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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel, XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Plaintiff,

v.

JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Principal Deputy Assistant Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and DOES 1-100,

Defendants.

Case No. 3:17-cv-04701-WHO

PLAINTIFF STATE OF CALIFORNIA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date:	September 5, 2018
Time:	2:00 p.m.
Dept:	2
Judge:	Honorable William H. Orrick
Trial Date:	January 28, 2019
Action Filed:	August, 14, 2017

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on Wednesday, September 5, at 2:00 p.m. or as soon thereafter as it may be heard before the Honorable William H. Orrick in Courtroom 2 of the U.S. District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff State of California, ex rel. Xavier Becerra, California Attorney General, will and does hereby move for summary judgment. This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the declarations, the Request for Judicial Notice, as well as the papers, evidence and records on file, and any other written or oral evidence or argument as may be presented at or before the time this Motion is heard by the Court.

California respectfully requests that the Court enter judgment in its favor as to each of its claims for relief because the undisputed evidence shows that: (1) the imposition of the Access and Notification Conditions violates the constitutional separation of powers; (2) the Access, Notification, and § 1373 Conditions (Challenged Conditions) violate the Spending Clause; (3) the Challenged Conditions violate the APA; (4) California is entitled to declaratory relief that all of the laws identified in its First Amended Complaint (FAC) comply with 8 U.S.C. § 1373 and § 1373 is unconstitutional on its face and in application; and (5) California is entitled to injunctive relief prohibiting Defendants from unlawfully withholding Edward Byrne Memorial Justice Assistance Grants (JAG) and Community Oriented Policing Services (COPS) funds.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Motion seeks to stop Defendants' unilateral and unconstitutional imposition of funding requirements designed to strip critical law enforcement grants from California for exercising its constitutionally protected right not to acquiesce to the federal government's immigration enforcement demands. To justify at least two of the conditions, Defendants rely on an administrative provision outside of the JAG authorizing statute, 34 U.S.C. § 10102, that allows Defendants to place "special conditions" on grants. But two district courts and the Seventh Circuit have already held § 10102 does not provide Defendants with the authority they claim here. *E.g.*, *Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018). Defendants also rely on 8 U.S.C. § 1373

purportedly being an "applicable law" for JAG and COPS. To justify withholding funding from California, Defendants wrongly enlarge the scope of § 1373's prohibition on restricting "information regarding . . . citizenship or immigration status" as requiring the State to allow release dates, addresses, and an expansive array of other personal information about the State's residents to be used for immigration enforcement purposes. But *no* federal court has accepted that reading and multiple courts have, at a minimum, questioned § 1373's constitutionality.

Most recently, Judge Mendez in the Eastern District of California rejected the enforcement of this broad reading of § 1373 against two of the statutes at issue here. The day after this Court denied Defendants' motion to dismiss and the State's motion for preliminary injunction in this case, ECF 88, 89, the United States sued California requesting that Senate Bill 54 (the California Values Act and Amended TRUST Act) be preliminarily enjoined because it allegedly conflicts with § 1373 and is otherwise preempted by federal law, *United States v. California*, 18-cv-490. The court denied that request, determining that § 1373 does not govern release dates and addresses. It explicitly found that "Section 1373 and the information sharing provisions of SB 54 do not directly conflict." ECF 189, slip op. at 41-42 (July 5, 2018) (E.D. Cal. Op.), and *dismissed the United States' SB 54 claim without leave to amend*. ECF 197, slip op. at 5-7 (July 9, 2018). In addition, the Supreme Court's recent decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), confirms that § 1373, a prohibition directed at the State, or at minimum, Defendants' broad interpretation of that statute, is unconstitutional under the Tenth Amendment. Defendants cannot require compliance with an unconstitutional law for the State to receive JAG and COPS funding. *See Philadelphia v. Sessions*, 17-3894, 2018 WL 2725503, at *31-33 (E.D. Pa. June 6, 2018). In any event, the undisputed record in this case unequivocally demonstrates that the State complies with § 1373 as that statute may be correctly construed, and to require California to do anything more would greatly burden the State, undermine trust between law enforcement agencies (LEAs) and the communities they serve, and jeopardize the health, safety, and welfare of all Californians.

Due to Defendants' actions, California and its political subdivisions have been unjustly denied law enforcement grants to the detriment of their communities. On June 26, 2018, while leaving the injunction in place for the City of Chicago, the Seventh Circuit stayed the scope of a

preliminary injunction of the Access and Notification Conditions pending disposition by the en banc court of the propriety of a nationwide injunction.[1] Freed from the nationwide injunction, Defendants have sown confusion and uncertainty into the FY 2017 grant-awarding process by entirely withholding awards from state and local jurisdictions in six states, including California. In the remaining 44 states, Defendants are disbursing federal funds, but have not awarded grants to local jurisdictions that Defendants ostensibly believe do not comply with § 1373. The result is a loss of $28.3 million to California and at least $56.6 million to jurisdictions nationwide.

This selection of winners and losers is not what Congress intended when creating JAG. Defendants cannot withhold congressionally authorized and appropriated formula grants for reasons not contemplated by the authorizing statute. They also cannot continue to withhold funding based on an incorrect determination that the State does not comply with a law that is on its face, and in application, unconstitutional. The same holds true for jurisdictions throughout the nation. Accordingly, California respectfully requests that: (a) Defendants be enjoined from imposing the Challenged Conditions in California or anywhere; (b) Defendants award the money and grant awards to all eligible jurisdictions without these conditions; and (c) the Court declare that the laws identified in the FAC comply with the only correct and constitutional construction of § 1373, or in the alternative, declare that § 1373 is unconstitutional on its face.

BACKGROUND

I. SECTION 1373 AND THE INA

Section 1373(a) of the Immigration and Nationality Act (INA) states:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from [immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Section 1373(b) proscribes federal, state, or local governments from prohibiting the "[s]ending," "[m]aintaining," or "[e]xchanging" of such information "with any other Federal, State, or local government entity." In contrast, other INA provisions protect certain vulnerable immigrants. For

[1] Order, *Chicago v. Sessions*, 17-2991 (7th Cir. June 26, 2018). A unanimous panel held Chicago established a likelihood of success on the merits. *Chicago*, 888 F.3d at 287. The Seventh Circuit voted to rehear the case en banc "only as to the narrow issue" of the scope of the injunction. Order, *Chicago v. Sessions* (7th Cir. June 4, 2018).

example, 8 U.S.C. § 1367(a), which was enacted as part of the same legislation as § 1373, *see* Pub. L. 104-208, generally prohibits the "use by or disclosure" of any information provided during the application process for certain witnesses and victims of crime, including U- or T-visas applicants, "to anyone" other than identified federal departments. It prohibits using such information to "make an adverse determination of admissibility or deportability." *Id.* The INA also details a "Special Immigrant Juvenile" process, through which certain abused, neglected, or abandoned children may seek legal immigration status. *Id.* § 1101(a)(27)(J).

II. CALIFORNIA'S STATUTES

The statutes at issue here respond to two overarching state interests. First, the Legislature found that LEAs' "limited resources" should be directed to the "matters of greatest concern to state and local governments," which is public safety, not immigration enforcement. Gov't Code § 7284.2(f). For example, the Values Act responds to the concern that the federal government's expanded immigration enforcement priorities and plan to use local law enforcement as "force multipliers" would cause LEAs to be inundated with immigration enforcement requests. Req. for Judicial Notice (RJN) Exs. 1 at 8; 2 at 1, 2, 9. This concern proved prescient.[2] Second, California concluded that prescribing clear limits on law enforcement involvement with immigration enforcement results in safer communities.[3] *E.g.*, RJN Exs. 4-6. The Legislature relied on law enforcement officers' statements about the public safety benefits of these community-policing centered practices. *See, e.g.*, RJN Exs. 7 at 7 (Presidential Taskforce describing how law enforcement entanglement with immigration enforcement makes it less likely for victims and witnesses to report crimes); 8 at 9 (San Francisco Sheriff describing concerns with law enforcement providing information to immigration authorities about domestic violence victims). LEAs throughout the State find it vital to maintain trust with immigrant communities; otherwise people "fail to disclose crimes that they witness and/or are victims to out of fear of deportation." Hart Decl. ¶¶ 7; *id.* ¶¶ 9, 11-18, 21; Rosen Decl. ¶¶ 6-9; *see also* Wong Decl. ¶¶ 4, 34-38, 44, 48,

[2] *See* TRAC Reports, Inc., Latest Data: Immigration and Customs Enforcement Detainers, California (2018), http://trac.syr.edu/phptools/immigration/detain/ (showing increase of 15,000 detainers in FY 2016 to 30,000 in FY 2017); *see also* RJN Ex. 3 (over 80 percent increase in detainers issued nationally after January 2017).

[3] *See, e.g.*, Gov't Code § 7284.2(c); 2016 Cal. Legis. Serv. Ch. 768 § 2(i) (the "TRUTH Act"); 2013 Cal. Legis. Serv. Ch. 570 § 1(d) (the "TRUST Act"); Cal. Penal Code § 422.93(a).

53. The need to foster trust with immigrant communities has become more critical in light of data showing declines in the State's immigrant communities reporting crimes in the face of the federal government's expanded immigration enforcement priorities. RJN Exs. 9, 10.

The State's declaratory relief claim involves two sets of California statutes: (a) statutes regulating when LEAs may assist in federal immigration enforcement (the TRUST, TRUTH, and Values Acts); and (b) six "State Confidentiality Statutes" (Penal Code §§ 422.93, 679.10, and 679.11, Welfare and Institutions Code §§ 827 and 831, and Code of Civil Procedure § 155).

A. The TRUST, TRUTH, and Values Acts and California's Implementation

In 2013, California enacted the TRUST Act, Gov't Code § 7282 *et seq.*, which defined when local LEAs could detain an individual for up to 48 hours after their ordinary release due to a detainer request. RJN Ex. 6. In 2016, the State enacted the TRUTH Act, Gov't Code § 7283 *et seq.*, which increases transparency about local LEAs' involvement in immigration enforcement and requires notifications to inmates prior to an interview with immigration authorities, but does not prohibit access to jails. *Id.* § 7283.1(a).

On October 5, 2017, Governor Brown signed into law the Values Act, Gov't Code § 7284 *et seq*., which expands upon the TRUST and TRUTH Acts. The Values Act addresses the Legislature's concern with limiting the use of state and local law enforcement resources for immigration enforcement and preserving community trust between state and local governments and the State's immigrant communities. *Id.* § 7284.2. Two provisions are relevant here. First, the Values Act amends the TRUST Act to regulate LEAs' response to "notification requests," which are requests by immigration authorities to be informed, "in advance of the public," about "the release date and time . . . of an individual in . . . custody." *Id.* §§ 7282.5(a), 7283(f), 7284.6(a)(1)(C); *see also* RJN Ex. 11 (I-247A "detainer" form with notification requests). The Values Act imposes some specified constrains on LEAs sharing of release dates, but allows them to notify immigration authorities about the release date of anyone who has been previously convicted of one of hundreds of crimes, or if the information is "available to the public." Gov't Code §§ 7282.5(a), 7284.6(a)(1)(C). Second, the Values Act prohibits the use of LEA money or personnel to "provid[e] personal information," as defined in California Civil Code § 1798.3,

about individuals, including victims and witnesses of crime, "for immigration enforcement purposes," unless that information is "available to the public." *Id.* § 7284.6(a)(1)(D).

The Values Act also permits many other forms of cooperation with immigration authorities. The Values Act provisions at issue in this case do not apply to the California Department of Corrections and Rehabilitation (CDCR), *id.* § 7284.4(a), which continues to cooperate with ICE, including by responding to notification requests and transferring persons in state custody to immigration authorities. RJN Exs. 12-16; *see also* Pen. Code §§ 5025-26 (requiring CDCR to cooperate with immigration authorities and to identify and refer "names and locations" of those in CDCR's custody who may be subject to deportation to immigration authorities). The Values Act does not restrict LEAs from sharing criminal-history information from California law enforcement databases accessible to immigration authorities. Gov't Code § 7284.6(b)(2); Reich Decl. ¶ 12. It also permits LEAs to participate in task forces with immigration authorities or share confidential information if the "primary purpose" of the task force is not immigration enforcement. Gov't Code § 7284.6(b)(3)(A). The Values Act explicitly permits jurisdictions to allow immigration authorities access to jails. *Id.* § 7284.6(b)(5). And, the Values Act expressly authorizes compliance with all aspects of § 1373. *Id.* § 7284.6(e).

On March 28, 2018, the California Department of Justice Division of Law Enforcement (DLE) provided guidance to LEAs about compliance with these state statutes. *See* RJN Ex. 17. The guidance reiterated that all LEAs are authorized to comply with § 1373. *Id.* at 3, 7. The guidance reminds LEAs of all of the circumstances where they may share release dates and other personal information, including when the information is "available to the public." *Id.* at 3, 5. It explains that "'available to the public' refers to information where a law enforcement agency has a practice or policy of making such information public, such as disclosing the information on its website or it has a practice or policy of providing the information to individuals in response to specific requests," so long as the LEA complies with state and federal privacy laws. *Id.* at 3.

During discovery, California produced "policies, manuals, bulletins, and orders" applicable to the only state LEA that receives JAG or COPS funding, the Bureau of Investigation's (BI), communications with immigration authorities. Sherman Decl. Ex. A (CA RFP Resp. 5). Among

the documents produced were DLE's policy manual and all manuals for the BI task forces funded through JAG and the COPS CAMP grant. Caligiuri Decl. ¶ 11, Exs. A-B. There is nothing in this record showing BI has restricted the exchange of information with immigration authorities beyond the limitations contained in California law. It is also undisputed that the Values Act has not affected immigration authorities' access to addresses in three state-run criminal history databases. *See* Gov't Code § 7284.6(b)(2); Reich Decl. ¶¶ 6-12 & Exs. A-C.

B. California's Confidentiality Statutes

To ensure the proper operation of state and local criminal and juvenile justice systems, California law contains long-standing protections of sensitive information concerning victims, witnesses, and juveniles. Penal Code §§ 679.10 and 679.11 prohibit entities that certify a person's cooperation with law enforcement from "disclosing the immigration status of a victim" or other person requesting certification "except to comply with federal law or legal process, or if authorized by the victim or person requesting [the certification form]." *Id.* §§ 679.10(k), 679.11(k); *see also* RJN Ex. 18. These protections impact thousands of immigrants who cooperate with law enforcement each year.[4] Penal Code § 422.93(b) protects hate-crime victims and witnesses "not charged with or convicted of committing any crime under State law" from being "detain[ed] . . . exclusively for any actual or suspected immigration violation or report[ed] or turn[ed] . . . over to federal immigration authorities." The State has also found confidentiality for juveniles essential "to avoid[ing] stigma and promot[ing] rehabilitation." Welf. & Inst. Code § 831(a). Generally, information in juvenile court records is confidential, with only limited disclosure allowed. *Id.* § 827; Cal. R. of Ct. 5.552(b)-(c). Consistent with that rule, the State implemented its role in the federal Special Immigrant Juvenile process by requiring that "information regarding the child's immigration status . . . remain confidential" with disclosure permitted to only a handful of enumerated parties. Civ. Proc. Code § 155(c). Information about a child's immigration status in any juvenile court proceeding must "remain confidential" just like all other information in the youth's court records. Welf. & Inst. Code § 831(e).

[4] For example, in 2016, the year § 679.10 came into effect for U-visa applicants, L.A. County received twice as many applications as the year before (954 in total, 80% of which were certified). McDonnell Decl., ECF 31, ¶ 14.

III. THE JAG AUTHORIZING STATUTE AND THE STATE'S JAG AND COPS GRANTS

Under its authorizing statute, JAG is a formula grant guaranteeing to each state a minimum allocation based on the state's population and violent crime rate. 34 U.S.C.§ 10156(a). The current JAG program derives from two earlier programs, which were merged in 2006. RJN Exs. 19, 20. The merger was designed to provide state and local governments "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits' all solution." H.R. Rep. 109-233, at 89 (2005). Immigration enforcement was never listed as a purpose of JAG's predecessor programs, and is not contemplated by any of the current program's eight congressionally specified "purpose areas." 34 U.S.C. § 10152(a)(1). Of particular significance, the only immigration-related requirement that has ever existed in any iteration of JAG (*i.e.*, a requirement that the recipient state provide certified records of "criminal convictions of aliens" [5]) was *repealed* by Congress in 2006 as part of the merger legislation. *See* 34 U.S.C. § 10153(a).

California's Board of State and Community Corrections ("BSCC") is the state entity that receives the State's share of JAG funds. According to the statutory formula, California should have received $28.3 million in JAG funding for FY 2017: $17.7 million to the BSCC, and the rest directly to local jurisdictions. Jolls Decl., ECF 29, ¶ 5. In previous years, the BSCC has issued subgrants to 32 local jurisdictions for education and crime prevention, law enforcement, and court programs. *Id.* ¶¶ 8, 10 & Ex. A. The BSCC also has funded BI to support task forces focused on criminal drug enforcement, violent crime, and gang activity. *Id.* ¶ 10; Caligiuri Decl. ¶ 27. BI additionally receives COPS competitive grants to support law enforcement efforts, including work on multi-jurisdictional task forces. Caligiuri Decl. ¶ 13. BI uses its COPS Anti-Methamphetamine Program ("CAMP") grant to provide State leadership on a task force that has resulted in the seizure of upwards of $30 million of illegal drugs since 2015. *See id.* ¶¶ 14-19.

IV. DEFENDANTS' CONDUCT WITH RESPECT TO JAG AND COPS GRANTS

In FY 2016, USDOJ declared § 1373 an "applicable law" for JAG, AR-384[6], and specifically required BSCC to submit a legal opinion validating its compliance with § 1373. Jolls

[5] Immigration Act of 1990, Pub. L. 101-649, § 507(a); Misc. and Tech. Immigration and Naturalization Amend. of 1991, Pub. L. 102-232, § 306(a)(6) (repealed 2006).

[6] The Administrative Record was filed at ECF 96.

Decl. Ex. B, ¶ 55. For FY 2017, each grant recipient's chief law officer must sign an affidavit, under penalty of perjury, affirming compliance with § 1373 on behalf of the State and "any entity, agency, or official" as applicable to the "program or activity to be funded." AR-1032-33; *see also* RJN Ex. 21. USDOJ represented final award conditions require grantees to collect § 1373 certifications from all subgrant recipients, monitor their subgrantees' compliance with § 1373 and to notify USDOJ of noncompliance. AR-994.

In 2017, Defendants sent letters to 38 state and local jurisdictions across the country, including to California and 12 of its political subdivisions, inquiring into their compliance with § 1373 and threatening to strip their JAG funding. RJN Exs. 22-25. California responded that it complies with § 1373. RJN Ex. 26. Defendants claim they are "still in the fact gathering stage" and do not know "exactly when [they] will make a final determination" on the State's compliance with § 1373. Sherman Decl. Ex. B (Defs. Rog Resp. 5). However, the federal government's filing of *United States. v. California* removes all doubt that a final determination already exists and that, in its view, the Values and TRUST Acts violate § 1373. *See* ECF 102 at 1.

In FY 2017, Defendants also added two new conditions to JAG. Jurisdictions must adopt with respect to the "program or activity" to be funded, a statute, rule, regulation, policy, or practice "designed to ensure" both: (1) "that agents of the United States . . . are given . . . access [to] any State (or State-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States" (Access Condition); and (2) "that, when a State (or State-contracted) correctional facility receives from DHS a formal written request . . . that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and–as early as practicable . . . provide the requested notice to DHS" (Notification Condition). ECF 42-1, Ex. B ¶¶ 55-56.

On September 15, 2017, the Northern District of Illinois enjoined the imposition of the Access and Notification Conditions nationwide. *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017). The Seventh Circuit upheld that decision. *Chicago*, 888 F.3d at 293. Defendants refused to issue JAG awards until the injunction was lifted. *See* Letter from USDOJ, *Chicago v.*

Sessions, 17-2991, at *1 (7th Cir., sent June 14, 2018). When the Seventh Circuit partially stayed application of the injunction beyond Chicago, Defendants selectively issued $197.3 million worth of JAG awards nationwide. RJN Exs. 27, 28. State and local jurisdictions in California and five other states were entirely shut out from those JAG awards. *See id.*; Schmidt Decl. ¶ 13. At least 17 local jurisdictions in the remaining 44 states have not been awarded JAG funds. *See* Sherman Decl. Ex. C. In total, Defendants withheld at least $56.6 million nationwide.

USDOJ announced that COPS applicants for 2017 must execute a § 1373 certification of compliance, similar to the one requested for JAG, with respect to the "program or activity to be funded." RJN Ex. 29 at 2 & Appx. D.[7] In FY 2017, BI applied for a COPS CAMP grant, submitted the requested § 1373 certification with a supplemental statement, and was awarded the grant. Caligiuri Decl. ¶¶ 22-23. However, Defendants have refused to allow BI to draw down these grant funds pending their administrative review into California's compliance with § 1373. *Id.* Following the Court's guidance in its order on the State's motion for preliminary injunction, BI decided to use the State's own dollars to "cover" the costs of the grant "while the litigation continues." ECF 89 at 27; Caligiuri Decl. ¶¶ 24-25. The COPS award, however, contains a provision prohibiting a recipient from using grant funds to replace dollars that the State already expends on the same program, or as the award calls it, "supplanting." RJN Ex. 31 at 5; ECF 91-1 at 14 n.4. Defendants, have refused to waive the supplanting prohibition in the COPS grant for BI, Sherman Decl. ¶ 6 & Ex. D, raising the specter that Defendants will use the supplanting prohibition to deny COPS funds to BI.

ARGUMENT

I. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a challenge to agency action, "the district judge sits as an appellate tribunal," and "review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir.

[7] USDOJ inserted the same requirements into the FY 2018 COPS CAMP application. RJN Ex. 30 at 11 & Appx. E. BI applied for that grant on June 27 with the certification and a supplemental statement. Caligiuri Decl. ¶ 26.

2001). The "function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

II. DEFENDANTS LACK STATUTORY AUTHORITY TO IMPOSE THE ACCESS AND NOTIFICATION CONDITIONS (COUNTS 1 AND 3)

Defendants' unauthorized imposition of the Access and Notifications Conditions violates the Separation of Powers. Congress—not the Executive Branch—holds power under the Spending Clause "to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Defendants cannot unilaterally insert conditions into grant awards without clear authorization from Congress. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013).

As every federal court to consider the issue has concluded, the Access and Notification Conditions violate these principles. Congress "did not impose any immigration enforcement conditions on the receipt of [JAG] funds," and Defendants cannot "use[] the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement." *Chicago*, 888 F.3d at 277; *Philadelphia*, 2018 WL 2725503, at *25 (holding the conditions "violate the constitutional principle of separation of powers"); *accord Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1097 (C.D. Cal. 2018) (substantively similar conditions were ultra vires because the authorizing statute "does not plainly or even arguably authorize the Attorney General" to add the conditions). In short, the Executive Branch has no authority "to condition the payment of such federal funds on adherence to its political priorities." *Chicago*, 888 F.3d at 283.

Congress prescribed only ministerial requirements and certifications for JAG recipients, *e.g.*, 34 U.S.C. § 10153(a)(5), and did not provide "open-ended authority to impose additional conditions." *Chicago*, 888 F.3d at 285 ("the notion of a broad grant of authority to impose any conditions on grant recipients is at odds with the nature of the[] JAG grant, which is a formula grant"); *see also Jama v. ICE*, 543 U.S. 335, 341 (2005) (courts will "not lightly assume that

Congress has omitted from its adopted text requirements that it nonetheless intends to apply"). "None of [the] provisions" of the JAG statute "grant the Attorney General the authority to impose conditions that require state or local governments to assist in immigration enforcement, nor to deny funds to states or local governments for the failure to comply with those conditions." *Chicago*, 888 F.3d at 284; *see also State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099, 1109 (8th Cir. 1973) (holding that agency did not have "unfettered discretion as to when and how" to allocate formula grants that "circumscribes that discretion").

Congress's overarching goal in creating JAG was to provide state and local governments with "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" to local law enforcement. H.R. Rep. 109-233, at 89 (2005). Consistent with this goal, when creating the current program, it repealed the only immigration related requirement that ever existed. *Supra* at 8. Defendants' attachment of the Access and Notification Conditions imposes the very type of immigration condition that Congress repealed. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Congress has also repeatedly declined to attach similar conditions to JAG, *see, e.g.*, RJN Exs. 32-35, including most recently on June 21, 2018. RJN Ex. 36 (House voting down HR 4760 by vote of 231-193).

The Access and Notification Conditions cannot be justified by 34 U.S.C. § 10102(a)(6), as Defendants' interpretation of that provision "is contrary to the plain meaning of the statutory language." *Chicago*, 888 F.3d at 284. In 2006, when § 10102(a)(6) was amended to permit OJP to "plac[e] special conditions on all grants," the term "special conditions" had a precise meaning—one that does not encompass the ability to add the Access and Notification Conditions. According to a USDOJ regulation in place at the time, Defendants could impose "*special* grant or subgrant conditions" only on "high-risk" grantees. 28 C.F.R. § 66.12 (removed Dec. 19, 2014). USDOJ still embraces this narrow meaning of "special condition" by distinguishing the new § 1373 "Special Award Condition" added to BI's COPS grant as a "High Risk Condition," RJN Ex. 31 at 20, while identifying other conditions as "Award Terms and Conditions." *Id.* at 5.

Moreover, § 10102(a)(6) is an OJP administrative provision that lies outside the JAG authorizing statute. Congress does not "alter the fundamental details of a regulatory scheme" in such "vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The Seventh Circuit found it "inconceivable that Congress would have anticipated that [USDOJ] could abrogate the entire distribution scheme" such that the "tightly-circumscribed structure of the[] JAG grants can be upended by some unbounded authority in § 10102." *Chicago*, 888 F.3d at 286. Instead, the Seventh Circuit recognized that § 10102(a)(6) "merely exemplifie[s] the type of other powers that the Assistant Attorney General may possess by delegation elsewhere." *Id.* at 285. Interpreting § 10102(a)(6) to provide limitless agency discretion "would allow [Defendants] to impose any conditions on the grants at will," and transform an administrative provision into "a tremendous power of widespread impact." *Id.* at 285, 287.

When Congress wanted to add substantive compliance conditions to JAG, it has done so explicitly. *E.g.*, 34 U.S.C. § 20927(a) (permitting 10 percent penalty for failing to "substantially implement" the Sex Offender Registration and Notification Act). Although "the Attorney General is authorized by other statutes to reduce [JAG] funding in certain circumstances . . . even then the amount of the reduction is set by statute." *Chicago*, 888 F.3d at 286; *see also Pennhurst*, 451 U.S. at 23. In contrast, there is no statutory authority that "even hint[s]" at requiring compliance with the Access and Notification Conditions, or conferring a broad delegation of authority for JAG. *See Arlington Cent. Sch. Dist.*, 548 U.S. at 297.[8] All of Congress's actions in connection with JAG and otherwise—providing flexibility to jurisdictions, expressly removing a condition related to immigration enforcement, repeatedly rejecting the attachment of funding conditions to immigration enforcement, and using precise and narrow terminology to define the authority to add conditions outside the JAG statute—point toward one conclusion: The Access and Notification Conditions are not permitted. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-44, 155-56, 160 (2000) (considering all of Congress's actions "[t]aken together" to

[8] Further undercutting the imposition of the Access and Notification Conditions is 34 U.S.C. § 10228(a), which is codified in the same chapter as the JAG authorizing statute, and prohibits the use of federal law enforcement grants to exercise "any direction, supervision, or control" over a state or local police force or criminal justice agency.

conclude that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

III. ALL THREE JAG CONDITIONS VIOLATE THE SPENDING CLAUSE (COUNTS 2 AND 3)

Congress may only use its spending power to place funding conditions that are related "to the federal interest in particular . . . programs." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Conditions on federal funds must also be "unambiguous," so that recipient jurisdictions may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17. The Challenged Conditions fail both tests.

A. There is No Sufficient Nexus Between the Conditions and JAG's Purpose

The Spending Clause requires funding conditions "bear some relationship to the purpose of the federal spending," *New York v. United States*, 505 U.S. 144, 167 (1992), and be "reasonably calculated" to address the "particular . . . purpose for which the funds are expended." *Dole*, 483, U.S. at 208-09. All three conditions fail to have a sufficient nexus to the particular purpose of JAG, and in fact undermine that purpose. The JAG legislative history is replete with recognition of local control to support local public safety priorities. *E.g.*, 151 Cong. Rec. 25, 919 (2005) (statement of Sen. Dayton) ("Byrne grants fund local law enforcement to combat the most urgent public safety problems in their own communities."). That purpose is reflected in the program's structure, which affords recipients flexibility to use funds for any of the eight criminal justice purposes—none of which include immigration enforcement. *See* 34 U.S.C. § 10152(a)(1).

The Challenged Conditions, which pertain to federal civil immigration enforcement, have little connection to local criminal justice. *See* AR-992 (AG Sessions announcing the conditions will "ensur[e] that federal immigration authorities have the information they need to enforce immigration laws."). Many immigration violations (such as overstaying a visa) do not intersect with criminal law at all, as those violations are subject only to civil penalties. *E.g.*, 8 U.S.C. §§ 1182(a)(6)(A) & (9)(B), 1202(g); 1227(a)(1)(B). The Administration's expanded focus on the removal of all "classes or categories of removable aliens," RJN Ex. 37 at 2, has only reinforced the attenuated relationship between these conditions and local criminal justice purposes. Since 2017, immigration authorities have substantially increased enforcement against those without

criminal convictions. RJN Ex. 3 at 7 (150% increase in ICE at-large arrests for non-criminal immigration violators between FY 2016 and FY 2017); Ex. 38 (approximate doubling of non-criminal immigration arrests nationally during the first six months of FY 2018); Ex. 39 (increase from 1,000 to 3,400 non-criminal arrests in California during that same time). Since Defendants consider those who have not been convicted of a crime within the scope of § 1373, Sherman Decl. Ex. E (Defs. RFA Resp. 18), the § 1373 Condition requires the State to comply with respect to persons who only violated the civil laws. Such a condition does not "share[] the same goal" that Congress had in creating JAG. *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003).

B. The Access and Notification Conditions are Ambiguous

In addition, the Access and Notification Conditions do not provide clear notice of what the conditions require. Defendants have not identified a single statute that provides guidance on these conditions and have not issued specific guidance themselves. For example, the conditions fail to explain whether the undefined term "designed to ensure" means that a jurisdiction must adopt a policy specifically directed to the conditions, or whether general regulations or practices are sufficient. *See* ECF 42-1, Ex. B ¶¶ 55, 56. When asked in discovery whether the TRUTH Act would disqualify the State for funding based on the Access Condition, Defendants refused to answer, stating it would depend on the "interpretation and application in specific factual scenarios." Sherman Decl. Ex. E (Defs. RFA Resp. 39). Defendants also refused to clarify which state entities they consider to be within the "program or activity" of the BSCC's award, and thus subject to the conditions. *Id.* Ex. B (Defs. Rog. Resp. 21). The conditions' "vague language does not make clear what conduct [they] proscribe[] or give[] jurisdictions a reasonable opportunity to avoid [their] penalties." *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 532 (N.D. Cal. 2017).

IV. ALL THREE JAG CONDITIONS ARE ARBITRARY AND CAPRICIOUS (COUNT 4)

Courts must "hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Court has already determined, there is no question that the imposition of the Challenged Conditions is "final agency action" because it is the "consummation of the agency's decision making process" and determines "obligations . . . from which legal

consequences flow." ECF 89 at 19-20 (relying on *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The Court also observed that it was "not clear" that the § 1373 Condition has the "requisite rational connection" necessary for Defendants to impose the condition. *See id.* at 21 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The full Administrative Record does not ameliorate the Court's previous concern as to the § 1373 Condition, nor justify the imposition of the Access and Notification Conditions. Rather, as the *Philadelphia* court determined when considering a virtually identical record, "if anything, the Administrative Record bolsters [the] view that the DOJ's decision to tie the Byrne JAG funds to the Challenged Conditions was arbitrary and capricious." *Philadelphia*, 2018 WL 2725503, at *28. The Administrative Record shows Defendants: (a) relied on factors Congress did not intend for it to consider; (b) failed to consider an important aspect of the problem the agency is addressing; and (c) offered an explanation for its decision that runs counter to the evidence before the agency. *State Farm*, 463 U.S. at 43. Any of these defects would suffice to find the Challenged Conditions arbitrary and capricious. All three exist here.

First, Defendants have not, and cannot, demonstrate that they acted consistent with factors that Congress intended in imposing any of the Challenged Conditions. The Access and Notification Conditions have no support in the JAG statute. *Supra* at 11-12. And although the JAG statute has never been linked to § 1373, without offering any evidence that Congress intended immigration enforcement to be a purpose area for JAG, USDOJ declared § 1373 an "applicable federal law." AR-384. At no point have Defendants adequately explained how the conditions are consistent with the underlying goals of JAG, or with Congress's intent in adopting JAG. The federal government's interest in immigration enforcement is not enough to show that interest is sufficiently connected to JAG to satisfy the arbitrary and capricious analysis. *See Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 186-87 (3d Cir. 1983) (invalidating agency action on grant conditions where the agency sought "to accomplish matters not included in that statute").

Second, Defendants have failed to grapple with the important public safety repercussions of the Challenged Conditions. *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) ("The agency . . . is required to examine the relevant data and articulate a satisfactory

explanation for its action including a rational connection between the facts found and the choices made . . ."). The Administrative Record contains evidence from JAG recipient jurisdictions that "gain[ing] the trust and cooperation of . . . residents, crime victims and witnesses . . . regardless of their immigration status" makes the "community stronger and . . . streets safer." AR-640; *see also* AR-487, AR-722. Yet, Defendants responded by not just keeping the § 1373 Condition, but adding the Access and Notification Conditions, without *any* consideration or analysis beyond the vague rhetoric in the documents announcing these new conditions. *See* AR-992-1037.

Third, Defendants' explanation for the Conditions runs counter to the evidence before the agency. This Court previously analyzed three reasons cited by Defendants and found each to be insufficient to justify the § 1373 Condition. For example, in their earlier briefing, Defendants alleged the § 1373 Condition was needed because of jurisdictions' refusal "to cooperate with federal immigration authorities in information sharing about undocumented immigrants who commit crimes." ECF 89 at 21. But, this Court determined that the "language of Section 1373 is too broad to achieve this information sharing goal" because it "captures the immigration status of all people" and not "merely immigrants who have committed crimes." *Id*. The other reasons that the Court found insufficient to support the § 1373 Condition are just as unpersuasive now for all three Challenged Conditions.[9] "DOJ has not anywhere demonstrated a link between localities maintaining as confidential the immigration status of non-criminal aliens or citizens and increases in crime and violence." *Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 624 (E.D. Pa. 2017).

This Court previously based its analysis on the Backgrounder on Grant Requirements, ECF 89 at 21, and nothing within the rest of the Administrative Record justifies a different result. The press release, AR-993, to which the Backgrounder was attached made claims about "sanctuary" jurisdictions and the need for the Challenged Conditions "without any support whatsoever." *Philadelphia*, 280 F. Supp. 3d at 623. Nor does the 2016 Office of Inspector General ("OIG") Memorandum, AR-366-381, discuss or contemplate how the conditions are consistent with

[9] In addition, this Court recognized that Defendants' second concern with awarding federal funds to jurisdictions that "frustrate federal immigration enforcement" is not addressed by the conditions since JAG funds "are used for purposes unrelated to immigration enforcement." Finally, the Court found Defendants' assertion that jurisdictions with policies like California "jeopardize the safety of their residents and undermine [Defendants'] ability to protect the public and reduce crime and violence" to be "unsupported" by the evidence in front of the agency. *Id*.

Congress's intent in adopting JAG or the contrary evidence before the agency. *See Philadelphia*, 280 F. Supp. 3d at 624 ("the memorandum did not purport to assess the wisdom" of imposing a Section 1373 Condition "and its effect on immigration policy or criminal justice"); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). A 2007 OIG Report about a different federal grant program similarly "does nothing to change the analysis" and "can hardly explain the DOJ's decision." *Philadelphia*, 2018 WL 2725503 at 26-27.

Moreover, all of the Challenged Conditions depart from past practice without any explanation. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007). USDOJ administered the current version of JAG for a decade without these conditions, and Defendants have fallen short of their "duty to explain why [they] deemed it necessary to overrule its previous position." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Instead, the Administrative Record offers undeniable evidence that USDOJ: (a) has limited discretion when administering a formula grant; and (b) understood negative consequences would result from linking § 1373 to JAG. USDOJ acknowledged its limited discretion to add new grant conditions on multiple occasions. In response to a request to "implement . . . a certification" on grants requiring "cooperat[ion] with federal immigration laws," AR-111, USDOJ responded in September 2015 that "many Department grant funds are formula-based, with the eligibility criteria (and related penalties, if any) set firmly by statute." AR-113. USDOJ explicitly recognized that "[i]n many cases," as with JAG, it "does not have the discretion to suspend funding *at all*." *Id*. (emphasis added). Just five months later, then-AG Loretta Lynch informed Congress that USDOJ was creating a new "policy" requiring compliance with § 1373 due to USDOJ "discussions" with select members of Congress. AR-202. Yet, USDOJ did not provide, at that time or since, justification for the "policy" change in light of the evidence before it.

Further, USDOJ found "[w]itholding . . . funding would have a significant, and unintended, impact on the underserved populations who benefit" from the grant programs "most of whom have no connection to immigration policy." AR-113. This was consistent with a longstanding law enforcement view, apparent from the Administrative Record, that such actions would be "detrimental." AR-85 (Major Cities Chiefs of Police Statement: "Merely shifting or diverting

federal funding . . . to any new immigration enforcement initiative would only result in a detrimental net loss"). When asked specifically by Congress about "policies that prohibit reporting illegal status" of individuals, AG Lynch responded that "with the current state of the law," and as to "local jurisdictions," this is "a local matter." AR-273. USDOJ's dramatic change in position has not been accompanied by the "reasoned explanation" that is required when an agency "disregard[s] facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

V. THIS COURT SHOULD DECLARE THAT § 1373 CANNOT BE LAWFULLY ENFORCED AGAINST THE IDENTIFIED STATE LAWS (COUNT 5)

A. *Murphy* Confirms § 1373 Cannot be Constitutionally Enforced Against the State Laws

Section 1373 cannot be "constitutionally enforced against the State statutes," FAC ¶ 153, because § 1373 is unconstitutional on its face. The Supreme Court's decision in *Murphy* confirms that a prohibition directed at the States violates the anti-commandeering doctrine and the Tenth Amendment just as much as an affirmative command. *Murphy* struck down the Professional and Amateur Sports Protection Act (PASPA), which made it "unlawful" for a "governmental entity" to "sponsor" or "authorize" sports betting. The Court held that this prohibition toward the states violates the anti-commandeering rule because it "unequivocally dictates what a state legislature may and may not do." *Murphy*, 138 S. Ct. at 1478. Such prohibitions force "state legislatures [to be] under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id.*

Section 1373, like PASPA, is a prohibition on "state" or "local governmental entit[ies] or official[s]"—specifically, it prohibits them from restricting governmental entities or officials from exchanging information regarding a person's immigration or citizenship status with other governmental entities. This prohibition "dictates what a State legislature may and may not do." Defendants state that to comply with § 1373, California "must repeal or eliminate the law, policy, or practice." Sherman Decl. Ex. B (Defs. Rog. Resp. 7). And, because § 1373 is not a provision

"that regulates private actors," under *Murphy*, it cannot possibly preempt state law. *See* 138 S. Ct. at 1479.

Furthermore, the "whole object" of § 1373 is to "direct the functioning of the state executive," *Printz v. United States*, 521 U.S. 898, 932 (1997), which is an additional intrusion on the State's sovereignty absent in *Murphy*. "The choice as to how to devote law enforcement resources—including whether or not to use such resources to aid in federal immigration efforts—would traditionally be one left to state and local authorities." *Chicago*, 888 F.3d at 282; *see also Alden v. Maine*, 527 U.S. 706, 752 (1999) ("[D]isplace[ment] [of] a State's allocation of governmental power and responsibility" strikes at federalism). If Congress cannot direct a state legislature in how to regulate its private residents engaging in sports betting, then it certainly cannot direct the legislature on how to regulate its own law enforcement officers. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign.").

In response to Philadelphia's request for declaratory relief "that it complies with § 1373, as constitutionally construed," the court found *Murphy* dispositive and held that the § 1373 Condition is unconstitutional because it "requires compliance with an unconstitutional statute (in this case, Section 1373)." *Philadelphia*, 2018 WL 2725503, at 31; *see also* E.D. Cal. Op. at 35 (finding constitutionality of § 1373 "highly suspect"). For all the reasons identified by the *Philadelphia* court, this Court should likewise conclude that § 1373 is unconstitutional.[10]

B. Defendants' Expansive Interpretation of § 1373 Cannot be Constitutionally Enforced Against the State's Laws

If § 1373 on its face survives after *Murphy*, Defendants still cannot constitutionally employ it to strong-arm the State into allowing a vast assortment of personal information that it possesses about its residents to be used for immigration enforcement. Judge Mendez is only the latest court to reject Defendants' interpretation because their view undermines the notion that § 1373 is "a

[10] *Murphy* also casts doubt on the Second Circuit's decision in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999). That decision was rooted in the view that § 1373's prohibition did not violate the Tenth Amendment because it did not "affirmatively conscript[]" nor "directly compel states or localities to require or prohibit anything." *Id.* at 35. This is a "distinction" that *Murphy* found to be "empty." 138 S. Ct. at 178; *see also* E.D. Cal. Op. at 51 ("…*Murphy* undercuts portions of the Second Circuit's reasoning and calls its conclusion into question.").

narrowly drawn information sharing provision." *See* E.D. Cal. Op. at 52. Instead, such a broad "Congressional mandate prohibiting states from restricting their law enforcement agencies' involvement in immigration enforcement activities . . . would likely violate the Tenth Amendment." *Id.* ("The Tenth Amendment analysis in *Murphy* supports this conclusion."). Specifically, Defendants' interpretation invades "the Constitution's structural protections of liberty," undermines political accountability, and "shift[s] the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477 (discussing three reasons for anti-commandeering doctrine).

Defendants consider § 1373 as a "very broad" statute. RJN Ex. 40 at 141:25-142:1, 149:17-23. Under their interpretation of § 1373, Defendants require the State to allow the disclosure of any "alien's" address, "location information," release date, date of birth, familial status, contact information, and identity. Sherman Decl. Ex. E (Defs. RFA Resps. 9-16). Moreover, Defendants expansively interpret the phrase "information . . . regarding immigration status" as prohibiting restrictions on any information that "supports federal immigration authorities in performing their duties under the INA." *Id.* Ex. B (Defs. Rog. Resp. 17); *see also id.* 6. By tying "information regarding . . . immigration status" to anything that supports immigration authorities' "duties under the INA," Defendants' interpretation requires the State to allow disclosure of a person's medical, *e.g.*, 8 U.S.C. § 1182(a)(1), educational, *e.g.*, *id.* § 1101(a)(15)(F)(i), and financial records, *e.g.*, *id.* § 1186b(d)(1). Other INA provisions allow an immigration officer to consider "any information" about a person when evaluating his or her admission or continued stay in the United States, further broadening the scope of information encompassed by Defendants' view of § 1373. *See id.* § 1225(a)(5); *see also, e.g.*, *id.* § 1225(d)(3) (allowing consideration of "any matter which is material and relevant to the enforcement of this Act"); *id.* § 1446 (authorizing immigration officer to take testimony on "any matter touching or in any way affecting . . . admissibility" for naturalization). The United States has, thus, "fail[ed] to provide a workable standard" to avoid "information . . . regarding immigration status" swallowing whole aspects of the state's provision of services to its residents. *See Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 504 (1992).

Not only do Defendants fail to establish a limiting principle for the information covered by § 1373, under Defendants' theory, "Section 1373 requires California to allow LEAs to respond to

all inquiries" from federal immigration authorities about release dates and personal information. Sherman Decl. Ex. B (Defs. Rog. Resps. 17, 18) (emphasis added). There are no exceptions, according to Defendants, *id.* (Defs. Rog. Resp. 7), including when a person has not been convicted of a crime. *Id.* Ex. E (Defs. RFA Resp. 38). The federal government has confirmed that it considers § 1373 as potentially invalidating state and federal privacy statutes. RJN Ex. 40 at 153:12-20. Indeed, the Department of Homeland Security (DHS) has already sought to invalidate at least two of the State's Confidentiality Statutes under the basis they violate § 1373. RJN Ex. 41 at 5-6 ("[T]o the extent that section 827 . . . is applicable, it is preempted by 8 U.S.C. § 1373.").

To comply with Defendants' interpretation of § 1373, California would have to allocate its law enforcement resources to allow: (a) the exchange of essentially all information that is provided to the State about all its "alien" residents; (b) regardless of whether those persons committed a crime; and (c) every time the State is asked for this information. In addition, by enforcing § 1373 against the State's statutes, Defendants are not applying it to information "available to the public," *see, e.g.*, Gov't Code, § 7284.6(a)(1)(C)-(D), but to information that "belongs to the State and is available to them in [law enforcement's] official capacity." *Printz*, 521 U.S. at 932 n.17. Under this interpretation, California's only alternative would be to stop providing essential governmental services, including enforcing the State's generally applicable criminal laws against its "alien" residents, that result in the collection of any information that Defendants assert is encompassed by § 1373. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). Thus, in order to comply with § 1373, California would be left with no "legitimate choice" to decline participation in the federal government's immigration enforcement program. *See New York*, 505 U.S. at 177, 185.

This interpretation of § 1373 burdens the State in at least two significant respects. *See* ECF 89 at 26. First, entangling state and local law enforcement with immigration enforcement erodes community trust, which jeopardizes public safety and impedes the State's ability to be politically accountable to its residents. *See Murphy*, 138 S. Ct. at 1477; *Printz*, 521 U.S. at 921-22; E.D. Cal.

Op. at 50 ("[W]hen California assists federal immigration enforcement in finding and taking custody of immigrants, it risks being blamed for a federal agency's mistakes [and] errors . . . ."). Unquestionably, trust is essential to encouraging victims and witnesses to report crime. Wong Decl. ¶¶ 4, 41-44, 52-53; *see also id.* ¶¶ 19-21, 30 (finding crime is lower in jurisdictions that limit entanglement with immigration enforcement); Hart Decl. ¶¶ 9, 11; Goldstein Decl. ¶ 5; Rosen Decl. ¶¶ 4, 8; *see also Chicago*, 888 F.3d at 280 (recognizing legitimate reasons why some jurisdictions "have determined that their local law enforcement efforts are handcuffed by such unbounded cooperation with immigration enforcement"). It is just as clear that state or local governments entanglement with immigration enforcement causes undocumented immigrants to be less inclined to use public services that require providing contact information, such as seeking health care and enrolling their children in school. *See* Wong Decl. ¶¶ 39-40, 44; Goldstein Decl. ¶ 7; *see also City of New York*, 179 F.3d at 36 ("The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local government functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved."); E.D. Cal. Op. at 51 ("Even perceived collaboration with immigration enforcement could upset the balance California aims to achieve"). This damage would extend to the State's dependency system if the State was unable to preserve the confidentiality of information about youth. Coyne Decl. ¶¶ 9-10. The State's communities would be less safe, healthy, and educated, harms that would be extend to *all* Californians. *See* Hart Decl. ¶¶ 7, 13, 14; Goldstein Decl. ¶ 9; Rosen Decl. ¶ 6; Wong Decl. ¶¶ 4, 40, 44, 51, 53.

Second, Defendants' interpretation of § 1373 would effectively allow the federal government to "shift[] the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477. For example, ICE doubled the number of detainer requests issued to California LEAs from around 15,000 in FY 2016 to 30,000 in FY 2017. *Supra* at 4 n.2. Under Defendants' theory, Sherman Decl. Ex. B (Defs. Rog. Resp. 17), the State must allow its LEAs to respond to each request, including requests for release dates, no matter how many and regardless of whether immigration authorities continue to increase the number of requests they make of LEAs. That is both burdensome to LEAs, *see* Hart Decl. ¶ 19, and impracticable for persons detained on a short-term

basis. *Id.* ¶ 20. The State is forced to "absorb the financial burden of implementing [this] federal regulatory program," and divert resources from criminal law enforcement. *Printz*, 521 U.S. at 930; *see also* E.D. Cal. Op. at 49-51 (finding it "entirely reasonable for the State to determine that assisting immigration enforcement . . . is a detrimental use of state law enforcement resources"). As in *Printz*, the Federal government is seeking to "augment[]" its own powers by "impress[ing] into its service—and at no cost to itself—the police officers of the 50 States." 521 U.S. at 922.

Since § 1373, or Defendants' interpretation of it, constitutes commandeering, "a balancing analysis is inappropriate." E.D. Cal. Op. at 48 (quoting *Printz*, 521 U.S. at 932); *see* ECF 102 at 2 (requesting parties address whether a "balancing" of the constitutional interests is "necessary or appropriate"). But, even if the Court determines that Defendants' actions do not clearly rise to the level of commandeering, Defendants' interpretation of § 1373 still exceeds Congress' authority because of the level of intrusiveness into the state's police power imposed by their interpretation. For example, in *United States v. Lopez*, the Court read "judicially enforceable outer limits" into the broad scope of the Commerce Clause when rejecting part of a federal statute that criminalized possession of a firearm in a school zone. 514 U.S. 549, 566 (1995). The Court said the law erased the distinction between "what is truly national and what is truly local." *Id.* at 567-68. The Court held similarly in *United States v. Morrison*, where the relationship of the Violence Against Women Act to interstate commerce was insufficient to interfere with the "local . . . regulation and punishment of intrastate violence." 529 U.S. at 618. Here, by broadening § 1373 to invalidate state statutes that in no way regulate immigration, Defendants stretch Congress' immigration powers beyond permissible limits while encroaching on the State's sovereign powers to regulate its law enforcement. *See DeCanas v. Bicas*, 424 U.S. 351, 355-56 (1976) (recognizing that Congress is "powerless to authorize or approve" an immigration statute to preempt a state statute that does not regulate "determination[s] of who should or should not be admitted into the country, and the conditions upon which a legal entrant may remain"). Moreover, the federal government seeks control over not just "immigration" and "citizenship status" information, but essentially all information that LEAs possess about their residents, regardless of how far removed that information is from a person's right to enter or remain in the country. The principles of *Lopez* and

Morrison prohibit the federal government's indirect use of immigration powers to so directly intrude into "truly local" aspects of the State's police power. *See Morrison*, 529 U.S. at 618.

C. The State's Laws Comply with § 1373 as Lawfully Construed

An analysis based on the plain text of § 1373 compels the same result. As an initial matter, the Values and TRUST Acts comply with § 1373 because the Values Act's savings clause expressly authorizes compliance with all aspects of § 1373 as properly construed. Gov't Code § 7284.6(e); *see also Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (the "authoritative statement" of a statute is its "plain text," including its "savings clause"). Judge Mendez in *U.S. v. California* found "no direct conflict between SB 54 and Section 1373." Op. at 36. Defendants attempt to create a conflict by interpreting § 1373 to encompass release dates, addresses, and any information which the Executive Branch unilaterally determines "support" immigration authorities in carrying out their duties. Sherman Decl. Ex. B (Defs. Rog Resps. 6, 17). But three courts, including Judge Mendez when faced with this exact issue, have already concluded that "the plain meaning of Section 1373 limits its reach to information strictly pertaining to immigration status (i.e. what one's immigration status is)." E.D. Cal. Op. at 38-39. "[N]o plausible reading of 'information regarding . . . citizenship or immigration status' encompasses the release date of an undocumented inmate." *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017), *appeal docketed*, 17-16283 (9th Cir. June 21, 2017); *see also* E.D. Cal. Op. at 39; *Philadelphia*, 2018 WL 2725503, at *35. Neither do addresses have "any bearing on one's immigration or citizenship status." E.D. Cal. Op. at 39-40.

Those decisions are correct. For a federal statute to extend into "traditionally sensitive areas" of the state's police power and "alter the usual constitutional balance between the States and the Federal Government," Congress must make its intentions "unmistakably clear in the *language of the statute*." *Gregory*, 501 U.S. at 460-61 (emphasis added); *see also Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). If Congress wanted § 1373 to broadly cover the exchange of virtually all information about an individual, as Defendants seek to do here, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). For instance, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, the same legislation that

created § 1373, Congress used the phrase, "any information which relates to an alien" in § 384 of that Act (8 U.S.C. § 1367(a)(2) of the INA) to describe information that is protected from disclosure. E.D. Cal. Op. at 39. This as well as other provisions of that legislation show that Congress knew how to use more sweeping and precise terminology when it wished to cover information about a person's address, nationality, or associations.[11] "The fact that Congress did not adopt a readily available and apparent alternative strongly supports" not injecting into § 1373 the types of information brought in by Defendants' interpretation. *See Hawaii v. Trump*, 585 U.S. __, slip op. at 23 (2018) (internal quotations omitted) (discussing 8 U.S.C. § 1152); *Steinle*, 230 F. Supp. 3d at 1015 ("[I]f the Congress that enacted [the Act] had intended to bar *all* restrictions of communication between local law enforcement and federal immigration authorities, or specifically to bar restrictions of sharing inmates' release dates, it could have included such language in the statute.") (emphasis in original).

"A contrary interpretation would know no bounds." E.D. Cal. Op. at 39. For instance, Defendants insist that home addresses are information "regarding immigration status" because they are "relevant" to whether an immigrant "evidenced an intent not to abandon his or her foreign residence, or otherwise violated the terms of such admission." Sherman Decl. Ex. B (Defs. Rog. Resp. 6). Under that same logic, whether a person receives any ongoing governmental service, such as unemployment and health benefits, vehicle registration, or school enrollment, would be relevant to immigration status. This confirms that Defendants' view of § 1373 "stop[s] nowhere." *Roach v. Mail Handlers Ben. Plan*, 298 F.3d 847, 849-50 (9th Cir. 2002); *supra* at 22.

The remainder of California's statutes also comply with § 1373 as lawfully construed. The TRUTH Act governs ICE interviews with detainees, so does not restrict information sharing in any way, as Defendants already determined. RJN Ex. 42. The State's Confidentiality Statutes emulate protections for classes of people that the INA also protects. Penal Code sections 422.93,

[11] *See, e.g.*, *id.* § 302, 8 U.S.C. § 1225(a)(5) (permitting immigration officers to ask "any information . . . regarding the purposes and intentions of the applicant" including intended length of stay and the applicant's admissibility); *id.* § 241, 8 U.S.C. § 1231(a)(3)(C) (requiring information "about the alien's nationality, circumstances, habits, associations, and activities and other information the Attorney General considers appropriate"); *id.* § 414, 8 U.S.C. § 1360(c)(2) (Social Security Commissioner must provide "information regarding the name and address of the alien").

679.10, and 679.11 protect victims and witnesses of crime. Likewise, 8 U.S.C. § 1367 generally prohibits the "use by or disclosure" of any information provided during the process of applying for U- or T-visas, or other benefits available for immigrant witnesses and victims of crime, "to anyone" other than identified federal departments. When a "general permission or prohibition is contradicted by a specific prohibition or permission . . . the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Therefore, § 1367's prohibition against disclosure should be construed as an exception to § 1373 to ensure both provisions are reconciled. *See id.*

For similar reasons, § 1373 cannot prohibit restrictions on the sharing of immigration status information for vulnerable youth in the juvenile justice system. *See* Civ. Proc. Code § 155(c); Welf. & Inst. Code §§ 827, 831. The "Special Immigrant Juvenile" process allows abused, abandoned and neglected youth to secure lawful immigration status, illustrating the INA's concern for such children. *See* 8 U.S.C. § 1101(a)(27)(J). Congress would not protect vulnerable youth in one section of the INA, but then undermine that protection by building in risks for those same youth in another section. Interpreting § 1373 to apply to children who provide information, at the government's invitation, to exercise a benefit, would constitute an unduly unfair form of entrapment. *See, e.g.*, *Raley v. Ohio*, 360 U.S. 423, 438 (1959); *Casa De Maryland v. DHS*, 284 F. Supp. 3d 758, 778-79 (D. Md. 2018) (enjoining DHS from using information provided by DACA applicants for immigration enforcement; doing so after inducing immigrants to provide this information would amount to "affirmative misconduct" by the government); *Sanchez v. Sessions*, 870 F.3d 901, 913 (9th Cir. 2017) (Pregerson, J., concurring) ("[I]t is unfair for the Government to encourage noncitizens to apply for immigration relief, and at a later date use statements in those relief applications against noncitizens in removal proceedings.").

D. The State Laws Allow LEAs to Provide Information to Immigration Authorities as Defendants' Interpretation of § 1373 Requires

Although the Court need not look further than the plain text of § 1373 and the limits on how that statute may be constitutionality construed, even if Defendants' interpretation of § 1373 were given any credence, California's laws, and the implementation of its laws, still comply. The only

State entities that receive JAG or COPS grants are the BSCC and BI. The BSCC is not a law enforcement agency, *see, e.g.*, Sherman Decl. Ex. F (CA Rog. Resp. 16), and the guidance that BSCC has provided to LEAs is to comply with the § 1373 Condition. Sherman Decl. Ex. G. There is also no dispute that BI complies with § 1373. DLE's policy changes following the Values Act, applicable to BI, authorize compliance with § 1373. Caligiuri Decl. Ex. A; RJN Ex. 17 at 3, 7. There is no policy, manual, bulletin, or order in which DLE or BI has instructed officers to limit communications with immigration authorities beyond the lawful limitations found in state law. *See* Caligiuri Decl. ¶ 11. BI still cooperates with immigration authorities on criminal investigations, and has specifically worked with Homeland Security Investigations within ICE on investigations since the Values Act became law. Caligiuri Decl. ¶¶ 9-11, 15-16. As part of these task forces, BI may share confidential information with immigration authorities. Gov't Code § 7284.6(b)(3); Caligiuri Decl. ¶ 9. In fact, the federal government acknowledges that it has no "issues" with BI. RJN Exs. 43 ¶ 11; 44 ¶ 6. And, although CDCR does not receive JAG or COPS grants, *see, e.g.*, Sherman Decl. Ex. A (CA RFP Resp. 7), the undisputed evidence also shows that state law requires CDCR to cooperate with immigration authorities, Pen. Code §§ 5025-26, and CDCR has additional policies providing for cooperation. Sherman Decl. Exs. 12-16.

The Values Act itself permits LEAs to provide release dates if the subject of the request was previously convicted of one or more of hundreds of offenses, whether the offense was a California offense, a federal offense, or an offense committed in another state. *See* Gov't Code § 7282.5(a); Sherman Decl. Ex. F (CA. Rog Resp. 5). The Values Act additionally allows LEAs to provide release dates to immigration authorities if the LEA has a practice of sharing such information with the public or has posted the information on its website, so long as it follows federal and state privacy laws. RJN Ex. 17 at 3. There is no state law that restricts the sharing of release dates on a website, and the California Public Records Act allows the disclosure of release dates unless that information would pose a safety risk. *See* Gov't Code § 6254(f)(1). Irrefutable evidence shows that immigration authorities have access to, and actively use, California's criminal history databases that contain addresses. Reich Decl. ¶¶ 6-15 & Exs. A-C.

The *Philadelphia* court's "second alternative holding" in finding for Philadelphia is instructive. There, the court determined that although the city restricted the sharing of release dates to immigration authorities, it complied with USDOJ's interpretation of § 1373 because it shared release dates in response to a judicial warrant. *See* 2018 WL 2725503, at *38-39. Here, similarly, the Values Act allows LEAs to facilitate a transfer of a person to immigration authorities if provided with a judicial warrant or a judicial probable cause determination. Gov't Code § 7284.6(a)(4). But, unlike in *Philadelphia*, the Values Act allows more because it permits LEAs to provide release dates or addresses to immigration authorities if the information is available to the public, and release dates if the person in custody meets the criminal history criteria in § 7282.5. *Id.* § 7284.6(a)(1)(C)-(D).

Finally, the federal government's own treatment of immigration status information for the categories of persons that the State's Confidentiality Statutes protect effectively concedes that those statutes comply with § 1373. By its plain terms, § 1373(b)(3) subjects the federal government to the same mandate as state and local entities not to restrict the sharing of immigration status information to other governmental agencies. Yet, "it has been the long-standing and consistent practice of DHS (and its predecessor INS) to use information submitted by people seeking . . . other benefits for the limited purpose of adjudicating their requests, and not for immigration enforcement purposes," except in limited circumstances. RJN Ex. 45. The federal government has implemented policies that limit disclosure of immigration status information to other governmental entities. *See* RJN Exs. 46, 47 ("In no case may any DHS, DOJ, or DOS employee permit use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief."). Likewise, DHS's policies acknowledge "that there are often confidentiality rules that govern disclosure of records from juvenile-related proceedings" that immigration officers should respect. RJN Ex. 48. This administration has repeatedly contended that it has maintained the policy for Deferred Action for Childhood Arrivals ("DACA") status individuals to "protect[] from disclosure" information provided by DACA applicants "to ICE and CBP for the purpose of immigration enforcement proceedings." RJN Ex. 49, Q19; 50 at 39 (claiming the policy "currently remains in effect"). The federal government has

taken similar positions to protect the immigration status of people who interact with federal agencies or seek benefits. *See, e.g.*, RJN Ex. 51 (IRS interpreting 26 U.S.C. § 6103 confidentiality obligations as prohibiting the disclosure of information for immigration enforcement purposes); 8 C.F.R. § 244.16 (prohibiting information disclosure for Temporary Protected Status applicants, with exceptions for federal and state LEAs, but not local LEAs).

VI. THE STATE IS ENTITLED TO INJUNCTIVE RELIEF

A. Irreparable Harm and Balance of Hardships and the Public Interest

A permanent injunction is appropriate where a plaintiff "suffered an irreparable injury," "remedies at law . . . are inadequate," "the balance of hardships between the plaintiff and defendant" supports an equitable remedy, and "the public interest would not be disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). When the federal government is the opposing party, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[C]onstitutional violation[s] alone, coupled with the damages incurred, can suffice to show irreparable harm." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (relying on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)). Injuries where "sovereign interests and public policies [are] at stake" are irreparable. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001).

California faces constitutional injury to its sovereignty. A plaintiff can suffer a constitutional injury by being forced to either comply with an unconstitutional law or else face community and financial injury. *See Am. Trucking*, 559 F.3d at 1058-59. Since the Challenged Conditions are unconstitutional, that is true here. Further, § 1373, or at minimum, Defendants' expansive interpretation of § 1373, is unconstitutional, so Defendants expect the State to comply with an unconstitutional law in order to receive funding. Defendants admit that the § 1373 certification requires jurisdictions to adopt the federal government's interpretation of the laws, Sherman Decl. Ex. E (Defs. RFA Resp. 16), and Defendants' filing of a lawsuit against the State alleging the Values Act violates § 1373 makes clear that the State faces legal jeopardy if Defendants refuse to accept a qualified certification. *See Morales*, 504 U.S. at 380-81 (relief proper where "respondents were faced with a Hobson's choice: continually violate the Texas law

and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings").

In addition to the serious constitutional injuries, Defendants' actions will cause real harm to the State's communities, no matter what the State does. If the State changes its laws to comply with unlawful and constitutionally impermissible conditions, the relationship of trust that the State statutes are intended to build will erode. *See* Hart Decl. ¶ 18; Goldstein Decl. ¶ 9; Wong. Decl. ¶¶ 11-13, 41-44, 53; *cf. Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 680 (7th Cir. 2012) (injuries to goodwill not easily measurable and often irreparable). State and local entities would have to divert limited resources to immigration activities to the detriment of more immediate local priorities. *See, e.g.*, Hart Decl. ¶ 19. Alternatively, if the State preserves its laws and Defendants cut off millions of dollars in JAG funding that the State is otherwise entitled to, the State will be unable to fund critical public safety programs, and the elimination of programs and staff positions may result. *See* Jolls Decl. ¶ 19; Caligiuri Decl. ¶¶ 23, 31, 32; McDonnell Decl., ECF 31, ¶¶ 8-9, 15; *see also United States v. North Carolina*, 192 F. Supp. 3d 620, 629 (M.D.N.C. 2016). The courts in *Chicago*, *Philadelphia*, and *Los Angeles* issued injunctions under similar circumstances, with far smaller amounts of money at issue than here. *Chicago*, 888 F.3d at 287; *Philadelphia*, 2018 WL 2725503, at *41-43; *Los Angeles*, 293 F. Supp. 3d at 1100.

The harm to the State from the loss of COPS grants is already being felt. USDOJ has refused to allocate BI's awarded COPS funds based on its ongoing "inquiry" into the State's compliance with § 1373. As a result, BI has had to divert funds it would otherwise spend toward other law enforcement priorities to keep BI personnel on the task force that COPS is supposed to fund. Caligiuri Decl. ¶ 24. BI has been constrained in its ability to fill six vacancies on its task force, indefinitely depriving it of resources to investigate large-scale illicit drug trafficking. Caligiuri Decl. ¶ 23. Moreover, notwithstanding this Court's suggestion that the State "cover" the costs of the grant while the litigation is pending, ECF 89 at 27, Defendants' position is that the COPS award prohibits BI from using its own dollars to fund the task force in the interim, and Defendants refuse to waive that prohibition. Sherman Decl. ¶ 6 & Ex. D. Defendants' actions have left BI between a rock and a hard place, with the Court's guidance in its March 5 Order and

public safety on the one side and Defendants' obstinacy on the other. BI chose to follow the Court's guidance by funding the task force in the interim to avoid additional damage to public safety. Caligiuri Decl. ¶¶ 24-25. BI should not be penalized for making that decision.

The balance of the hardships and the public interest also favor "'prevent[ing] the violation of a party's constitutional rights.'" *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (citation omitted). As this Court stated previously, "the public interest would appear to be better served if the State did not have to choose between the Byrne JAG Program grant funds to assist its criminal law enforcement efforts and the health of its relationship with the immigrant community." ECF 89 at 27. The record on these points has only grown stronger.

B. Nationwide Injunctive Relief

A nationwide injunction barring the Challenged Conditions is needed here both to protect California's specific interests in JAG funding and to protect the strong public interest in enjoining the unconstitutional conditions. First, a nationwide injunction protects California's interest in receiving its statutorily-allocated grant from a limited annual fund. JAG funding consists of one annual pool of money, and the statute requires it be disbursed according to a formula among qualifying jurisdictions, with none held back. Defendants violated that framework by failing to provide any jurisdiction in California with JAG funding. Absent a nationwide injunction, Defendants could continue to disburse the remaining appropriated JAG funds to jurisdictions without injunctions, while refusing to disburse funds to California. Then when this case is resolved, funds may no longer be available for California. *Cf. Suffolk v. Sebelius*, 605 F.3d 135, 141-42 (2d Cir. 2010) (affirming as moot dismissal of challenge to denial of grant funds where funds were already distributed during the pendency of litigation). The State faces that possibility here because Defendants have already awarded $197.3 million of JAG awards, RJN Exs. 27, 28, the authorizing statute provides no guarantee that withheld funds will be saved indefinitely, and in other circumstances, the authorizing statute allows for withheld funds to be reallocated to other, "compliant" JAG recipients. *See* 34 U.S.C. §§ 20927, 30307(e)(5).

Second, where a court finds an agency's actions to be unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l*

Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014). A court has broad discretion to define the terms of an injunction, *Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015), and there is no requirement that an injunction affect only the parties. *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). Since the Challenged Conditions are illegal and unconstitutional, and § 1373 is unconstitutional, the most equitable course of action is to enjoin the application of the conditions nationwide. When a law is unconstitutional on its face, a nationwide injunction is proper. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (citation omitted).

Third, nationwide relief is appropriate because the conditions' constitutional deficiencies are not geographically limited to California. Defendants' statutory authority over JAG is uniform across jurisdictions. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("The scope of injunctive relief is dictated by the extent of the violation established," not by geography). The structure of the program—where state and local governments are interconnected because funding changes to one grantee affect allocations to others, 34 U.S.C. § 10156—makes piecemeal relief unsuitable. Here, all state and local jurisdictions in six states, and at least 17 local jurisdictions in other states, have been deprived of JAG funding, and are currently suffering harm from the inability to fund critical programs. *See* Pittman Decl. ¶ 9; Schmidt Decl. ¶ 14; Swift Decl. ¶¶ 2-3; Springer Decl. ¶¶ 10-15; Wall Decl. ¶¶ 5-7; Grumet Decl. ¶¶ 12-16. And many jurisdictions may have awards that are too small to justify litigation. *See, e.g.*, Swift Decl. ¶ 3. Thus, these jurisdictions as a practical matter are forced to choose between forgoing funds or subjecting themselves to unconstitutional grant award conditions. Finally, as the Challenged Conditions are unconstitutional, only a nationwide injunction provides complete relief. "When the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself." *Zamecnik v. Indian Prairie Sch. Dist*. #204, 636 F.3d 874, 879 (7th Cir. 2011) (Posner, J.).

C. Mandamus Relief/Mandatory Injunction

In addition and/or in the alternative, California is entitled to mandamus relief. Under the APA, courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Section 706(1) "is a source of injunctive relief to remedy an arbitrary or capricious

delay or denial of agency action." *Sierra Pacific Industries v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989). Because the imposition of the Challenged Conditions are unlawful under the APA for exceeding statutory authority and being arbitrary and capricious, see FAC ¶¶ 133-144, the Court should issue a mandatory injunction under § 706(1) compelling disbursal of the awards and funds to all qualifying jurisdictions. *See* FAC ¶ 17 & FAC, Prayer for Relief ¶¶ 3, 4.[12]

A "ministerial or non-discretionary act" is necessary for a mandatory injunction. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (internal quotations omitted). Congress's use of a formula grant structure, in conjunction with the use of the word "shall" in § 10156(a)(1), imposed a non-discretionary duty on Defendants. *Philadelphia*, 2018 WL 2725503, at *44. Defendants have failed to issue awards to all qualifying jurisdictions, inconsistent with the statute's formula. Sherman Decl. Ex. C. The Executive Branch may not refuse congressional mandates to allocate the full amounts appropriated. *See Train v. City of New York*, 420 U.S. 35, 45-46 (1975). This is especially so for formula grants. *See, e.g.*, *Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) ("We hold that the [agency] was required to distribute the money available so as to preserve the allocation formula provided by [statute]."); *Volpe*, 479 F.2d at 1114; *see also Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) ("[F]ormula grants . . . are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula").

The Ninth Circuit uses the six-factor test laid out in *Telecommc'ns. Research & Action v. FCC (TRAC)*, 750 F.2d 70, 79-80 (9th Cir. 1984) to decide if the agency action was "unlawfully withheld" under § 706(1). The first two factors look at whether the statutory scheme or a "rule of reason" govern the time an agency has to make a decision. *Id.* at 80. "[I]t bears emphasis that Congress specifically set the JAG Program as an annual award, and the DOJ's delay has precluded the [plaintiff] from receiving the intended award at such time as the [plaintiff] can make timely use of it." *See Philadelphia*, 2018 WL 2725503, at *44; *supra* at 31. The other factors look to hardship and equity, and also support an injunction. The delay impacts human

[12] That Defendants may respond to an injunction preventing application of the Challenged Conditions to JAG by simply refusing to issue the funds at all is not a hypothetical problem. That is precisely what Defendants did in reaction to Chicago securing a nationwide injunction against the Access and Notification Conditions.

welfare rather than only economic regulation (factor three), and serious state public safety interests are prejudiced by the delay (factor five). *TRAC*, 750 F.2d at 80. Without the funds, California would be forced to abandon effective programs that otherwise reduce recidivism for at-risk youth, counter the distribution of illegal drugs, [and] advance community policing. *See, e.g.*, Jolls Decl. ¶ 10. Because Defendants do not claim that disbursing the funds would negatively impact competing agency priorities, they have not shown that "the effect of expediting delayed action on agency activities of a higher or competing priority," (factor four) weighs in their favor. *TRAC*, 750 F.2d at 80. Finally, as for factor six, "the court need not find any impropriety . . . to hold that agency action is unreasonably delayed," *Id.* at 80—though Defendants are acting improperly by withholding funding based on unlawful conditions. *See* FAC ¶¶ 139-144.

Likewise, even though COPS is not a formula grant, California satisfies all of the factors for mandatory relief for that grant. Since Defendants awarded the grant to California already, Defendants' allocation of funding to California is no longer discretionary since the State complies with the grant's conditions. Further, Defendants unlawful withholding of funding has precluded California from timely using the grant to the detriment of public safety. Caligiuri Decl. ¶¶ 23-25.

Alternatively, the court should issue a mandatory injunction ordering the disbursement of JAG funding on the basis of Plaintiff's request that it "[p]ermanently enjoin Defendants from using the § 1373, Access, and Notification Conditions as restrictions for JAG funding," FAC, Prayer for Relief ¶ 2, and from "withholding and terminating" JAG and COPS funding, *id*. ¶¶ 3, 4. *See Marquez v. Hardin*, 339 F. Supp. 1364, 1366, 1368 (N.D. Cal. 1969) (analyzing Plaintiffs' prayer that Defendants be enjoined from "failing or refusing to enforce their statutory duty" under the National School Lunch Act as a mandamus claim, though it was "cast in terms of a restraining injunction"). In this case, a mandatory injunction compelling the government to disburse the funds is a necessary component of the requested injunctive relief.

CONCLUSION

For the foregoing reasons, California requests this Court grant its Motion.

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