program other than those previously identified, where application is not disputed. Until a disputed application is made, there is no ripe controversy suitable for judicial decision. An order that does not by its own force create or change any legal rights or obligations does not give rise to the kind of concrete dispute needed for a ripe case.

ARGUMENT

I. Section 9(a) of the Executive Order is a direction from the President to cabinet officers to exercise their authority under existing law.

Before discussing the issue of whether an injunction may properly issue against enforcement of this order, it is essential to determine the meaning and legal effect of the order.

A. Plain Language.

In construing a statute, courts must begin with the text. If the text is plain and not absurd, there is nothing else to decide. *See Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296-297 (2006). The same is true when interpreting regulations, *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000), and it stands to reason it should be true for executive orders as well. *See Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (same principles for executive orders).

The heading language and subdivision (a) of section 9 of the Executive Order read (emphasis added):

> "Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, *to the fullest extent of the law*, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.
>
> (a) In furtherance of this policy, the Attorney General and the Secretary [of Homeland Security], in their discretion and *to the extent consistent with law*, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and *to the extent consistent with law*, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take *appropriate* enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." Excerpt of Record 189 ("ER").

The heart of this subdivision is the direction to the two cabinet officers regarding eligibility for grants. Several points are immediately apparent from the text.

First, on its face the Executive Order is a direction by the President to the heads of two executive departments. It does not direct the plaintiffs or anyone else other than a federal executive agency or official to do anything or refrain from doing anything. This is fundamentally different from the executive order at issue in *Bassidji* which "prohibits United States citizens from investing in and trading with Iran," *i.e.*, a rule directly binding on private citizens. *See* 413 F.3d at 930.

Second, and closely related, the Executive Order does not purport to change the law of eligibility for federal grants. Quite the contrary, it

expressly limits the officers' actions regarding eligibility "to the extent consistent with law."

Third, "sanctuary jurisdiction" is clearly and expressly defined for the purpose of this provision. It means "jurisdictions that willfully refuse to comply with 8 U.S.C. [section] 1373." That term is used to mean other things elsewhere, but given the unambiguous definition in the text of this subdivision, other usages are irrelevant.

These points are consistent with the purpose and policy of the order as a whole as expressed in other sections. Section 1, Purpose, in the second paragraph, describes "sanctuary jurisdictions" as those that "willfully violate Federal law." The "bottom line" of the purpose section describes the purpose as directing executive agencies "to employ all *lawful* means to enforce the immigration laws of the United States." (Emphasis added). Section 2, Policy, states the policy regarding sanctuary jurisdictions in subdivision (c) (emphasis added): "Ensure that jurisdictions that fail to comply with *applicable* Federal law do not receive Federal funds, *except as mandated by law*." At the end of the order, in Section 18, General Provisions, subdivision (b) provides (emphasis added): "This order shall be implemented *consistent with applicable law* and subject to the availability of appropriations."

Despite the Executive Order's repeated references limiting defunding to the confines of the law, the district court asserts that the Executive Order authorizes imposition of conditions on grants beyond those authorized by law. *See* Order Granting the County of Santa Clara's and City and County of San Francisco's Motions to Enjoin Section 9(a) of Executive Order 13768,

p. 14, lines 6-18 ("Preliminary Order"), ER 65; Order Granting Motion for Summary Judgment 3-4, 6-7 ("Final Order"), ER 6-7, 9-10[2]. Only secondarily does the district court consider the language that should have been front and center, "to the extent consistent with law." The district court pejoratively refers to the Government's argument based on the express limitation in the text as "attempts to read out all of Section 9(a)'s unconstitutional directives . . . ." *See* Preliminary Order, ER 65, line 19; Final Order, ER 20, lines 12-13. The Government is not "reading out," it is merely reading.

The district court rationalizes its expansive reading of the Executive Order contrary to its language by saying that if the Executive Order does not expand the conditions on federal funds beyond those of existing law then "it does nothing at all" and is "legally meaningless," and therefore this would not be a reasonable interpretation. *See* Preliminary Order, ER 66, lines 2-3; Final Order, ER 20, lines 17-21. No explanation is given for the remarkable premise of this rationale that a direction of a superior to a subordinate to exercise existing authority is "meaningless" and "nothing at all."

One recent and well-known example is sufficient to refute the premise. Four years ago Attorney General Eric Holder issued a controversial memo to federal prosecutors regarding their use of discretion in charging criminal offenses, directing that prosecutors should routinely decline to charge drug

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2. The Final Order at page 2, line 12, ER 5, expressly incorporates the reasons stated in the prior orders, so we cite both orders for the district court's interpretation.

quantities triggering mandatory minimums unless certain criteria were met. *See* Memorandum of Eric Holder, Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013) <https://www.documentcloud.org/documents/1094233-attorney-general-eric-holders-memorandum-on.html>. Recently, Attorney General Jeff Sessions reinstated the prior policy that normally "prosecutors should charge and pursue the most serious, readily provable offense," *see* Memorandum of Jeff Sessions, Attorney General, to All Federal Prosecutors, *Department Charging and Sentencing Policy* 1 (May 10, 2017) <https://www.documentcloud.org/documents/3719263-AG-Memo-on-Department-Charging-and-Sentencing.html>, expressly rescinding the previous guidance to the extent it was inconsistent. *See id*. at 2 & n.1. These memoranda do not, could not, and do not purport to change the law of sentencing. Yet they are certainly not "meaningless." While there is strong disagreement on which policy is better, there is no dispute that these policies matter a great deal. *See*, *e.g.*, Beth Reinhard, *Mixed Grades for Old Drug Policy*, Wall St. J., May 15, 2017, A3, col. 1 (discussing varying reactions).

Directives from the executive branch of government serve a number of different purposes. Some are quasi-legislative. Within limits, Congress can legislate rules of law in broad terms and delegate to an executive agency the power to fill in the details. Such "legislative rules" have the "force and effect of law." *See Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199, 1203, 191

L.Ed.2d 186, 195 (2015). They are generally issued by agencies through notice-and-comment rulemaking, *see id*., although in *Bassidji*, 413 F.3d at 932, a statute authorized the President to make the rule by executive order.

Another type of rule is "interpretive." Such rules typically "are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *Perez*, 135 S.Ct. at 1204, 191 L.Ed.2d at 195 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). Such rules may be issued much less formally. *See id*. The Department of Justice's letter of July 7, 2016, regarding compliance with section 1373 and eligibility for two federal grant programs, *see* Preliminary Order, ER 57 & n.2, is an interpretive rule. The requirement that grant applicants certify that they "will comply with . . . all other applicable federal laws," 34 U.S.C. § 10153(a)(5)(D); 42 U.S.C. former § 3752(a)(5)(D), had been on the books for many years, *see* 119 Stat. 3097 (2006), but the interpretation that section 1373 was such a law was new.

The executive duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3, does not mean that all laws must be enforced to the hilt all the time. The executive has wide discretion in enforcement, which is generally not reviewable by the judiciary. *See Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985). Within the hierarchical structure of the executive branch, superiors can instruct subordinates how to exercise that discretion, and a third type of executive directive is such an internal instruction.

On its face, section 9(a) of the Executive Order is this third type of directive. Manifestly, statutory limitations on grants to jurisdictions which

willfully refuse to comply with section 1373 had not been enforced "to the extent consistent with the law" in prior years, with corrective action as to the two programs identified in the July 2016 letter having only been taken six months earlier. Five days after taking office, the President directed his law enforcement department heads to enforce those limitations, which includes continuing the policies adopted the previous July and determining if any other grant programs have similar conditions not yet being enforced. Section 9(c) directs the Director of the Office of Management and Budget to provide information to that end.

The next question is whether other materials inside and outside the Executive Order transform the portion at issue from the type indicated by its plain language into another type.

B. Detainers.

The injunction that is the subject of this appeal is directed only to subsection (a) of section 9 of the Executive Order. "The defendants are permanently enjoined from enforcing Section 9(a) of the Executive Order against jurisdictions they deem as sanctuary jurisdictions." Final Order, ER 31, lines 5-6. Detainers are not mentioned in subsection (a). As discussed above, subsection (a) unambiguously limits defunding to jurisdictions which willfully refuse to comply with section 1373, which also does not mention detainers.

The Executive Order addresses detainers in subsection (b), and its approach is markedly different from subsection (a). This subsection directs the Secretary to inform the public of crimes committed by aliens and whether

detainers were not honored with respect to those aliens. No pressure is applied to jurisdictions with detainer noncooperation policies other than that applied by their own people in response to crimes that would not have happened if the jurisdiction had honored U.S. Immigration and Customs Enforcement (ICE) detainers.

The district court did not enjoin the implementation of subsection (b), and there is no apparent basis for doing so. Even so, the district court relied on the detainer issue in order to interpret section 9(a) as going beyond legally authorized grant conditions regarding compliance with section 1373. The district court reliance is based in part on the term "sanctuary jurisdiction." *See* Preliminary Order, ER 72; Final Order, ER 26.

"Sanctuary jurisdiction" or "sanctuary city" is widely recognized to be an imprecise term that has been given various meanings by the many jurisdictions to adopt some form of policy of noncooperation with ICE. *See*, *e.g.*, Lee, Omri, & Preston, *What Are Sanctuary Cities?*, N.Y. Times (updated Feb. 6, 2017) <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html>. Refusal to honor detainer requests from ICE is often a major part of a state or local "sanctuary" policy. *See* Memorandum of Michael Horowitz, Department of Justice Inspector General, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016) <https://oig.justice.gov/reports/2016/1607.pdf> ("Horowitz Memo").

The Government recognizes that, unlike section 1373 noncompliance, refusal of detainers is not a violation of federal law. *See* Horowitz Memo 4

& n.6 ("voluntary requests"). That is, no doubt, the reason for the sharp difference in the treatment of section 1373 noncompliance and detainer refusal in subdivisions (a) and (b), respectively. The memo goes on to discuss potential violations of section 1373 that may follow from a detainer refusal policy, either because the policy is drafted so broadly as to limit communication in direct violation of section 1373, because local employees do not understand their responsibilities under federal law and "savings clauses" of the ordinances, or because statements of local leaders outside the formal policies cause employees to interpret them as sweeping more broadly than they do on their face. *See id*. at 4-8.

The district court cites the Horowitz Memo's discussion of these concerns to support the proposition that "*under the Order*, compliance with Section 1373 *requires* compliance with detainer requests . . . ." Preliminary Order, ER 72, lines 8-9 (emphasis added). The conclusion does not follow. The memo predates the Executive Order by eight months, and the considerations it discusses do not depend on the order. Jurisdictions that wish to maintain a detainer noncooperation policy while still obeying federal law may indeed need to reexamine their policies and make adjustments, but that requirement is independent of the Executive Order and does not by any stretch of the imagination require abandonment of any jurisdiction's policy on detainers.

At the preliminary injunction stage, the district court misconstrued the Executive Order as to direct effects on detainer policies:

> "In addition . . . , the Order may also *directly* require states and local governments to honor ICE detainer requests to avoid being designated

> 'sanctuary jurisdictions.' While the defunding provision in Section 9(a) *seems* to define 'sanctuary jurisdictions' as those that run afoul of Section 1373, Section 9(b) *equates* 'sanctuary jurisdictions' with 'any jurisdiction that ignored or otherwise failed to honor any detainers with respect to [aliens that have committed criminal actions].' This language raises the reasonable concern that a state or local government may be designated a sanctuary jurisdiction, and subject to defunding, if it fails to honor ICE detainer requests. This interpretation is supported by Section 9(a)'s broad grant of discretion to the Secretary to *designate jurisdictions as 'sanctuary jurisdictions*.' While the Order states that the Secretary's designation authority must be exercised 'consistent with law,' with the exception of the Order there are no laws regarding 'sanctuary jurisdiction' designations: Section 9 gives the Secretary *unlimited discretion*." Preliminary Order, ER 72 (emphasis added).

This paragraph contains two errors in interpretation. First, there is no "seems" about the defunding provision. Subsection (a) unambiguously directs defunding only of "jurisdictions that willfully refuse to comply with 8 U.S.C. 1373" and only "to the extent consistent with law." The term "sanctuary jurisdictions" is relegated to a parenthetical, indicating that the operative phrase of the main sentence is intended to be the definition of "sanctuary jurisdictions," at least for the purpose of this subsection.

Second, the designation authority assigned to the Secretary, given its context, is best understood as referring to the usage of the term "sanctuary jurisdictions" in the preceding sentence. So understood, the Secretary does

not have "unlimited discretion" but rather is limited to determining which jurisdictions "willfully refuse to comply with 8 U.S.C. 1373." If the designation meant anything else, then it would have no impact on any protectable interest of any state or local government. The only other uses of the term in the Executive Order are in the information gathering and reporting requirements of subsections (b) and (c) which directly affect only the federal government.

This misinterpretation is carried forward in the Final Order. "The Counties have demonstrated that under their reasonable interpretation, the Executive Order equates 'sanctuary jurisdictions' with 'any jurisdiction that ignored or otherwise failed to honor any detainers' and therefore places such jurisdictions at risk of losing all federal grants. *See* EO § 9(b)." Final Order, ER 26, lines 7-10. This is not a reasonable interpretation for the reasons noted above, and in any event it is an elementary principle of interpretation to avoid constitutional conflict, not to go looking for it. *See Skilling v. United States*, 561 U.S. 358, 406 (2010).

The issue of detainers does not provide a basis for interpreting section 9(a) contrary to its plain language. The defunding provision of subsection (a) is expressly addressed only to jurisdictions willfully violating section 1373, and federal government action under subdivision (b) on detainers is limited to public information, not defunding.

C. External Statements.

When interpreting statutes, there is some controversy over how much weight to give to legislative history materials. *See Bruesewitz v. Wyeth LLC*,

562 U.S. 223, 240 (2011) ("those of us who believe legislative history is a legitimate tool of statutory interpretation," implying some do not). There is little disagreement, though, that such materials have limits. "No matter how clearly its report purports to do so, a committee of Congress cannot take language that could only cover 'flies' or 'mosquitoes,' and tell the courts that it really covers 'ducks.' " *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991). In this case, a defunding provision expressly provides that it is limited "to the extent consistent with law," and the district court cites various statements of the President and others to interpret it as reading, in effect, the exact opposite, "contrary to law." This usage would be unsupportable even if the statements actually said that, but they do not.

The district court relies on a statement by President Donald Trump in a television interview. "I don't want to defund anybody. I want to give them the money they need to properly operate as a city or a state. If they're going to have sanctuary cities, we may have to do that. Certainly that would be a weapon." Final Order, ER 15, lines 14-19. This statement says nothing about the scope of defunding or about which of the "various meanings" of the nebulous term "sanctuary cities" is being used. If the funding is Byrne Grants and "sanctuary cities" means cities that refuse to comply with section 1373, then this statement is consistent with the interpretation of the prior Administration. The rhetorical flourish of the word "weapon" adds nothing. Of course withholding of funds tends to affect government decision-making, and the statutory requirement of compliance with federal law in order to qualify is consistent with a policy of providing that incentive.

In the Final Order, ER 6, lines 23-25, the district court astonishingly gives interpretive weight to statements by the press secretary. Giving such weight to the statements of a minor government employee with no policy-making authority is too absurd to require discussion.

The statement by the Attorney General quoted on page 12 of the Final Order, ER 15, is fully consistent with the understanding that the defunding is limited to that authorized by law. The Attorney General notes withholding, etc., of grants as a consequence of willful violation of section 1373 without specifying which grants. There is no inconsistency between this statement and the position that it refers only to grants that can be withheld on that ground on the basis of existing law.

In footnote 9 on page 24 of the Preliminary Order, ER 75, the district court notes the Declined Detainer Outcome Report. As explained in Part I B, *supra*, this report merely informs the public of the dire consequences of releasing alien criminals who could have been removed, eliminating the danger they present to law-abiding citizens and aliens alike. Publication of information presents no constitutional issue.

General statements to the effect that the anti-cooperation policies of San Francisco and Santa Clara present a genuine threat to public safety, Preliminary Order, ER 76-77; Final Order, ER 16-17, have no probative value on the interpretation of the Executive Order and certainly do not imply an intent to violate the law. The Attorney General's statement in an op-ed that "Kathryn Steinle might be alive today if she had not lived in a 'sanctuary city,' " *see* ER 16, is undeniably true. It would be a most remarkable method

of interpretation if a government official's statement of the truth were a ground to interpret an executive order in a manner contrary to its clear wording.

In summary, section 9(a) of the Executive Order is a direction by the President to his subordinates to exercise their authority to condition federal grants on compliance with 8 U.S.C. § 1373 to the extent that existing law authorizes such a condition. Interpreting this section to direct these officials to act contrary to law is contrary to its plain wording and unsupported by the other rationales offered by the district court. With this understanding, we turn to the question of whether an injunction against enforcement of this section is legally supportable.

II. Direct judicial interference with the President's supervision of executive officers violates the separation of powers.

The district court held that the Executive Order violates the separation of powers, *see* Final Order, ER 23, but once the true nature of the Executive Order is understood, it is evident that the district court's injunction is the actual violation of the separation of powers in this case.

"The executive Power shall be vested in a President of the United States of America." U.S. Const., art. II, § 1. However, the President could not possibly execute the laws by himself, and he must do so through subordinates. By implication, the Constitution requires that those subordinates " 'act for him *under his direction* in the execution of the laws.' " *Buckley v. Valeo*, 424 U.S. 1, 135-136 (1976) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)) (emphasis added).

The injunction entered in this case does not order executive officers to perform specific acts that they have a ministerial duty to perform. *Cf. Marbury v. Madison*, 5 U.S. 137, 166-169 (1803). It does not order them to refrain from specific acts that would violate the rights of any person or entity. *Cf. Ex parte Young*, 209 U.S. 123, 167 (1908). These are orders that courts may legitimately direct to executive officers without exceeding the bounds of the judicial function. Instead, the district court in this case ordered cabinet-level executive officers not to "enforce" a directive from the President regarding how to exercise authority granted to them by law, a directive expressly and unmistakably limited "to the extent consistent with law."

At the preliminary injunction stage, the district court asserted that "[t]his injunction does not impact the Government's ability to use lawful means to enforce existing conditions of federal grants or 8 U.S.C. 1373 . . . ." Preliminary Order, ER 100, lines 15-17. That is a curious statement, to say the least, because using lawful means is exactly what the enjoined section of the Executive Order requires. The Final Order does not contain this proviso.

The Department of Justice has, in the last two years under two different Administrations, identified three programs where it interprets the relevant law to require compliance with 8 U.S.C. § 1373 to be a condition of the grants even though this was not recognized until 2016. *See* Final Order, ER 9. Enforcing these recognized conditions would be enforcing section 9(a) of the Executive Order and is apparently enjoined. If the Department of Justice were to find additional programs where the governing statute is properly

interpreted to require compliance for eligibility, enforcing that requirement would violate the literal terms of the injunction even though entirely legal. If Congress were to enact new legislation requiring section 1373 compliance as a condition of a grant, the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3, would collide with the literal terms of the injunction.

A greater intrusion into the constitutional power of the executive by the judiciary is difficult to imagine. A court has ordered cabinet officers to disregard a direction from the President on the exercise of executive authority without regard to whether that direction is consistent with law or even required by law in a particular instance. If these officers conclude that a particular action is required or permitted by law, they would have to go to the court for clarification and a ruling before taking action in order to avoid risking contempt. The Constitution requires that executive officers be under the direction of the President, but Judge Orrick has effectively placed them under *his* direction.

III. The case is not ripe until a specific funding program is at issue.

The reason why the district court did not enjoin the Attorney General or the Secretary of Homeland Security from enforcing section 9(a) with regard to particular programs is that they have not taken any action to do so, except for three programs for which the compliance condition is not challenged. That is not a reason to issue a nationwide injunction of breathtaking sweep; that is a reason to issue no injunction at all.

The ripeness doctrine is "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " *National Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967)). That rationale applies in spades to this case.

The district court summarizes a variety of federal funding programs that are important to the financial stability of the plaintiff jurisdictions. *See* Final Order, ER 12-14. Conspicuously absent is any action by any government official to cut off these funds or require section 1373 compliance as a condition for continuing them. Quite the contrary, the official word from the Government is that only grant programs administered by two law enforcement departments are contemplated for section 1373 conditions, and then only under "existing statutory or constitutional authority." *See* Final Order 6, ER 9. Significantly, the Attorney General's memorandum promises local jurisdictions notice that Section 1373 compliance is required.[3]

Reno v. Catholic Social Services, 509 U.S. 43, 57-58 (1993), noted the general rule of *Abbott Laboratories* and the exception where the promulgation of a regulation by itself "presented plaintiffs with the

3. As explained, in Part I A, *supra*, the district court's assertion that the "plain language" of the Executive Order is to the contrary is clearly erroneous.

immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." Regulations fall under the rule of waiting for concrete application, not the exception of immediate review, where "[t]hey impose no penalties for violating any newly imposed restriction . . . ." *Id*. at 58.

As an internal Executive Branch directive from the President directing his subordinates how to exercise authority they already possess, the Executive Order is similar to the policy statement in *National Park Hospitality Assn*., *supra*. With regard to persons and entities outside the federal government, the Executive Order

> "does not command anyone to do anything or to refrain from doing anything; it does not grant, withhold, or modify any formal legal license, power, or authority; it does not subject anyone to any civil or criminal liability; and it creates no legal rights or obligations . . . ." 538 U.S. at 809 (internal quotation marks and brackets omitted).

If there were any doubt which "side of the line," *see Reno*, 509 U.S. at 58, this case fell on, the Attorney General's memorandum with its promise of notice erased it. The Government is not threatening to spring retroactive conditions on previously unconditional grants. "This is a case in search of a controversy." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1137 (9th Cir. 2000) (en banc). If a dispute over whether the statute for a particular program requires section 1373 compliance as a condition, that dispute can and should be resolved when it arises, *i.e.*, when it is "ripe."

CONCLUSION

The decision of the district court should be reversed.

December 22, 2017

Respectfully submitted,

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Criminal Justice Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a), and Ninth Circuit Rule 32-1, I certify that the attached Brief Amicus Curiae for the Criminal Justice Legal Foundation is proportionally spaced, uses 15-point Times New Roman type and contains 5334 words.

December 22, 2017 s/KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2017 I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit, and served to counsel, via ECF system.

December 22, 2017 s/KENT S. SCHEIDEGGER