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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

DONALD J. TRUMP, President of the United States, UNITED STATES OF AMERICA, ELAINE DUKE, Acting Secretary of United States Department of Homeland Security, JEFFERSON B. SESSIONS III, Attorney General of the United States, DOES 1-100,

Defendants.

Case No. 3:17-cv-00485-WHO

PLAINTIFF CITY AND COUNTY OF SAN FRANCISCO'S REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Date: October 18, 2017
Time: 2:00 p.m.
Judge: Honorable William H. Orrick
Department: Courtroom 2, 17th Floor

Date Filed: January 31, 2017
Trial Date: April 23, 2018

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Introduction

San Francisco seeks a declaration that "San Francisco Administrative Code Chapters 12H and 12I comply with 8 U.S.C. § 1373." Dkt. No. 158-1 at 2. Defendants' suggestion that San Francisco seeks a broader declaration about other laws, policies, or practices, is incorrect. *See* Dkt. No. 172 ("Opp.") at 8, 16. While San Francisco believes that all of its laws, policies, and practices are consistent with Section 1373, the present request for declaratory relief concerns only San Francisco's sanctuary laws—Chapters 12H and 12I—because these are the laws that Defendants have specifically targeted for possible enforcement action.

Defendants have threatened three types of action against jurisdictions, such as San Francisco, that they regard as violating Section 1373. First, the Executive Order itself directs the withholding of federal funds from jurisdictions that "willfully violate Section 1373." Executive Order § 9(a). Second, Defendants have threatened to bring civil preemption suits against these jurisdictions. *See* Supplemental Request for Judicial Notice in Support of Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment ("Supp. RJN") Exh. A at 8; Exh. B at 26. Third and finally, Defendants have threatened criminal action against officials who falsely certify compliance with Section 1373. Dkt. No. 163 ("MSJ RJN") Exh. O at 38. These threats create significant pressure for jurisdictions to change their laws, whether or not they already comply with Section 1373. Indeed, by threatening dire consequences for non-compliance, while creating a maelstrom of uncertainty about what is required to comply, Defendants seek to compel changes beyond the requirements of Section 1373 itself. *See* Dkt. No. 158 ("MSJ") at 5 (noting that the Executive Order led Miami-Dade County to change its detainer policy).

San Francisco seeks declaratory relief to alleviate these threats. Chapters 12H and 12I do not restrict sending federal immigration officials information about an individual's immigration status, and they therefore comply with Section 1373. While Defendants would prefer to delay resolution of this issue, and argue that it requires further factual development (Opp. at 16–17) or should be addressed in another pending case (Opp. at 9), San Francisco's claim presents a pure question of law that will be the same regardless of the case in which it is litigated. Further, Defendants' position that Chapters 12H and 12I violate Section 1373 (Opp. at 13), coupled with their repeated suggestion that this issue should

not be decided until Defendants bring an enforcement action against San Francisco (Opp. at 3, 9, 11), underscores San Francisco's need for declaratory relief. "The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981).

San Francisco also seeks declaratory relief and a permanent injunction against Section 9(a) of the Executive Order. The Court has already held that San Francisco is likely to succeed on the merits of its claims against the Executive Order and that injunctive relief is warranted. Defendants offer no reason to reconsider this holding, and no reason to delay entry of a permanent injunction.

Argument

I. San Francisco Is Entitled To A Declaratory Judgment That Chapters 12H And 12I Of Its Administrative Code Comply With Section 1373.

A. San Francisco's Declaratory Relief Claim Is Justiciable Because There Is An Actual Controversy About Whether 12H And 12I Conflict With Section 1373.

The Court has already held that "San Francisco has stated a justiciable claim for declaratory relief." Dkt. No. 146 ("Recon. Order") at 19. As the Court recognized, the relevant question for both Article III standing and entitlement to relief under the Declaratory Judgment Act is whether the claim concerns an "actual controversy." *Id.* at 16. Fundamentally, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. at 17 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). An actual controversy about San Francisco's sanctuary laws has existed throughout this litigation, and this controversy is only underscored by Defendants' brief, which contends that Chapters 12H and 12I conflict with Section 1373. Opp. at 13.

In arguing that San Francisco's declaratory relief claim is not justiciable, Defendants seek to impose four new barriers to declaratory relief. These barriers have no statutory basis, and as discussed below, they conflict with numerous cases deciding declaratory relief claims in similar circumstances.

First, Defendants contend that declaratory relief is not appropriate because San Francisco has already enacted the laws at issue. Opp. at 10. This is wrong. When there is an actual controversy about

whether a local or state law complies with federal law, the local or state jurisdiction may seek declaratory relief to resolve that controversy. *See, e.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 730–31 (1995) (ruling on City of Edmonds' declaratory judgment claim that the Fair Housing Act did not constrain a City zoning code rule); *Arizona v. Atchison, Topeka and Santa Fe R.R. Co.*, 656 F.2d 398, 402–03 (9th Cir. 1981) (ruling on Arizona's request for a declaration that its scheme of assessing property for tax collection was consistent with the Railroad Revitalization and Regulatory Reform Act of 1976).

Second, Defendants contend that the Court cannot issue declaratory relief about San Francisco's laws without reference to "the City's policies and conduct in implementing those ordinances." Opp. at 11. This, too, is wrong. Courts routinely decide whether a state law is facially consistent with federal law, without any inquiry into the state law's implementation. *See, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98–99 (1992) (evaluating only the face of the laws at issue in a declaratory judgment action regarding interaction between Illinois hazardous waste laws and federal Occupational Safety and Health Act); *Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996) (holding "preemption challenge is fit for judicial decision" and that the court "can decide the newspapers' claim without further factual development"). In *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), for instance, the Supreme Court decided a declaratory judgment action without awaiting further factual development regarding California's implementation of the challenged laws. *Id.* at 201. The Court stated that "although it would be useful to have the benefit of California's interpretation of what constitutes a demonstrated technology or means for the disposal of high-level nuclear waste, resolution of the preemption question need not await that development." *Id.*

Indeed, Defendants' Answer to San Francisco's allegation that it complies with Section 1373 confirms that this a purely legal question calling for "conclusions of law." Dkt. No. 152 ¶¶ 38, 145.[1] Defendants are bound by their Answer, which forecloses their newfound argument that the Court

[1] Defendants have also expressed the view that this is a legal question in requiring certifications of compliance with Section 1373 from jurisdictions' chief *legal* officers. MSJ RJN Exh. O at 38.

cannot decide this question without a factual inquiry. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

Third, the Court has already rejected Defendants' argument (Opp. at 9, 11–12) that a plaintiff must have an independent statutory cause of action to bring a claim for declaratory relief. Recon. Order at 16–17. Defendants give no reason for the Court to revisit its prior holding on this issue.

Fourth, Defendants are wrong that declaratory relief is available only when it would eliminate all "legal jeopardy." *See* Opp. at 8–11. The Declaratory Judgment Act makes declaratory relief available "whether or not further relief is or could be sought," 28 U.S.C. § 2201, explicitly acknowledging the possibility of further litigation related to the controversy at issue. Consistent with this directive, declaratory judgments need not eliminate all sources of controversy between the parties. For instance, the Supreme Court has repeatedly held that declaratory relief is appropriate on a patent infringement theory even though it would not resolve potential contractual disputes. *See Medtronic, Inc. v. Mirowski Family Ventures,* LLC, 134 S. Ct. 843, 848 (2014); *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128-29 (2007). Similarly, the Court has explained that particular applications of a statute may be declared unconstitutional, even though the statute could conceivably be constitutionally applied in other circumstances. *Steffel v. Thompson*, 415 U.S. 452, 470 (1974) (*quoting Perez v. Ledesma*, 401 U.S. 82, 104, 124–26 (1971)).[2]

Calderon v. Ashmus, 523 U.S. 740 (1998), is not to the contrary. Defendants rely on the Court's statement that an inmate contemplating a future habeas petition could not "carve out one issue in the dispute for separate adjudication." *Id*. at 749. Yet *Calderon* distinguished this request for an advance ruling on a collateral legal issue from "the traditional scope of declaratory judgment actions" which have "completely resolved a concrete controversy susceptible to conclusive judicial

[2] Similarly, another court in the Northern District recently found declaratory relief to be proper in a case where Apple sought declaratory judgment on seven of many patents held by Ericsson. *Apple, Inc. v. Telefonaktiebolaget LM Ericsson, Inc.*, No. 15-cv-00154, 2015 WL 1802467 (N.D. Cal. Apr. 20, 2015). Ericsson argued that declaratory relief was improper because the dispute between Apple and Ericsson over Apple's products involved more than just these seven patents. *Id.* at *2 ("Ericsson's main contention in its briefs and at oral argument is that Apple's complaint is an inconsequential drop in the ocean that divides the parties."). Relying on *MedImmune*, the court found that declaratory relief was proper because the seven patents formed an adequate "case and controversy" between the parties.

determination." *Id*. San Francisco's request for declaratory relief falls squarely within this latter category. Defendants have threatened, among other things, to bring "civil litigation asserting that a jurisdiction's law or policy is preempted by federal law." Supp. RJN Exh. A at 8; *see also* Exh. B. at 26. And Defendants reiterate in their Opposition that they may bring an "enforcement action" regarding "whether the San Francisco ordinances are consistent, on their face, with Section 1373." Opp. at 3. San Francisco's request for declaratory relief does not attempt to "carve out" an isolated issue, but instead seeks relief that would completely resolve this threatened action. The possibility that Defendants might take other action against San Francisco does not change this analysis. "A declaratory action need not be dismissed because it could not settle all possible differences between the parties[.]" 10B Wright & Miller, Federal Practice And Procedure § 2759.

B. Chapters 12H And 12I Comply With Section 1373.

1. Chapter 12H

Despite Defendants' contrary arguments, Chapter 12H is fully consistent with Section 1373. Chapter 12H includes two related prohibitions and a savings clause. The "assistance" provision restricts "us[ing] any City funds or resources to assist in the enforcement of Federal immigration law." S.F. Admin. Code § 12H.2. The "information" provision restricts using City funds or resources to "gather or disseminate information regarding release status of individuals or any other such personal information as defined in Chapter 12I." *Id*. Finally, the savings clause exempts from both provisions any assistance "required by Federal or State statute, regulation, or court decision." *Id.*

Defendants' argument that Chapter 12H violates Section 1373 fails for three independent reasons. First, Chapter 12H's savings clause requires compliance with federal law, removing the hypothetical conflict with Section 1373 that Defendants suggest. Second, Defendants focus on Chapter 12H's "assistance" provision, but it is the more specific "information" provision that governs the sharing of information with federal immigration officials, and permits sharing the narrow category of information addressed by Section 1373. Third, the City amended Chapter 12H specifically to delete a prior restriction against sharing immigration status information, evincing a clear intent to eliminate this restriction and to comply with Section 1373.

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To begin, Chapter 12H's savings clause expressly requires compliance with federal law. *See* S.F. Admin. Code § 12H.2. This savings clause avoids the possible conflict that Defendants posit between Chapter 12H and Section 1373. Indeed, the Justice Department's Office of Inspector General approved this precise language in a 2007 report evaluating jurisdictions' cooperation with ICE and compliance with Section 1373:

> San Francisco has designated itself as a "City and County of Refuge" and has limited the extent to which municipal agencies and employees may assist in immigration enforcement. The City Administrative Code states that "no department, agency, commission, officer or employee . . . shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals . . . *unless such assistance is required by federal or state statute, regulation or court decision.*" The proviso requiring compliance with federal law reinforces our view that there is insufficient evidence to conclude that San Francisco fails to cooperate with ICE's efforts to remove undocumented aliens.

Supp. RJN C at 24 (emphasis in original). The report went on to conclude that "in light of the specific provisions requiring compliance with federal law, we cannot conclude that San Francisco's policies are contrary to 8 U.S.C. § 1373." *Id.* at 26. This conclusion is correct.[3]

Defendants' 12H arguments focus on Chapter 12H's "assistance" provision, but it is the more specific "information" provision that governs the sharing of information with federal immigration officials. "A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." *S.F. Taxpayers Ass'n v. Bd. of Supervisors*, 2 Cal.4th 571, 577 (1992) (quoting *Rose v. State*, 19 Cal.2d 713, 723–24 (1942)).[4] Defendants argue that this canon of statutory construction does not apply because of the disjunctive "or" between the two clauses, meaning they can operate independently (Opp. at 14 n.4), but that argument is unavailing. As the Supreme Court recently explained:

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[3] Defendants have recently changed their interpretation of the 12H savings clause, although the savings clause remains unaltered. Defendants' brief (Opp. 15-16) and a 2016 OIG memo opine that the Chapter 12H savings clause "would not seem to be effective in precluding the law from running afoul of Section 1373." MSJ RJN Exh. F at 6 n.7. Defendants do not explain this change in position.

[4] Federal courts are "bound by California rules of construction in [their] independent interpretation of the California statutes at issue." *Goldman v. Salisbury* (*In re Goldman*), 70 F.3d 1028, 1029 (9th Cir. 1995).

> We know of no authority for the proposition that the canon is confined to situations in which the entirety of the specific provision is a "subset" of the general one. When the conduct at issue falls within the scope of both provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general.

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2072 (2012). Here, the conduct at issue is sharing immigration status information with federal immigration officials. As in *RadLAX*, that conduct could fall within the scope of both provisions, but the specific "information" provision presumptively governs.

Thus, responding to Defendants' hypothetical, Chapter 12H does not "prevent an employee from using her office telephone to call federal authorities to report on an individual's immigration status." Opp. at 15. This sharing of information is governed by the specific provision about sharing information with federal immigration officials, not by the general prohibition against assisting in the enforcement of immigration law. And as explained below, the information provision was amended to *allow* sharing immigration status information, ensuring compliance with Section 1373.

Indeed, the third reason Defendants' argument fails is that the City amended Chapter 12H specifically to delete a prior restriction against sharing immigration status information. *See* Supp. RJN Exh. D. The information provision previously prohibited sharing information about "immigration status," but the City amended that prohibition in July 2016 to delete the reference to "immigration status" and replace it with "release status and other such personal information." Neither "release status" nor "personal information" encompasses immigration status information as addressed by Section 1373. *See* MSJ at 11. "Release status" refers to whether an individual is in law enforcement custody and "personal information" is defined to mean "any confidential, identifying information about an individual, including, but not limited to, home or work contact information, and family emergency contact information." S.F. Admin. Code § 12I.2. This does not include information about a person's immigration status, which cannot be used to identify or contact an individual.

"When legislators delete language, we may assume that they intended to eliminate the effect of the previous wording." *See Stewart v. Ragland*, 934 F.2d 1033, 1037 n.6 (9th Cir. 1991). Put differently, "[t]he sweep of [a] statute should not be enlarged by insertion of language which the Legislature has overtly left out." *Traverso v. People ex rel. Dep't of Transportation*, 46 Cal. App. 4th

1197, 1207 (1996) (quoting *People v. Brannon*, 32 Cal. App. 3d 971, 977 (1973)). Construing Chapter 12H to prohibit sharing immigration status information would run afoul of this rule. The Board of Supervisors deleted a restriction against sharing immigration status information. The Court should reject Defendants' attempts to reinsert that deleted language in order to create a conflict with federal law where none otherwise exists.

2. Chapter 12I

Defendants cite two provisions of Chapter 12I in arguing that it violates Section 1373. Neither of these provisions, however, conflicts with Section 1373.

Section 12I.3(e) states in full: "Law enforcement officials shall not arrest or detain an individual, or provide any individual's *personal information* to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws." *Id*. (emphasis added). As explained above, however, "personal information" does not include immigration status, and this subsection does not restrict local officials from sharing immigration status information with federal officials. Indeed, this definition was added at the same time that the City *deleted* a reference to immigration status information, establishing a clear intent to remove any restriction on sharing that information. *See* pages 7–8, *supra*.

Section 12I.5 requires the Sheriff and Juvenile Probation Officer to provide semi-annual reports to the Board of Supervisors that include, among other things, "a description of any communications the Department made to the Federal agency charged with enforcement of the Federal immigration law." Defendants contend, without evidence, that this reporting requirement discourages local officers from sharing immigration status information with federal authorities. Yet this is a run-of-the-mill reporting requirement—typical in federal, state, and local law[5]—that gives policymakers

[5] *See, e.g.*, 10 U.S.C. § 4542(g) (requiring the Secretary of the Army to file a semi-annual report with Congress describing any cooperative project agreements it enters into with foreign countries regarding a technical data package for large-caliber weapons); Cal. Rules of Ct. 10.855(j) (requiring each superior court to file a semi-annual report to the California Judicial Council containing a list of court records destroyed, preserved, or transferred according to statutory requirements); S.F. Admin. Code § 37.9E(j) (requiring the San Francisco Rent Board to provide an annual report to the Board of Supervisors listing all rental units that have been the subject of buyout agreements).

information about how laws are implemented. Defendants' argument implies that San Francisco must amend or delete its reporting requirements in order to conform with Section 1373. Yet this suggestion that the City's legislative body must be kept in the dark about City employees' communications with federal officials raises serious Tenth Amendment concerns. *See* pages 10–11, *infra*.

Finally, Defendants argue—without a scintilla of evidence—that "a San Francisco officer would risk disciplinary action any time he or she shared information regarding immigration status, rendering the ordinance in square violation of Section 1373." Opp. at 14. This is pure conjecture, with no support in the record or in the plain text of Chapter 12I. To the contrary, record evidence shows that San Francisco has affirmatively informed all employees about their rights under Section 1373, and explained that Chapters 12H and 12I impose *other* types of restrictions, which are consistent with federal law. MSJ RJN Exh. V.

3. Section 1373

The plain text of Section 1373 does not limit a local government's actions regarding any information except for "citizenship or immigration status." As discussed above, Chapters 12H and 12I do not regulate this category of information. Defendants' argument that these ordinances nonetheless violate Section 1373 depends on an expansive interpretation of Section 1373 that is divorced from the statutory text and raises serious constitutional questions. For both reasons, the Court should reject Defendants' overly broad interpretation of Section 1373, and hold that the statute means what it says: local governments may not restrict employees from sharing immigration status information with federal immigration officials, but they may impose other restrictions.

As one example of Defendants' expansive interpretation of Section 1373, they now argue that it may cover release date information requested in ICE detainers (Opp. at 12), despite prior briefing to the contrary (Dkt. No. 133 at 7–8). ICE detainers ask jurisdictions to notify the Department of Homeland Security at least 48 hours before releasing a named individual from custody, and to maintain custody of the individual for up to 48 hours beyond the scheduled release time in order to allow DHS to take them into custody. *See* Dkt. No. 161 at Exh. A. Yet notwithstanding Defendants' attempt to bring notification of release date within the scope of Section 1373, "no plausible reading of 'information regarding . . . citizenship or immigration status' encompasses the release date of an

undocumented inmate." *Steinle v. City and Cty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017). The *Steinle* court explained:

> Nothing in 8 U.S.C. § 1373(a) addresses information concerning an inmate's release date. The statute, by its terms, governs only "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). If the Congress that enacted the Omnibus Consolidated Appropriations Act of 1997 (which included § 1373(a)) had intended to bar all restriction 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. It did not, and no plausible reading of "information regarding . . . citizenship or immigration status" encompasses the release date of an undocumented inmate. Because the plain language of the statute is clear on this point, the Court has no occasion to consult legislative history.

Id. Steinle's reasoning is correct, and it also applies to Defendants' suggestion that Section 1373 is implicated by any requirement that could have the effect of "discouraging local officers from sharing immigration-status information with federal authorities." Opp. at 14. As Defendants' argument makes clear, they view *any* restriction on assisting with federal immigration enforcement or communicating with ICE as discouraging information sharing, and potentially violating Section 1373. For a jurisdiction to comply with Defendants' expansive view of Section 1373, it would have to allow employees to spend significant time and resources responding to detainer requests, among other things. *See* Dkt. No. 160 (noting additional administration and training required to comply with ICE detainer requests); Dkt. No. 161 (noting increasing volume of detainer requests).

Even if the text of Section 1373 could possibly be read to require jurisdictions to do more than allow employees to share immigration status information with federal officials, the canon of constitutional avoidance would preclude this interpretation. When faced with two possible constructions of a statute, one of which raises "serious constitutional problems," a reviewing court should adopt the interpretation that poses no such constitutional difficulty. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). For the doctrine to apply, it is not necessary for a court to determine that the proffered interpretation is unconstitutional. It is sufficient that the interpretation would give rise to serious constitutional questions. *Id.* at 191; *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1111 (9th Cir. 2001).

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At a minimum, Section 1373 would raise serious Tenth Amendment questions if it required local governments to help enforce federal immigration laws, by, for example, responding to detainer requests. "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). Section 1373 would also pose serious constitutional questions if it were read to preempt local laws like Chapters 12H and 12I, which reflect San Francisco's considered judgment that limiting local involvement in federal immigration enforcement promotes public health, safety, and welfare. S.F. Admin. Code § 12.I.1. These traditional matters of local concern lie at the heart of a state's police power. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Similarly, interpreting Section 1373 to impose additional restrictions on a state's authority to control its own employees—by, for example, precluding reporting requirements about employees' actions within the scope of their official duties—would strike at the heart of state sovereignty. *See Nevada v. Hicks*, 533 U.S. 353, 365 (2001); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "[I]t is incumbent on the federal courts to be certain of Congress' intent before finding that federal law overrides the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory*, 501 U.S. at 460). Section 1373 provides no such certainty, and the Court should decline Defendants' invitation to adopt an interpretation that raises serious constitutional questions.

C. Further Factual Development Is Not Necessary To Resolve This Claim.

Defendants make a half-hearted request for further factual development under Federal Rule of Civil Procedure 56(d), but they make no attempt to satisfy the requirements of this Rule. Opp. at 17. Rule 56(d) requires a party seeking continuance of a summary judgment motion to "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition . . . ." This affidavit must show (1) "the specific facts that [Defendants] hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779–80 (9th Cir. 1998). "References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f)" (which was subsequently recodified as

Rule 56(d)). *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986). Thus, Defendants cannot move for Rule 56(d) relief by merely stating in their brief that "factual development . . . would be needed" in this matter. Opp. at 17.

Even if Defendants had made a proper motion, Rule 56(d) has no bearing on a case that involves "a pure question of law." *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1048–49 (9th Cir. 2015). As discussed in Section I(A), *supra*, San Francisco's declaratory relief claim presents a pure question of statutory construction: whether Chapters 12H and 12I comply with Section 1373. Defendants previously agreed that no factual development is needed to resolve this claim, stating that whether they would seek discovery from San Francisco turned on how San Francisco styled its declaratory relief claim. *See* Supp. RJN Exh. E at 13:5-18. Defendants made clear that no discovery would be necessary if San Francisco's claim was "based only on the face of their ordinances." *Id*.

Consistent with this representation, Defendants have not sought *any* form of discovery in this case, and the time for them to do so has passed. *See* Dkt. No. 88 (setting close of fact discovery on October 31, 2017); Fed. R. Civ. P. 33 and 34 (allowing 30 days to respond to written discovery). This creates an additional bar to Rule 56(d) relief, which requires that a party seeking further factual development has "diligently pursued its *previous* discovery opportunities." *Qualls ex rel. Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

Finally, Defendants speculate without evidence that San Francisco has internal policies that conflict with Section 1373. Yet "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (footnote omitted). For the reasons explained above, San Francisco's policies are not material to the Court's decision about whether Chapters 12H and 12I on their face conflict with Section 1373. And even if they were relevant, the only record evidence suggests that these policies are consistent with Chapters 12H and 12I, and with Section 1373.[6] *See* MSJ RJN Exh. V; *see also* Section I(B)(2), *supra*.

[6] Instead of offering evidence on this point, Defendants repeatedly cite *Steinle*'s discussion of a memorandum, issued by a *prior* San Francisco sheriff under a *prior* version of Chapter 12H, that restricted providing citizenship or immigration status information to ICE. Opp. at 10, 11, 17 (citing *Steinle*, 230 F. Supp. 3d at 1003-04). But San Francisco's current Sheriff revoked the memorandum

II. San Francisco Is Entitled To Declaratory Relief And A Nationwide Injunction Enjoining Section 9(A) Of The Executive Order.

Defendants offer no reason why this Court should not permanently enjoin Section 9(a) of the Executive Order. Instead, they simply repeat arguments they have made previously regarding the justiciability of San Francisco's claims and the impact of the AG Memorandum. This Court has already rejected Defendants' arguments. *See generally* Recon Order. It should do the same here, and enter a nationwide permanent injunction prohibiting enforcement of the Executive Order.

A. San Francisco's Challenge To The Executive Order Is Justiciable.

Defendants argue that San Francisco lacks standing to pursue its challenges to the Executive Order. Defendants claim that San Francisco cannot point to a concrete injury from the Executive Order, and argue that the Executive Order is an internal directive that does not govern the implementation of existing law. This Court has previously rejected these exact arguments, and concluded that San Francisco's claims are ripe, that San Francisco has standing, and that the Executive Order is not an internal directive. Recon. Order at 14–15; *see also* Dkt. No. 82 ("PI Order") at 11–35.

Defendants offer no new reason why San Francisco's claims are not justiciable. Instead, they argue that the Federal Government's failure to take any steps to implement the Executive Order—aside from the AG Memorandum—shows that San Francisco is not injured. Opp. at 19. But Section 9(a) has been enjoined during this time (PI Order at 49), and Defendants' inaction while they are bound by the preliminary injunction does not diminish San Francisco's standing to seek summary judgment.

B. The Executive Order's Funding Restriction Violates The Separation of Powers, The Spending Clause, And The Tenth Amendment.

Defendants also reiterate their previous arguments that the Funding Restriction complies with the Separation of Powers, the Spending Clause, and the Tenth Amendment. But this Court has

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discussed in *Steinle*, and the Sheriff's current policies conform with the current version of Chapter 12H. *See* Declaration of Sheriff Vicki Hennessy In Support of San Francisco's Reply to Opposition to Motion for Summary Judgement at ¶¶ 5-6. These policies do not restrict Department employees from providing ICE representatives with citizenship or immigration status information. *Id*. at ¶ 6.

previously held that the Executive Order offends these constitutional provisions, *see* Recon. Order at 15, PI Order at 35–41, and none of Defendants' arguments affect the Court's earlier analysis.[7] Defendants continue to suggest that the AG Memorandum eliminates these constitutional concerns. Opp. at 20–25. But this Court has already found that the AG Memorandum is nothing more than "an 'illusory promise' to enforce the Executive Order narrowly and, as such, does not resolve the constitutional claims" that San Francisco has brought. Recon. Order at 13–14.

C. The Executive Order's Enforcement Provision Violates The Tenth Amendment.

Defendants likewise offer no reason why the Court should not grant summary judgment regarding the Executive Order's Enforcement Provision. The Court has already found the Enforcement Provision to exceed the Tenth Amendment's limitations. *See* Recon. Order at 15; PI Order at 39–41.

D. The Court Should Issue A Nationwide Injunction Against All Defendants.

Because the Executive Order applies nationwide, the Court should issue a nationwide injunction preventing its enforcement. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). District courts routinely grant nationwide injunctions, particularly in cases like this one involving the facial invalidity of a federal law. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (noting that "the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction"); *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1410 (D.C. Cir. 1998) (affirming a nationwide injunction in the context of a "facial challenge to the validity of a [federal] regulation").

Defendants' contrary arguments are unavailing. Opp. at 27–28. That the Ninth Circuit affirmed the denial of a nationwide injunction in a single case, *Skydive Arizona, Inc. v. Quattrochi*, 673 F.3d 1105, 1116 (9th Cir. 2012), has no bearing on whether nationwide relief is appropriate here. The *Skydive Arizona* injunction was limited to Arizona because the plaintiff failed to provide that the defendant's "conduct outside Arizona was illegal." *Id*. Here, by contrast, Section 9(a) of the Executive

[7] Indeed, San Francisco's reliance on federal funds—and the attendant harm threatened by the Executive Order—is clearer than ever. *See* Supp. RJN Exh. F.

Order is unconstitutional on its face, and Defendants' conduct to enforce Section 9(a) anywhere in the nation would be illegal. In short, *Skydive Arizona* merely reinforces that a lower court has the discretion to craft an injunction that will remedy the harm at issue.[8]

Defendants offer no authority to the contrary. Instead, they dredge up an amicus brief San Francisco signed opposing a nationwide injunction in *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). As Defendants acknowledge (Opp. at 28), the court in that case affirmed a nationwide injunction against a federal program. That San Francisco unsuccessfully opposed a nationwide injunction in a separate case cannot forever preclude it from seeking nationwide relief in another case.

Conclusion

For the foregoing reasons, San Francisco respectfully requests that the Court: (1) declare that Chapters 12H and 12I of San Francisco's Administrative Code comply with Section 1373, (2) declare that Section 9(a) of the Executive Order is unconstitutional on its face, and (3) enter a nationwide injunction prohibiting all Defendants, including the President, from enforcing Section 9(a) of the Executive Order.

Dated: October 4, 2017

DENNIS J. HERRERA
City Attorney

By: */s/ Mollie M. Lee*
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[8] As relevant here, the district court's discretion includes deciding whether the constitutional violations in the Executive Order can be remedied by an injunction against the named inferior officers, or whether injunctive relief against the President himself is warranted. Previously, the Court declined to issue injunctive relief against the President (PI Order at 48-49), but a subsequent White House statement suggests that the enjoined provision of the Executive Order is still being enforced. *See* MSJ RJN Exh. U (describing Section 9(a) of the Executive Order and indicating that the Department of Justice is enforcing this section). Statements like this maintain the coercive threat of the Executive Order, and an injunction against all Defendants is necessary to remedy this harm.