

1 BRETT SHUMATE
 Assistant Attorney General
 2 Civil Division
 YAAKOV ROTH
 3 Principal Deputy Assistant Attorney General
 DREW C. ENSIGN
 4 Deputy Assistant Attorney General
 ELIANIS PEREZ
 5 Assistant Director
 LAUREN FASCETT
 6 Senior Litigation Counsel
 LINDSAY ZIMLIKI
 7 ANGEL FLEMING
 8 VICTORIA TURCIOS
 9 CAROLINE MCGUIRE
Trial Attorneys
 10 U.S. Department of Justice
 Office of Immigration Litigation
 11 General Litigation and Appeals Section
 P.O. Box 868, Ben Franklin Station
 12 Washington, DC 20044
 13 *Attorneys for Defendants*

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

17			
18	CITY AND COUNTY OF)	CASE NO. 3:25-CV-1350 (WHO)
	SAN FRANCISCO, <i>et al.</i> ,)	
19)	NOTICE OF MOTION AND DEFENDANTS'
	Plaintiffs,)	MOTION TO DISMISS THE SECOND
20)	AMENDED COMPLAINT
	v.)	
21	DONALD J. TRUMP, <i>et al.</i> ,)	
22)	Hearing Date: October 22, 2025
)	Time: 2:00 P.M. PST
23	Defendants.)	Honorable William H. Orrick III
24)	

25
26
27
28

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 22, 2025, at 2 P.M., or as soon thereafter as may be heard before the Honorable William H. Orrick III in Courtroom 2 of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants will, and hereby do, move this Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the Second Amended Complaint (SAC) in its entirety.

This case involves 50 Plaintiffs—various cities, counties, municipalities and charters—who seek declaratory and injunctive relief against the Government as a whole alleging that it has withheld already appropriated federal funds by issuing Executive Orders and agency memoranda. But the Court must dismiss their SAC in its entirety because the challenged Executive Orders and agency directives merely instruct agencies to assess federal grant programs to determine where they can lawfully add immigration related conditions. Plaintiffs’ SAC asserts eight causes of action. They all fail. Plaintiffs lack pre-enforcement standing to bring their constitutional claims and their Fifth Amendment claim is not ripe. Thus, the Court should dismiss them under Federal Rule of Civil Procedure 12(b)(1). Alternatively, Plaintiffs constitutional and Administrative Procedure Act claims must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

This motion is based on the Memorandum of Points and Authorities and Exhibits attached hereto; all pleadings, papers, and files in this cause of action; and such oral argument as may be presented at a hearing on the Motion.

TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 BACKGROUND 2

4 I. Subject Matter Jurisdiction Under Rule 12(b)(1) 3

5 II. Failure to State a Claim Under Rule 12(b)(6)..... 4

6

7 ARGUMENT 4

8 III. The Court Should Dismiss the SAC Under Rule 12(b)(1) For Lack of Jurisdiction

9 Because Plaintiffs Fail to Establish Article III Standing. 4

10 A. Plaintiffs fail to establish injury-in-fact. 4

11 B. Plaintiffs SAC fails to establish pre-enforcement standing. 5

12

13 C. Plaintiffs’ Fifth Amendment claim that the Executive Orders are

14 unconstitutionally vague and deprives them of money or property without due

15 process is unripe for review. 8

16 IV. The Court Should Dismiss the SAC Under Rule 12(b)(6) for Failure to State a Claim

17 Upon Which Relief Can be Granted. 9

18 A. Plaintiffs fail to plead that the Executive Orders are facially unconstitutional. 9

19

20 B. Plaintiffs fail to plead that the Executive Orders violate the doctrine of

21 Separation of Powers and the Spending Clause..... 11

22

23 C. Plaintiffs fail to plead that the Executive Orders violate the Tenth

24 Amendment. 18

25

26 D. Plaintiffs fail to state a claim under the APA for which the Court can grant

27 relief. 20

28 CONCLUSION..... 25

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Laboratories v. Gardner,
 387 U.S. 136 (1967)..... 22

Alan Guttmacher Inst. v. McPherson,
 597 F. Supp. 1530 (S.D.N.Y. 1984)..... 24

Amica Ctr. for Immigrant Rights, et al. v. U.S. Dep’t of Justice,
 No. 25-298 (RDM), 2025 WL 1852762 (D.D.C. July 6, 2025)..... 24

Arizona v. United States,
 567 U.S. 387 (2012)..... 20

Babbitt v. United Farm Workers National Union, etc., et al.,
 442 U.S. 289 (1979)..... 5

Balistreri v. Pacifica Police Dep’t,
 901 F.2d 696 (9th Cir. 1988) 4

Bennett v. Ky. Dep’t of Educ.,
 470 U.S. 656 (1985)..... 16

Bennett v. Spear,
 520 U.S. 154 (1997)..... 20

Biden v. Missouri,
 595 U.S. 87 (2022)..... 16

Biden v. Sierra Club,
 — U.S. —, 142 S. Ct. 46 (2021)..... 13

Bldg. Constr. Trades Dep’t, AFL-CIO v. Allbaugh,
 295 F.3d 28 (D.C. Cir. 2002)..... 10, 11, 14, 15

Chafin v. Chafin,
 568 U.S. 165 (2013)..... 3

1 *Charles C. Steward Mach. Co. v. Davis*,

2 301 U.S. 548 (1937)..... 18

3 *City & Cnty. of S.F.*,

4 897 F.3d 5, 6, 8

5 *City & Cnty. of San Francisco*,

6 2025 WL 1282637 16, 21

7 *City & Cty. of San Francisco v. Barr*,

8 965 F.3d 753 (9th Cir. 2020) 7

9 *City of Fall River*,

10 507 F.3d 22

11 *City of Los Angeles v. Barr*,

12 929 F.3d 1163 (9th Cir. 2019) 10

13 *City of Los Angeles v. McLaughlin*,

14 865 F.2d 1084 (9th Cir. 1989) 8

15 *City of Philadelphia v. Sessions*,

16 280 F. Supp. 3d 579 (E.D. Penn. 2017) 21, 24

17 *City of Santa Clara, Cal. v. Andrus*,

18 572 F.2d 660 (9th Cir. 1978) 8

19 *Cnty. Action of Laramie Cnty., Inc. v. Bowen*,

20 866 F.2d 347 (10th Cir. 1989) 24

21 *Cnty. Credit Union v. Citizens Equity First Credit Union*,

22 65 F.4th 1012 (9th Cir. 2023) 3

23 *Common Cause v. Trump*,

24 506 F. Supp. 3d 39 (D.D.C. 2020) 15

25 *Commonwealth v. Am. Booksellers Ass’n, Inc.*,

26 236 Va. 168 (1988) 6

27 *Daimler Chrysler v. Cuno*,

28 547 U.S. 332 (2006)..... 4

1 *Dalton v. Specter*,

2 511 U.S. 462 (1994)..... 1, 12

3 *Daniels-Hall v. Nat’l Educ. Ass’n*,

4 629 F.3d 992 (9th Cir. 2010) 14

5 *DeVillier v. Texas*,

6 601 U.S. 285 (2024)..... 13

7 *Easyriders Freedom F.I.G.H.T. v. Hannigan*,

8 92 F.3d 1486 (9th Cir. 1996) 9

9 *Env’tl. Def. Ctr., Inc. v. EPA*,

10 344 F.3d 832 (9th Cir. 2003) 20

11 *Franklin v. Massachusetts*,

12 505 U.S. 788 (1992)..... passim

13 *Freedom to Travel Campaign v. Newcomb*,

14 82 F.3d 1431 (9th Cir. 1996) 9

15 *FTC v. Standard Oil Co.*,

16 449 U.S. 232 (1980)..... 21, 22

17 *Glob. Health Council v. Trump*,

18 No. 25-5097, 2025 WL 2326021 (D.C. Cir. Aug. 13, 2025)..... 12, 13

19 *Heckler v. Chaney*,

20 470 U.S. 821 (1985)..... 24

21 *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*,

22 746 F.2d 855 (D.C. Cir. 1984)..... 24

23 *Johnson v. Riverside Healthcare System, LP*,

24 534 F.3d 1116 (9th Cir. 2008) 4

25 *Khoja v. Orexigen Therapeutics, Inc.*,

26 899 F.3d 988 (9th Cir. 2018) 4

27 *Lewis v. Continental Bank Corp.*,

28 494 U.S. 472 (1990)..... 3

1 *Lincoln v. Vigil*,
 2 508 U.S. 182 (1993)..... 23, 24, 25
 3 *Los Angeles v. Lyons*,
 4 461 U.S. 95 (1983)..... 7
 5 *Louisiana v. Biden*,
 6 64 F.4th 674 (5th Cir. 2023) 4
 7 *Lujan v. Defs. of Wildlife*,
 8 504 U.S. 555(1992)..... 4
 9 *Medina v. Planned Parenthood S. Atl.*,
 10 — U.S. —, 145 S. Ct. 2219 (2025)..... 12
 11 *Milk Train, Inc. v. Veneman*,
 12 310 F.3d 747 (D.C. Cir. 2002)..... 24
 13 *Murphy Co. v. Biden*,
 14 65 F.4th 1122 (9th Cir. 2023) 13
 15 *Myers v. United States*,
 16 272 U.S. 52 (1926)..... 11
 17 *National Federation of Independent Business v. Sebelius*,
 18 567 U.S. 519 (U.S., 2012)..... 18, 19
 19 *New Jersey Hosp. Ass’n. v. United States*,
 20 23 F. Supp. 2d 497 (D.N.J. 1998) 21
 21 *New York v. United States*,
 22 505 U.S. 144 (1992)..... 8, 16, 19
 23 *Maywathers v. Newland*,
 24 314 F.3d 1062 (9th Cir. 2002) 16
 25 *Oregon Natural Desert Ass’n. v. U.S. Forest Service*,
 26 465 F.3d 977 (9th Cir. 2006) 22
 27 *Pimentel v. Dreyfus*,
 28 670 F.3d 1096 (9th Cir. 2012) 18

1 *Policy & Rsch., LLC v. U.S. Dep’t of Health & Human Servs.*,
 2 313 F. Supp. 3d 62 (D.D.C. 2018) 24
 3 *Reno v. Flores*,
 4 507 U.S. 292 (1993)..... 10, 15
 5 *Santa Clara v. Trump, et al.*,
 6 250 F. Supp. 3d 497 (N.D. Cal. Apr. 25, 2017)..... 6
 7 *Seattle Pac. Univ. v. Ferguson*,
 8 104 F.4th 50 (9th Cir. 2024) 7
 9 *Seila Law LLC v. CFPB*,
 10 591 U.S. 197 (2020)..... 11
 11 *Sierra Club v. Trump*,
 12 929 F.3d 670 (9th Cir. 2019) 13
 13 *South Carolina v. Katzenbach*,
 14 383 U.S. 301, (1966)..... 8
 15 *South Dakota v. Dole*,
 16 483 U.S. 203 (1987)..... 8, 16, 17, 19
 17 *Spokeo, Inc. v. Robins*,
 18 578 U.S. 330 (2016)..... 3, 4
 19 *State ex rel. Becerra v. Sessions*,
 20 284 F. Supp. 3d 1015 (N.D. Cal. 2018) 7, 16, 21
 21 *State v. DOJ*,
 22 951 F.3d 84 (2d Cir. 2020)..... 19
 23 *Steel Co. v. Citizens for a Better Env’t*,
 24 523 U.S. 83 (1998)..... 4
 25 *Steffel v. Thompson*,
 26 415 U.S. 452 (1974)..... 5, 6
 27 *Texas v. United States*,
 28 523 U.S. 296 (1998)..... 5, 22

1 *Trump v. New York*,

2 592 U.S. 125 (2020)..... 7, 8

3 *U.S. Term Limits, Inc. v. Thornton*,

4 514 U.S. 779 (1995)..... 19

5 *Ukiah Valley Med. Ctr. v. Fed. Trade Comm’n*,

6 911 F.2d 261 (9th Cir. 1990) 22

7 *United States v. Alabama*,

8 691 F.3d 1269 (11th Cir. 2012) 20

9 *United States v. Mazurie*,

10 419 U.S. 544 (1975)..... 9

11 *United States v. Pickard*,

12 100 F. Supp. 3d 981 (E.D. Cal. 2015)..... 20

13 *United States v. Salerno*,

14 481 U.S. 739 (1987)..... 9

15 *United States v. South Carolina*,

16 720 F.3d 518 (4th Cir. 2013) 20

17 *United States v. Thoms*,

18 684 F.3d 893 (9th Cir. 2012) 8

19 *Urban v. Tesla, Inc.*,

20 698 F. Supp. 3d 1124 (N.D. Cal. 2023) 3

21 *Virginia v. American Booksellers, Inc.*,

22 484 U.S. 383 (1988)..... 5, 6

23 *Warren v. Fox Fam. Worldwide, Inc.*,

24 328 F.3d 1136 (9th Cir. 2003) 3

25 *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*,

26 5 F.4th 997 (9th Cir. 2021) 21

27

28

1 **Statutes**

2 2 U.S.C. § 681 *et seq.* 11, 12

3 5 U.S.C. 701(a)(2)..... 22, 23, 25

4 5 U.S.C. § 704..... 20, 22

5 6 U.S.C. § 112(b)(2) 23

6 8 U.S.C. § 1373..... 6, 21

7 8 U.S.C. § 1373(a) 14, 17

8 8 U.S.C. § 1601..... 18

9 8 U.S.C. § 1601(2)(A)..... 17

10 8 U.S.C. § 1601(3) 17

11 8 U.S.C. § 1611(c)(1)(A) 23

12 42 U.S.C. § 11386(b)(8) 23

13 42 U.S.C. § 3752(a)(5)(D) 15

14 49 U.S.C. § 5334(a)(1)..... 23

15

16 **Rules**

17 Fed. R. Evid. 201 14

18

19 **Other Authorities**

20 Proclamation No. 13,768,

21 82 Fed. Reg. 8799 (Jan. 25, 2017) 6

22 Proclamation No. 14,218

23 90 Fed. Reg. 8443 (Jan. 20, 2025)..... passim

24 Proclamation No. 14,169

25 90 Fed. Reg. 8619 (Jan. 30, 2025) 12

26 Proclamation No. 14,159

27 90 Fed. Reg. 10518 (Feb. 19, 2025) passim

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES¹**

2 **INTRODUCTION**

3 Here, 50 Plaintiffs seek declaratory and injunctive relief against the Government alleging that it
4 withheld already appropriated federal funds by issuing Executive Orders and agency memoranda that
5 instruct agencies to assess their federal grant programs to determine where they can lawfully add
6 immigration related conditions. Plaintiffs claim that specific sections of these Executive directives are
7 unconstitutional, both facially and as applied, and violate the Administrative Procedure Act (APA).
8 Plaintiffs do not challenge any specific grant program, nor do they allege that they have been denied
9 funding due to the addition of an immigration condition to a grant for which they applied.

10 Plaintiffs’ Second Amended Complaint (SAC) should be dismissed for lack of jurisdiction. First,
11 Plaintiffs fail to establish standing because they fail to plead an injury in fact, as they do not allege any
12 specific funding loss. Absent this, Plaintiffs must establish pre-enforcement standing, which they also fail
13 to do because the challenged Executive Orders do not proscribe conduct that implicates a constitutional
14 interest. Second, as local governments, Plaintiffs lack standing to bring a Fifth Amendment Due Process
15 challenge. Third, because their claim that the Executive directives are facially void for vagueness under
16 the Fifth Amendment’s Due Process Clause and because this claim does not implicate First Amendment
17 rights, it must be examined in light of the facts of the case. But the claim is based on facts that have yet to
18 occur. Thus, their facially void for vagueness challenge is not ripe for review.

19 Alternatively, the SAC should be dismissed for failure to state a claim upon which relief can be
20 granted. First, their claim that the Executive Orders are facially unconstitutional fail because Plaintiffs do
21 not, and cannot, establish that the Orders would be unconstitutional in all their applications. Second,
22 Plaintiffs’ independent Separation of Powers and Spending Clause claims are foreclosed by the Supreme
23 Court’s holding in *Dalton v. Specter*, 511 U.S. 462 (1994), where the claims are actually statutory violation
24 claims—the President violated the Impound Control Act of 1972 (ICA) when he issued the challenged
25 Executive Orders that (they allege) will result in the impoundment of already appropriated funds. Third,
26 Plaintiffs’ Separation of Powers claim fails because the text of the challenged Executive Orders does not
27

28

¹ Defendants herein refer to the original page numbers listed at the bottom center of Plaintiffs’ SAC.

1 freeze or withhold funds from Plaintiffs but instead instructs agencies to assess their grant programs to
2 determine where immigration related conditions can be lawfully implemented. Further, Congress has
3 frequently authorized agencies administering certain grant programs to impose discretionary conditions
4 on their receipt. Fourth, Plaintiffs’ Tenth Amendment claim fails because Plaintiffs have not and cannot
5 plead facts necessary for the Court to determine a possible commandeering where the actual conditions
6 imposed and the amount of money in question is critical to the analysis. Plaintiffs speculate that every
7 federal grant that they may apply for is implicated and that they will face enforcement actions arising from
8 the Executive directives. Their claims are speculative and contrary to the facts, especially where they have
9 not had to change their policies, or lost funds or faced any enforcement actions.

10 Likewise, Plaintiffs fail to state plausible claims for relief under the Administrative Procedure Act
11 (APA) where Plaintiffs fail to identify a final agency action. The challenged agency directives provide
12 guidance to executive agencies as to how they should review and evaluate funding and do not mark the
13 end of the decisionmaking phase for the agencies. Further, the Executive directives do not immediately
14 affect the Plaintiffs. Lastly, Plaintiffs’ challenge to the agencies’ implementation of the Executive Orders
15 at issue must also be dismissed, where the allocation of funds across various grant programs is an
16 administrative decision firmly committed to agency discretion.

17 **BACKGROUND**

18 Five locality Plaintiffs filed this lawsuit on February 7, 2025, alleging that the February 5th Bondi
19 Memo and Executive Order 14,159 violated the Separation of Powers, the Spending Clause, Due Process,
20 the Tenth Amendment, and the Administrative Procedure Act (APA). Dkt. No. 1. On February 27, 2025,
21 Plaintiffs filed a First Amended Complaint (FAC), asserting the same eight counts as the initial Complaint,
22 challenging the legality of Executive Order 14,218, and adding eleven new cities and counties as Plaintiffs.
23 Dkt. No. 22 at 4–5 (Parties), 75–86 (Count I–XIII). On March 17, 2025, Plaintiffs filed a motion for
24 preliminary injunction. Dkt. No. 61 at 1. The Court granted the preliminary injunction on April 24, 2025.
25 Dkt. No. 111.² On May 9, 2025, the Court issued an order clarifying its preliminary injunction and
26 explained that “the Government is entitled to identify particular grants and funding programs that it
27

28 ² The injunction did not apply to Defendant President Donald J. Trump “with respect to the ‘performance of his official duties.’” Dkt. No. 111 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992)).

1 believes should be conditioned upon compliance with immigration-related objectives, and to litigate its
2 position.” Dkt. No. 126 at 2. The Court further stated that if the Government “identifi[ed] the funds the
3 Government believes are at issue ... following an evaluation of the type of funding involved to determine
4 if there is a nexus between the funding stream, the jurisdiction’s policies, and the desired immigration-
5 related conditions,” doing so “may resolve some of the problems” identified. *Id.* at 6.

6 On July 8, 2025, Plaintiffs filed a Motion for Leave to File a SAC and on July 29, 2025, filed a
7 Motion for a Second Preliminary Injunction. Dkt. Nos. 151, 177, 178. The Court permitted Plaintiffs to
8 file a SAC. Dkt. Nos. 186, 193. In the SAC, Plaintiffs added thirty-four (34) new localities as plaintiffs,
9 two new defendants (Office of Management and Budget and its director, Russell Vought), and factual
10 developments since the FAC. *Id.* Plaintiffs did not seek to add new claims. *Id.* On August 23, 2025, the
11 Court granted Plaintiffs’ Motion for a Second Preliminary Injunction, which extended the Court’s first
12 preliminary injunction to the new Plaintiffs and new Defendants added to the SAC. Dkt. No. 225.

13 STANDARDS OF REVIEW

14 **I. Subject Matter Jurisdiction Under Rule 12(b)(1)**

15 “[T]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with,
16 an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.”
17 *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477
18 (1990)). Courts “may not decide questions that cannot affect the rights of litigants in the case before them
19 or give opinions advising what the law would be upon a hypothetical state of facts.” *Id.* (internal quotation
20 omitted). Rule 12(b)(1) governs motions to dismiss for lack of standing, which pertains to subject matter
21 jurisdiction. *Urban v. Tesla, Inc.*, 698 F. Supp. 3d 1124, 1131 (N.D. Cal. 2023). Jurisdictional attacks
22 under Rule 12(b)(1) may be “either facial or factual.” *Cnty. Credit Union v. Citizens Equity First Credit*
23 *Union*, 65 F.4th 1012, 1028 (9th Cir. 2023). “In ruling on a 12(b)(1) jurisdictional challenge, a court may
24 look beyond the complaint and consider extrinsic evidence.” *Warren v. Fox Fam. Worldwide, Inc.*, 328
25 F.3d 1136, 1141 n.5 (9th Cir. 2003). “The plaintiff, as the party invoking federal jurisdiction, bears the
26 burden of establishing these elements,” and “must clearly ... allege facts demonstrating each
27 element.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted).

1 **II. Failure to State a Claim Under Rule 12(b)(6)**

2 Dismissal under Rule 12(b)(6) is proper where there is either a “lack of a cognizable legal theory”
3 or “the absence of sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside*
4 *Healthcare System, LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep’t*,
5 901 F.2d 696, 699 (9th Cir. 1988)). A court may consider documents attached or incorporated by reference
6 to the complaint or “matters of which the court may take judicial notice.” *Khoja v. Orexigen Therapeutics,*
7 *Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

8 **ARGUMENT**

9 **III. The Court Should Dismiss the SAC Under Rule 12(b)(1) For Lack of Jurisdiction Because**
10 **Plaintiffs Fail to Establish Article III Standing.**

11 Plaintiffs have not established Article III jurisdiction where they have not established a
12 particularized or concrete injury or a pre-enforcement injury for purposes of standing.

13 **A. Plaintiffs fail to establish injury-in-fact.**

14 Plaintiffs must establish an injury that is concrete, particularized, and imminent rather than
15 “conjectural or hypothetical,” *Spokeo*, 578 U.S. at 339 (citations omitted), and must do so for each claim
16 and each form of relief they seek, *Daimler Chrysler v. Cuno*, 547 U.S. 332, 352 (2006). And for each
17 claim, Plaintiffs must show that relief will in fact redress their injury. *Steel Co. v. Citizens for a Better*
18 *Env’t*, 523 U.S. 83, 103 (1998). That is, it is “likely” and not “merely speculative” that the plaintiff’s
19 injury will be remedied by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561(1992).

20 The Court previously held that Plaintiffs failed to establish an injury in their FAC. *See* Dkt. 126 at
21 32 (“the Cities and Counties have not yet suffered a loss of funds or other enforcement action under the
22 2025 Executive Orders, . . .”). The same remains true of the SAC. The Executive Orders did not terminate
23 any particular fund or program; rather, they merely provided policy directives to federal agencies. Any
24 alleged future harm necessarily depends on future action by the agencies and Plaintiffs have not adequately
25 alleged any such action has impacted them. *See Louisiana v. Biden*, 64 F.4th 674, 681 (5th Cir. 2023)
26 (plaintiffs lacked standing to challenge an executive order that required agencies to “exercise discretion
27 in conducting their cost-benefit analyses and []... use the Interim Estimates as ‘appropriate and consistent
28 with applicable law,’” because “the mere ‘possibility of regulation’ fails to satisfy injury in fact”).

1 Moreover, Plaintiffs’ claims are contingent upon many layers of hypothetical and contradictory
2 future actions. Plaintiffs allege that agencies will take actions solely because of the Executive Orders’
3 directives to do so but also ignore their clear directive to stay within the confines of the law. These
4 “contingent future events ... may not occur as anticipated, or indeed may not occur at all,” rendering
5 Plaintiffs’ claims unripe for review. *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted).
6 As such, Plaintiffs’ SAC fails to establish an injury in fact.

7 **B. Plaintiffs SAC fails to establish pre-enforcement standing.**

8 Plaintiffs’ SAC fails to establish pre-enforcement standing³ because the challenged Executive
9 Orders do not proscribe conduct, let alone conduct with an arguably constitutional interest. A plaintiff
10 may demonstrate pre-enforcement standing by showing “an intention to engage in a course of conduct
11 arguably affected with a constitutional interest, *but proscribed by a statute*, and [that] there exists a
12 credible threat of prosecution thereunder.” *Babbitt v. United Farm Workers National Union, etc., et al.*,
13 442 U.S. 289, 298 (1979) (emphasis added).

14 Pre-enforcement standing is inapplicable here because the Executive Orders merely constitute
15 instructions and do not *proscribe* conduct. This case is materially distinct from Supreme Court cases which
16 found pre-enforcement standing existed. For example, in *Babbitt*, the Supreme Court found pre-
17 enforcement standing existed for certain claims challenging the Arizona Legislature’s enactment of “a
18 comprehensive scheme for the regulation of agricultural employment relations[.]” 442 U.S. at 292. The
19 challenged Arizona statute proscribed conduct related to, *inter alia*, election of bargaining representatives
20 and consumer publicity, and imposed criminal penalties for violations. *Id.* at 297. In *Steffel v. Thompson*,
21 a petitioner was threatened with criminal trespass if he did not stop distributing anti-Vietnam handbills.
22 415 U.S. 452, 454–55 (1974). There, the Court found the petitioner established pre-enforcement standing
23 to challenge the constitutionality of the Georgia trespassing statute where petitioner had “been twice
24 warned to stop handbilling...told by the police that if he again handbills at the shopping center and disobeys
25

26 ³ Despite Plaintiffs’ failure to allege an injury in fact, this Court determined Plaintiffs had pre-enforcement
27 standing for purposes of a preliminary injunction. *See* Dkt. No. 126 at 43 (stating the Cities and Counties
28 can establish standing by demonstrating a “well-founded fear that the law will be enforced against them.”)
(citing *City & Cnty. of S.F.*, 897 F.3d at 1236, quoting *American Booksellers*, 484 U.S. at 392). The Court
should revisit this finding because the SAC fails to establish pre-enforcement standing.

1 a warning to stop he will likely be prosecuted.” *Id.* at 459. In *Virginia v. American Booksellers, Inc.*, the
2 Court similarly found the booksellers had pre-enforcement standing to bring a constitutional challenge of
3 a statute prohibiting the display of sexually explicit material to juveniles where the law was “aimed
4 directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and
5 costly compliance measures or risk criminal prosecution.” 484 U.S. 383, 392, *certified question answered*
6 *sub nom. Commonwealth v. Am. Booksellers Ass’n, Inc.*, 236 Va. 168, 372 S.E.2d 618 (1988).

7 Although the relevant constitutional questions in *Babbit*, *Steffel*, and *American Booksellers*, are
8 varied, they all involved challenges to the constitutionality of laws or statutes proscribing specific conduct.
9 This element of pre-enforcement standing is missing from Plaintiffs’ case here. The Executive Orders do
10 not *proscribe* any conduct. Instead, the Executive Orders direct agencies to engage in deliberative
11 processes regarding their authority to add conditions to the disbursement of federal funds. Indeed, in the
12 months that have followed Plaintiffs’ initial preliminary injunction, the Government continues those
13 deliberative processes. For this reason, Plaintiffs have failed to establish pre-enforcement standing and
14 their SAC continues to premise their purported injury on budgetary uncertainty, as opposed to funding
15 impact. This demonstrates that funding decisions are still in flux and that the Executive Orders do not
16 have any *proscriptive* effect.

17 Moreover, the fact that this Court previously found similarly situated plaintiffs, in prior litigation—
18 *County of Santa Clara v. Trump, et al.*, 250 F. Supp. 3d 497 (N.D. Cal. Apr. 25, 2017) (Preliminary
19 Injunction Order), *aff’d*, 897 F.3d 1225 (9th Cir. 2018)—established pre-enforcement standing is not
20 controlling because the Executive Orders at issue here are distinct from those previously considered. Such
21 previous litigation was predicated on Executive Order 13,768, which is distinguishable from the executive
22 directives at issue now. *Compare* Proclamation No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) *with*
23 Presidential Proclamation 14,218, 90 Fed. Reg. 8443 (Jan. 20, 2025). In that case, Executive Order 13,768
24 specifically ordered that funding be withheld unless a locality agreed to comply with 8 U.S.C. § 1373. *See*
25 82 Fed. Reg. at 8800 (“the Attorney General and the Secretary, in their discretion and to the extent
26 consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373
27 (sanctuary jurisdictions) are not eligible to receive Federal grants...”). Sanctuary jurisdictions knew early
28 on whether they could certify compliance with 8 U.S.C. § 1373, and filed suit based on their purported

1 inability to do so. *See, e.g., City & Cty. of San Francisco v. Barr*, 965 F.3d 753, 761 (9th Cir. 2020); *State*
2 *ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1019 (N.D. Cal. 2018).

3 Here however, Executive Order 14,218 at Section 2 (i) and (ii) and Executive Order 14,159 at
4 Section 17 leave the evaluation of federal funding decisions open-ended. *See e.g.* 90 Fed. Reg. at 8447
5 (“Immediately review and, if appropriate, audit all contracts, grants, or other agreements providing Federal
6 funding to non-governmental organizations supporting or providing services, either directly or indirectly,
7 to removable or illegal aliens, to ensure...that they do not promote or facilitate violations of our
8 immigration laws.”); Proclamation No. 14,218, 90 Fed. Reg. 10518 (Feb. 25, 2025) (“ensure, consistent
9 with applicable law, that Federal payments to States and localities do not, by design or effect, facilitate
10 the subsidization or promotion of illegal immigration, or abet so-called ‘sanctuary’ policies that seek to
11 shield illegal aliens from deportation...”). Because the underlying facts here support that the Executive
12 Orders call for a deliberative process of government funding review, which is taking place, Plaintiffs have
13 not established pre-enforcement standing.

14 Additionally, while the Executive Orders direct agencies to evaluate federal funding of certain
15 localities, the “when” and “how” of the Executive Branch implementing this general directive, and how
16 it will affect each Plaintiff remains “no more than conjecture.” *Trump v. New York*, 592 U.S. 125, 131
17 (2020) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)), *cf. Seattle Pac. Univ. v. Ferguson*, 104
18 F.4th 50, 59 (9th Cir. 2024) (“Some of our precedents suggest that pre-enforcement standing requires the
19 ‘when, to whom, where, or under what circumstances’ the plaintiff plans to violate the law.”). This is
20 because the Executive Orders both call for a review and contain a savings clause that all action be taken
21 “consistent with applicable law[.]” E.O. 14,218 § 2(a)(ii) (emphasis added); 90 Fed. Reg. at 10518; *see*
22 *also* E.O. 14,159 § 19; 90 Fed. Reg. at 8447. The Bondi Memo and Noem Memos provide no more of a
23 “concrete” injury than the Orders. For instance, the Bondi Memo directs the Associate Attorney General
24 to create a report identifying grants that may be conditioned upon compliance with immigration laws.
25 Bondi Memo at 2. The Noem Memo similarly directs components to review federal financial assistance
26 awards to determine if Department funds are going to sanctuary jurisdictions and, to the extent consistent
27 with relevant legal authorities and applicable terms and conditions of each award, cease providing federal
28 funding to sanctuary jurisdictions. Noem Memo at 3. The federal government is permitted to internally

1 evaluate its funding decisions, regardless of whether it publicly announces that an evaluation process is
2 happening. *See* Dkt. No. 136 at 8 (“The Preliminary Injunction is not intended to hamstring the
3 Government’s lawful evaluation of federal funds to States and localities that have sanctuary policies.”).

4 Lastly, any future Executive action “will reflect both legal and practical constraints,” as any action
5 will be lawful, “making any prediction about future injury [is] just that—a prediction.” *Trump*, 592 U.S.
6 at 133. Missing from Plaintiffs’ equation is the identification of any funding that has decreased solely
7 because of an Executive Order. No meaningful analysis can occur without such funding details. *See e.g.*,
8 *City and Cnty of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (examining whether
9 Congress tied withholding of funding to compliance when assessing whether an Executive Order violated
10 Separation of Powers); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (evaluating the
11 relationship between the conditions and the purpose of the federal spending to determine if such conditions
12 violated Spending Clause); *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987) (same).

13 **C. Plaintiffs’ Fifth Amendment claim that the Executive Orders are**
14 **unconstitutionally vague and deprives them of money or property without due**
15 **process is unripe for review.⁴**

16 Plaintiffs allege that the Executive Orders are void for vagueness, arguing both that they are
17 unconstitutionally vague in every possible application, *see* Dkt. No. 193 at Prayer for Relief at ¶¶ 1, 3, 5,
18 and as they apply to Plaintiffs *id.* at ¶¶ 2, 4, 6; ¶¶ 430-432. Specifically, Plaintiffs contend that the
19 Executive directives “work a deprivation of money or property without due process” because they are “so
20 vague they fail to provide fair notice of what is prohibited[.]” Dkt. No. 193 at ¶¶ 428, 429. Courts,
21 however, analyze vagueness challenges to statutes or laws as they are applied, rather than on their face,

22 ⁴ Initially, Plaintiffs, who are all cities, counties, and municipalities, have failed to establish that they have
23 standing to bring a Due Process claim under the Fifth Amendment. *See City of Los Angeles v. McLaughlin*,
24 865 F.2d 1084, 1087 (9th Cir. 1989) (“We have not ruled on whether a city has standing to sue on behalf
25 of its citizens under the due process clause.”); *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 675–77
26 (9th Cir. 1978) (the court specifically declined to decide whether Santa Clara was a “person” entitled to
27 due process protection under the Fifth Amendment and disposed of the case on other grounds), *cert.*
28 *denied*, 439 U.S. 859 (1978); *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24, (1966) (“The word
‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode
of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never
been done by any court.”); *United States v. Thoms*, 684 F.3d 893, 899 n.4 (9th Cir. 2012) (quoting
Katzenbach, 383 U.S. at 323, 86 S. Ct. 803); (States are not proper party plaintiffs to make claims under
the Due Process Clause, because they are simply not “persons” protected by the Fifth Amendment).

1 unless First Amendment concerns are implicated. *See United States v. Mazurie*, 419 U.S. 544, 550 (1975)
2 (“It is well established that vagueness challenges to statutes which do not involve First Amendment
3 freedoms must be examined in the light of the facts of the case at hand.”). Here, Plaintiffs do not allege
4 any First Amendment rights. Plaintiffs are, thus, limited to an argument that the Executive directives are
5 vague as applied to them. But Plaintiffs’ fears that a yet-to-be-taken action by the Executive *might* be
6 arbitrary and/or *might* lack fair notice is inherently speculative, and therefore not ripe for review. Where
7 there are insufficient facts to determine the vagueness of a law as applied, the issue is not ripe for
8 adjudication. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996) (citing
9 *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir. 1996) (concluding that vagueness
10 of one provision of a regulation was not ripe for review due to insufficient facts). Here, Plaintiffs simply
11 speculate as to what funding may be impacted, SAC ¶¶ 454–687, in what amount, *id.*, and in what
12 jurisdiction, *id.* Thus, an “as applied” vagueness challenge is premature and not ripe for review. As such,
13 the Court should dismiss their Fifth Amendment Due Process claim.

14 **IV. The Court Should Dismiss the SAC Under Rule 12(b)(6) for Failure to State a Claim Upon**
15 **Which Relief Can be Granted.**

16 **A. Plaintiffs fail to plead that the Executive Orders are facially unconstitutional.**

17 In their Prayer for Relief, Plaintiffs ask this Court to declare that portions of each of the challenged
18 Executive Orders relating to “sanctuary” policies are unconstitutional and invalid on its face. Dkt. No. 193
19 at 161. To succeed on a facial challenge to the Executive Orders, Plaintiffs would have to establish that
20 the Orders would be unconstitutional in all applications. *See United States v. Salerno*, 481 U.S. 739, 745
21 (1987) (explaining that a facial challenge must establish that “no set of circumstances exists under which
22 the [enactment] would be valid”). Plaintiffs cannot make such a showing here.

23 By their own terms, the Executive Orders provide that when an agency takes steps to implement
24 them, it must only do so via appropriate lawful actions. Section 17 of E.O. 14,159 directs the Attorney
25 General and the Secretary of Homeland Security to “evaluate and undertake any *lawful actions* to ensure
26 that so-called ‘sanctuary’ jurisdictions, which seek to interfere with the lawful exercise of Federal law
27 enforcement operations, do not receive access to Federal funds.” E.O. 14,159 at § 17 (emphasis added).
28 Section 2(a)(ii) of E.O. 14,218 provides that, to prevent taxpayer resources from supporting illegal

1 immigration and to ensure taxpayer funded benefits do not go to illegal aliens, the head of each agency
2 should “ensure, *consistent with applicable law*, that Federal payments to States and localities do not, by
3 design or effect, facilitate the subsidization or promotion of illegal immigration, or abet so-called
4 ‘sanctuary’ policies that seek to shield illegal aliens from deportation[.]” E.O. 14,218 § 2(a)(ii) (emphasis
5 added). And Section 3 of E.O. 14,287 directs the Attorney General and the Secretary of Homeland Security
6 to publish a list of jurisdictions that obstruct the enforcement of Federal immigration laws and pursue
7 legal remedies as appropriate.

8 Plaintiffs wholly ignore that the challenged Executive Orders specify that agencies should
9 undertake “lawful actions,” E.O. 14,159, or those that are “consistent with applicable law,” E.O. 14,218
10 § 2. Indeed, as the D.C. Circuit recognized, when “the Executive Order itself instructs the agency to follow
11 the law,” “[t]he mere possibility that some agency might make a legally suspect decision to award a
12 contract or to deny funding for a project does not justify an injunction against enforcement of a policy that
13 . . . is above suspicion in the ordinary course of administration.” *Bldg. Constr. Trades Dep’t, AFL-CIO v.*
14 *Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)). And
15 Plaintiffs cannot obtain their requested relief foreclosing agencies from relying on or implementing the
16 President’s Executive Orders because they have not demonstrated that an agency could *never* permissibly
17 rely on the Executive Orders to condition or withhold funding.

18 The standard is especially hard to meet here because Congress frequently authorizes the Executive
19 to impose discretionary conditions on the receipt of federal grants. Plaintiffs do not even attempt to make
20 the required showing of blanket unconstitutionality across every grant program administered by the
21 defendant agencies. *See, e.g., City of Los Angeles v. Barr*, 929 F.3d 1163, 1181 (9th Cir. 2019) (“We
22 conclude that DOJ did not exceed its statutory authority in including two scoring factors related to illegal
23 immigration as part of its implementation of the [COPS] grant program.”). As a Judge on the Fourth
24 Circuit recently observed in a similar case, there are “serious questions about the ripeness of this lawsuit
25 and plaintiffs’ standing to bring it” to the extent that plaintiffs are challenging an overall Executive Order
26 rather than “any particular agency action implementing the Executive Order[.]” Order Staying Preliminary
27 Injunction at 9, *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189 (4th Cir. Mar.

1 14, 2025) (Doc. 29) (Rushing, J., concurring). That is equally true here, where Plaintiffs seek to preclude
2 *any* implementation of the Executive Orders regardless of the agency or grant program at issue.

3 Ultimately, the Executive Orders represent the President instructing subordinate agencies to
4 evaluate certain funding, to the extent they have legal authority to do so, and to the extent such funding
5 implicates the President’s immigration policies. Such Presidential instructions to subordinate agencies are
6 plainly lawful. “Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who
7 must ‘take Care that the laws be faithfully executed.’” *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020)
8 (quoting U.S. CONST. art. II, § 1, cl. 1; *id.*, § 3). “Because no single person could fulfill that responsibility
9 alone, the Framers expected that the President would rely on subordinate officers for assistance.” *Id.* at
10 203-04. To that end, the President has authority to exercise “‘general administrative control of those
11 executing the laws,’ throughout the Executive Branch of government, of which he is the head.” *Allbaugh*,
12 295 F.3d at 32 (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)). Therefore, the Court should
13 dismiss the claim that the Executive Orders are facially unconstitutional.

14 **B. Plaintiffs fail to plead that the Executive Orders violate the doctrine of Separation**
15 **of Powers and the Spending Clause.**

16 Plaintiffs’ SAC fails to state a claim that the Executive Orders and directives violate the Separation
17 of Powers doctrine. SAC ¶¶703–713. Plaintiffs’ SAC alleges that “Defendants’ conditioning of federal
18 funding on local governments’ cooperation with immigration enforcement violates principles of
19 separation of powers[,]” specifically “Congress’s exclusive spending power” and “power to legislate[.]”
20 Dkt. No. 193 at ¶¶ 713 and 708, respectively. Plaintiffs’ SAC further alleges that “the funding restrictions
21 in the challenged Executive Orders, and the Bondi and Noem Directives are not authorized by Congress
22 and therefore violate the Spending Clause as well.” *Id.* at ¶ 716. Plaintiffs further claim that the President
23 violated the Impoundment Control Act of 1974 (IAC) because he failed to “notify and request authority
24 from Congress to rescind or defer funds *before* acting to withhold or pause federal payments.” *Id.* at ¶ 762
25 (citing 2 U.S.C. §§ 681 *et seq.*).
26
27
28

1 **1. The Supreme Court’s decision in *Dalton v. Specter* precludes Plaintiffs’ independent**
2 **Separation of Powers and Spending Clause claims when their claims are based on**
3 **the allegation that the President violated the Impound Control Act.⁵**

4 Article I of the Constitution confers on Congress the authority to “lay and collect Taxes, Duties,
5 Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the
6 United States.” U.S. CONST. Art. I, § 8, cl. 1. Thus, Congress “may raise and appropriate money to advance
7 the general welfare.” *Medina v. Planned Parenthood S. Atl.*, — U.S. —, 145 S. Ct. 2219 (2025)
8 (citation modified). The Constitution further mandates that “[n]o money shall be drawn from the Treasury,
9 but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7. The Take Care Clause,
10 however, “charges the Executive Branch with enforcing federal law,” including spending-power laws.
11 *Medina*, 145 S. Ct. at 2229 (citing U.S. Const., art. II, § 3). Here, Plaintiffs claim that the President violated
12 such spending-power laws encoded in the ICA when he issued the challenged Executive Orders because
13 they effectively withhold funds appropriated by Congress by requiring agencies to place immigration-
14 related conditions on the receipt of said funds. Dkt. No. 196 at ¶¶ 441-42 (citing provisions of ICA), 762.

15 Recently, however, the D.C. Circuit held in a very similar case that grantees are foreclosed by
16 *Dalton v. Specter*, 511 U.S. 462 (1994), from asserting a non-statutory right to vindicate separation-of-
17 powers principles. *Glob. Health Council*, 2025 WL 2326021, at *6. In *Dalton*, the Supreme Court rejected
18 the notion that “every action by the President, or by another executive official, in excess of his statutory
19 authority is *ipso facto* in violation of the Constitution.” *Id.*, 511 U.S. at 472. “[C]laims simply alleging
20 that the President exceeded his statutory authority are not constitutional claims, subject to judicial review
21 under the exception recognized in *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992) (holding that
22 there is no review of presidential action under the APA, but there can be judicial review of presidential
23 action to determine whether it violates the Constitution). In *Global Health Council*, recipients of foreign-
24 assistance funds sued to enjoin various agencies from implementing Executive Order 14,169, which
25 temporarily suspended all foreign aid. 2025 WL 2326021. The grantees brought a constitutional claim that
26 the Government violated separation-of-powers principles by impounding funds in violation of the 2024

27 ⁵ Additionally, Plaintiffs are precluded from bringing an APA claim, at least during the period in which
28 statutory processes of the Impoundment Control Act (ICA), 2 U.S.C.A. § 681 *et seq.* run their course. *See*
Glob. Health Council v. Trump, No. 25-5097, 2025 WL 2326021, at *11 (D.C. Cir. Aug. 13, 2025).

1 Appropriations Act, the ICA and the Anti-Deficiency Act. *Id.*, 2025 WL 2326021, at *5. The D.C. Circuit
2 noted that “[c]onstitutional rights do not typically come with a built-in cause of action to allow for private
3 enforcement in courts[, but i]nstead, . . . are generally invoked defensively in cases arising under other
4 sources of law, or asserted offensively pursuant to an independent cause of action designed for that
5 purpose.” *Id.* at *6 (D.C. Cir. Aug. 13, 2025) (quoting *DeVillier v. Texas*, 601 U.S. 285, 291 (2024)).
6 Because the ICA provides a mechanism for the President to act on impoundment, the panel found that the
7 plaintiffs lacked a constitutional cause of action.⁶ *Id.*, 2025 WL 2326021, at *8. Similarly, Plaintiffs’ claim
8 is a statutory one: The President is said to have violated the terms of the ICA by issuing Executive Orders
9 that—according to Plaintiffs—in effect withhold already appropriated federal funds without following the
10 procedures set forth in the ICA. Thus, their separation-of-powers and spending clause claims cannot be
11 brought as independent constitutional claims.

12 **2. Alternatively, the Executive Orders do not violate the doctrine of Separation of**
13 **Powers or the Spending Clause.**

14 Even if this Court finds that Plaintiffs’ separation of powers claim can be brought as an
15 independent constitutional claim, Plaintiffs still fail to state a claim upon which relief can be granted
16 because the Executive directives do not freeze or withhold the distribution of already-appropriated funds
17 or unilaterally impose conditions on all federal funds without Congressional authorization. For example,
18 section 17 of EO 14,159 instructs that a deliberative process take place, and for the Executive to undertake
19 any *lawful actions* to ensure that “sanctuary” jurisdictions do not receive access to Federal funds.
20 Executive Order 14,159 applies only to programs administered by the Departments of Justice and DHS,
21 and even within those Departments, federal funds are evaluated on a grant-by-grant or program-by-
22 program basis, rather than in a blanket or categorical fashion. This reality is evidenced by the publicly
23 available information on DHS’ website THE DEPARTMENT OF HOMELAND SECURITY, *DHS Standard Terms*
24 *and Conditions*, <https://www.dhs.gov/publication/dhs-standard-terms-and-conditions>, (last visited on
25 Aug. 26, 2025) (stating “Not all of DHS’s Standard Terms and Conditions apply to every DHS grant
26

27 ⁶ The panel recognized that the Ninth Circuit, in *Murphy Co. v. Biden*, 65 F.4th 1122, 1130 (9th Cir. 2023),
28 took a more expansive view of *Dalton*.” *Glob. Health*, 2025 WL 2326021, at *9, n. 15. But it also noted
that the *Murphy Co.* holding relied upon *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), which the
Supreme in later vacated in *Biden v. Sierra Club*, — U.S. —, 142 S. Ct. 46 (2021).

1 programs. DHS directs individuals to review the program’s NOFO and/or FEMA-State Agreement to
2 determine which Terms and Conditions apply to a particular grant.”⁷ Indeed, in Plaintiffs’ SAC at ¶¶
3 388-389, references the March 20, 2025 FEMA Memo from Cameron Hamilton to the DHS Secretary. In
4 that Memo, FEMA only *recommended* that immigration-related conditions could be applied to 12 FEMA
5 non-disaster preparedness programs “where the purpose of the grant has a nexus to immigration activities,
6 law enforcement or national security” or “where the statute does not limit how FEMA implements the
7 program.” *Id.* at 3; Dkt. No. 151-10 (Exhibit G). It further stated that dozens more programs will *not* be
8 subject to any such restriction, in addition to a blanket exemption for disaster grants and non-disaster
9 mitigation grants, grants to fire departments and national search and rescue organizations. *Id.*

10 Related, Section 2(b) of EO 14,218 asks certain federal agencies to identify sources of funding for
11 illegal aliens and recommend additional agency action to align federal spending with the Order. The Bondi
12 Memo makes clear that all action will be done “consistent with law[.]” Bondi Memo at 1. The same is
13 true of the Noem Memo. Noem Memo at 3 (“To the extent consistent with relevant legal authorities and
14 the applicable terms and conditions of each award...”). Regarding any grants, the Bondi Memo confirms
15 that DOJ will require compliance with 8 U.S.C. § 1373(a) as a condition of grant eligibility only where
16 “consistent with statutory authority and past practice.” *Id.* at 2. The same is true of the Noem Memo, which
17 directs components to cease funding sanctuary jurisdictions “to the extent consistent with relevant legal
18 authorities and applicable terms and conditions of each award[.]” Noem Memo at 2. Nothing in these
19 directives would violate any applicable constitutional or statutory limitation. *See Bldg. Constr. Trades*
20 *Dep’t, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (rejecting separation of powers challenge
21 to Executive Order where the President is merely exercising his “supervisory authority over the Executive
22 Branch” when he “directs his subordinates” to take certain action “but only ‘[t]o the extent permitted by
23 law’” (alteration in original) (citation omitted)). All this qualifying language would be meaningless if the
24 Government’s goal was to universally withhold all funding, without an individualized evaluation.

27 ⁷ The Court may take judicial notice of the government websites cited herein. *See* Fed. R. Evid. 201;
28 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 999 (9th Cir. 2010) (information on government websites
is subject to judicial notice).

1 Moreover, even if DOJ imposes conditions on future grants, Plaintiffs fail to state a claim that the
2 Executive Orders violate the separation of powers doctrine. In fact, Congress has frequently authorized
3 agencies administering certain grant programs to impose discretionary conditions on their receipt. Those
4 statutory authorizations have taken a variety of forms, including authorizing an agency to ensure that a
5 grant recipient complies “with all provisions of . . . applicable Federal laws,” *see* 42 U.S.C.
6 § 3752(a)(5)(D) (governing DOJ grant program), or allowing an agency to “plac[e] special conditions” on
7 certain grants under appropriate circumstances. *See id.* § 3712(a).

8 Courts have also long recognized instances where the Executive may—consistent with new policy
9 directives—terminate or add conditions on contracts and funds without violating the separation of powers.
10 The D.C. Circuit’s decision in *Allbaugh* is instructive. There, the plaintiffs challenged an executive order
11 that provided that “to the extent permitted by law,” no federal agency and no entity that receives federal
12 assistance for a construction product could require or prohibit bidders or contractors from entering into a
13 project labor agreement. *Allbaugh*, 295 F.3d at 29. Plaintiffs sued, claiming that the executive order
14 exceeded the President’s constitutional authority. *See id.* at 31-32. The D.C. Circuit rejected this argument,
15 highlighting that the executive order “directs [agencies] how to proceed in administering federally funded
16 projects, but only “[t]o the extent permitted by law.”” *Id.* at 33. “Thus, if an executive agency, such as the
17 FEMA, may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by
18 statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the
19 agency to follow the law.” *Id.* The court concluded that “[t]he mere possibility that some agency might
20 make a legally suspect decision to award a contract or to deny funding for a project does not justify an
21 injunction against enforcement of a policy that ... is above suspicion in the ordinary course of
22 administration.” *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)); *see also Common Cause v. Trump*,
23 506 F. Supp. 3d 39, 47 (D.D.C. 2020) (“We cannot ignore these repeated and unambiguous qualifiers
24 imposing lawfulness and feasibility constraints on implementing the memorandum.”).

25 Plaintiffs similarly fail to articulate a claim that the executive directives violate the Spending
26 Clause such that this claim survives the pleadings stage. U.S. CONST. art. I, § 8, cl. 1. “Congress may
27 attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad
28 policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal

1 statutory and administrative directives.” *Dole*, 483 U.S. at 206 (quotation marks omitted). In *Dole*, the
2 Supreme Court held that “[e]ven if Congress [] . . . might lack the power to impose directly a national
3 minimum drinking age, [] . . ., [23 U.S.C.] § 158’s indirect encouragement of state action to obtain
4 uniformity in the States’ drinking age is a valid use of the spending power.” The Court outlined certain
5 limitations that “the exercise of the spending power must be in pursuit of ‘the general welfare’” and
6 conditions on the receipt of federal funds must be stated “unambiguously” so that recipients can “exercise
7 their choice knowingly, cognizant of the consequences of their participation.” *Id.* at 207. But the *Dole*
8 Court noted this “nexus” concept—“that conditions on federal grants might be illegitimate if they are
9 unrelated ‘to the federal interest in particular national projects or programs’”—had only been “suggested
10 (without significant elaboration)” in prior cases. *Id.* at 208; *see State ex rel. Becerra v. Sessions*, 284
11 F.Supp.3d 1015 at 1034 (N.D. CA 2018) citing *Maywathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir.
12 2002) (discussing nexus as a “low-threshold relatedness inquiry”).

13 Supreme Court precedent (and long practice) makes clear that agencies have power to set grant
14 criteria on their own accord, while subject to Congressional direction if such direction has been given. For
15 example, the Supreme Court upheld agency-imposed conditions on the Medicare and Medicaid programs
16 in *Biden v. Missouri*, 595 U.S. 87, 90, 94 (2022) (per curiam) (finding that a new condition of participation
17 in Medicare and Medicaid requiring facilities to ensure that staff are vaccinated against COVID-19 did
18 not exceed applicable statutory authority); *see also Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985)
19 (stating that Congress cannot “prospectively resolve every possible ambiguity concerning particular
20 applications of the requirements”). Moreover, the Supreme Court has made clear that, even where the
21 Federal Government may not be able to *compel* them to do a particular activity, it may *encourage* States
22 and municipalities to implement federal regulatory programs. *See New York*, 505 U.S. at 149.

23 In granting the preliminary injunction, this Court held that Plaintiffs were likely to show that the
24 executive directives violate the Spending Clause because they purport to reach all federal funding, past
25 and present, and impose conditions without any nexus to the conditioned funds. *City & Cnty. of San*
26 *Francisco*, 2025 WL 1282637, at **30–31. However, the executive directives do not apply to retroactively
27 impact funding, because the language in those materials is forward looking. For example, the Bondi Memo
28 language discusses conditions on future grants, *i.e.*, “the Department will require any jurisdiction that

1 *applies* for certain Department grants to be compliant with 8 U.S.C. § 1373(a)” and “the Department *may*
2 *seek* to tailor *future* grants. . . .” *Id.* (emphasis added). Therefore, potential grantees are already on notice
3 of the revised terms prior to requesting funding, and will be able to exercise their choice knowingly,
4 cognizant of the consequences of their participation in grant programs that include any such conditions.
5 *Dole*, 483 U.S. at 207. Likewise, the executive directives do not apply to all funding. *Id.* at 26, 61. This
6 fact is evidenced by the conditional language used throughout these executive directives. *See, e.g.*, Bondi
7 Memo at 2 (“Consistent with statutory authority and past practice, the Department will require any
8 jurisdiction that applies for *certain* Department grants to be compliant with 8 U.S.C. § 1373(a).”) (emphasis added); Noem Memo at 5 (“To the extent consistent with relevant legal authorities and the
9 applicable terms and conditions *of each award*, each component must cease providing federal funding to
10 sanctuary jurisdictions.”) (emphasis added). Indeed, these materials do not purport to form the basis for
11 immigration-related conditions, but to guide agency decision-making in crafting the same. Thus, any
12 specific funding conditions are not imposed via the Executive Orders themselves but rather from the
13 relevant agencies’ determination—on a program-by-program basis—what individual grant conditions
14 should apply. And any challenge regarding whether agency-specific grant conditions satisfy Spending
15 Clause requirements cannot be reviewed in this lawsuit only challenging the Executive Orders generally.

17 Further, any conditions arguably derived from the Executive Orders stem from references to
18 specific statutory authority. For example, Executive Order 14,218 seeks to implement the requirements
19 Congress imposed 30 years ago in PRWORA.⁸ Those requirements, indicating that federal public benefits,

21 ⁸ Nearly 30 years ago, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation
22 Act of 1996 (PRWORA). In that statute, Congress enacted a “national policy with respect to welfare and
23 immigration” specifying that “aliens within the Nation’s borders [should] not depend on public resources
24 to meet their needs.” 8 U.S.C. § 1601(2)(A). The statute noted that, notwithstanding that policy, “aliens
25 have been applying for and receiving public benefits from Federal, State, and local governments at
26 increasing rates” and explained that “[i]t is a compelling government interest to remove the incentive for
27 illegal immigration provided by the availability of public benefits.” 8 U.S.C. § 1601(3), (6). Under
28 PRWORA, with certain exceptions, “an alien who is not a qualified alien . . . is not eligible for any Federal
public benefit.” 8 U.S.C. § 1611(a). In general, an alien is not qualified if he or she is not lawfully admitted
to the United States. *Id.* at § 1641(b). “Federal public benefits” include “any . . . welfare, health, disability,
public or assisted housing . . . food assistance . . . or any other similar benefit for which payments or
assistance are provided to an individual, household, or family eligibility unit by an agency of the United
States or by appropriated funds of the United States.” *Id.* at § 1611(c)(1). Under that definition, such
payments are governed by PRWORA’s restrictions “even if administered by a state or local agency” or

1 even when administered through a State or locality, should not be provided to aliens unlawfully present
2 in the United States, are clearly set forth in federal law. In PRWORA, Congress recognized that a
3 restriction on federal public benefits to unlawful aliens is part of the “national policy with respect to
4 welfare and immigration,” 8 U.S.C. § 1601, and the Executive Order 14,218 simply reaffirms and
5 reinforces existing policy and accompanying federal statutory restrictions.

6 Plaintiffs contend that the contested terms here impose conditions so severe as to “cross the line”
7 into coercion, citing to *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 579 (U.S.,
8 2012) (*NFIB*). SAC ¶¶ 426, 717. Under the Plaintiffs’ overbroad reading of *NFIB*, all widely imposed
9 conditions would be unconstitutionally coercive, simply because so much of local governments’ funding
10 derives from the Federal Government. But that is not the law. To the contrary, *NFIB* stressed (and as
11 Justice Ginsburg’s concurrence in the judgment observed) that this coercion arose from the unexpected
12 imposition on the states to accept a dramatically broadened, independent grant program at the risk of
13 losing all federal assistance of longstanding Medicaid coverage. *NFIB*, 567 U.S. at 579-81; *id.* at 624-25
14 (Ginsburg, J., concurring in judgment, dissenting in reasoning). The Court held that the combination of
15 the nature and size of the threatened funding loss distinguished that case from *Dole*. *Id.*

16 As explained in *NFIB*, the Court has not “‘fix[ed] the outermost line’ where persuasion gives way
17 to coercion.” 567 U.S. at 585 (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937)).
18 That point has not been passed here. While, for the reasons stated above, the scope of grants affected by
19 the challenged directives remains unclear, any particular grant on its own will represent a far smaller
20 percentage of a city’s overall budget. Thus, the facts of this case fall in the range of the inducements
21 considered acceptable in *Dole*, rather than the threat of a loss of all Medicaid funds considered in *NFIB*.
22 Therefore, Plaintiffs cannot state a claim that the executive directives violate the Spending Clause, and
23 for the same reasons, their claim should not survive the pleadings stage.

24 **C. Plaintiffs fail to plead that the Executive Orders violate the Tenth Amendment.**

25 Plaintiffs fail to state a claim that the Executive directives violate the Tenth Amendment to survive
26 the pleadings stage. The Tenth Amendment embodies the principle that the “pre-existing sovereign States”

27 _____
28 are made through “a joint federal-state cooperative partnership.” *Pimentel v. Dreyfus*, 670 F.3d 1096, 1099
n.4 (9th Cir. 2012) (per curiam).

1 (and their subdivisions) retain their sovereignty under the Constitution and that the Federal Government
2 may not encroach upon that sovereignty. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995);
3 *New York*, 505 U.S. at 156. Congress may use its Spending Clause power “to grant federal funds to the
4 States, and may condition such a grant upon the States taking certain actions that Congress could not
5 require them to take.” *NFIB*, 567 U.S. at 576 (plurality opinion). It may, for example, make certain federal
6 funds available only to localities that enact a given regulatory regime. *Dole*, 483 U.S. at 205–08 (upholding
7 federal statute conditioning state receipt of federal highway funds on state adoption of minimum drinking
8 age of twenty-one). But even where those conditions otherwise comply with Spending Clause
9 requirements, if “pressure turns into compulsion,” those conditions may “run[] contrary to our system of
10 federalism” and violate the Tenth Amendment. *NFIB*, 567 U.S. at 577–78. To do so, the conditions must
11 be extreme: “weapon[s] of coercion, destroying or impairing the autonomy of the states,” putting a
12 proverbial “gun to the head.” *Id.* at 579, 581. Plaintiffs argue that “[b]y restricting funding and directing
13 enforcement against Plaintiffs for limiting cooperation with federal immigration authorities, Defendants
14 seek to commandeer Plaintiffs in furtherance of a federal regulatory program.” SAC ¶ 702. However, in
15 order to determine whether commandeering is present here, the amount of money in question is critical to
16 the analysis. *State v. DOJ*, 951 F.3d 84, 116 (2d Cir. 2020) (analyzing what percentage of a local
17 government budget may be impacted by federal withholding to evaluate plaintiffs’ Tenth Amendment
18 commandeering claims). Plaintiffs describe generally the amount of federal funds they receive or expect
19 to receive, and speculate what funding *may* be impacted, but cannot establish that any funds have been
20 actually impacted. And at this point in the litigation, it is untenable to argue that *all* of their federal funding
21 will be impacted. For example, the FEMA memo underscores this very point, because it evidences that
22 the agency is evaluating each grant individually to determine whether funding conditions would be
23 appropriate. To this end, DHS (through FEMA) identified only twelve programs to which immigration-
24 related conditions may apply and exempted many more programs from that condition. *See* Dkt. No. 151-
25 10 at 3. Those twelve programs represent a small portion of all FEMA grants. Thus, refusal to comply
26 with an immigration-related condition may affect the funds available for that particular program, but it
27 would not “threat[en] to terminate other ... grants” to which the immigration-related condition does not
28 apply. *NFIB*, 567 U.S. at 580 (plurality opinion).

1 Moreover, Plaintiffs fail to state a claim for relief where they only speculate that enforcement
2 actions may arise from the executive directives. *See Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th
3 Cir. 2003) (“[A]s long as the alternative to implementing a federal regulatory program does not offend the
4 Constitution’s guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise
5 unappealing is insufficient to establish a Tenth Amendment violation.”) (internal quotation marks
6 omitted). *Cf. United States v. Pickard*, 100 F. Supp. 3d 981, 1011 (E.D. Cal. 2015) (rejecting a Tenth
7 Amendment challenge to a statement of agency policy on the grounds that a policy statement “is a very
8 different creature from a statute” in that it does not bind States as would a statute). Despite Plaintiffs’
9 complaints about affirmative litigation, *see* SAC ¶ 375-82, 411, there is always a possibility that the
10 Federal Government may sue a State or local government alleging that their laws or policies are
11 constitutionally preempted. *See Arizona v. United States*, 567 U.S. 387 (2012); *United States v. South*
12 *Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). This
13 authority exists entirely independent of the Executive Orders. *Id.* And if such action were to occur, the
14 affected jurisdiction would have an opportunity at that time to challenge its propriety and merits. As such,
15 Plaintiffs fail to state a claim that the executive directives violate the Tenth Amendment.

16 **D. Plaintiffs fail to state a claim under the APA for which the Court can grant relief.**

17 **1. Plaintiffs fail to identify a final agency action**

18 Presidential actions are not agency actions reviewable under the APA. Thus, Plaintiffs cannot
19 challenge the Executive Orders on that basis. Dkt. No. 111 at 5, n.5; *see, e.g., Franklin v. Massachusetts*,
20 505 U.S. at 801. As to other directives, Plaintiffs have not identified final agency action for review. *See* 5
21 U.S.C. § 704 (APA review requires final agency action). Agency action is final only if (1) it marks “the
22 consummation of the agency’s decision-making process”—it must not be merely tentative or interlocutory
23 in nature, and (2) the “action must be one by which rights or obligations have been determined, or from
24 which legal consequences flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Both
25 conditions must be satisfied for agency action to be “final” under the APA. *Id.* at 175.

26 The Bondi Memo calls for an assessment to be implemented over time after analysis and
27 deliberation is completed by agency components. Dkt. No. 22 at 111-113 (Exhibit D). Cases finding final
28 agency action have involved some concrete act in excess of an announcement of such an assessment or

1 plan. *See, e.g., State ex rel Becerra*, 284 F. Supp. 3d at 1015 (finding final agency action when funding
2 was in fact dependent on the certification condition on the Byrne JAG program); *City of Philadelphia v.*
3 *Sessions*, 280 F. Supp. 3d 579 (E.D. Penn. 2017) (finding final agency action when the Attorney General
4 conditioned funding Byrne JAG on applicants certifying compliance with 8 U.S.C. § 1373).

5 Further, the memo instructs the Associate Attorney General, in coordination with components that
6 provide Department grants, to “report to the Attorney General the grants to which [compliance with 8
7 U.S.C. § 1373] applies.” Dkt. No. 22 at 112 (Ex. D). Absent a discrete and final agency action, federal
8 courts cannot review an on-going program or policy. *See Franklin*, 505 U.S. at 797 (“The core question
9 is whether the agency has completed its decision-making process, and whether the result of that process
10 is one that will directly affect the parties.”). The purpose of the report is for the agency to engage in
11 decision-making—decisions that have not yet been made. Plaintiffs’ funding has not been impacted, and
12 their suit, thus, aims at anticipated, programmatic changes, which are squarely precluded from APA
13 review. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1011 (9th Cir. 2021).

14 Lastly, the Bondi memo states, “to the extent consistent with applicable statutes, regulations, and
15 terms, the Department *may seek to tailor future grants* to promote a lawful system of immigration, and to
16 reduce efforts by state or local jurisdictions to undermine a lawful system of immigration.” Dkt. No. 22 at
17 111 (Ex. D). The applicable portions are framed in future tense, indicating they are not “definitive
18 statement[s] of position”, but rather “a threshold determination that further inquiry is warranted....” *See*
19 *FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980); *Franklin*, 505 U.S. at 798 (no final agency action
20 where “the Secretary’s report to the President carries no direct consequences” but “serves more like a
21 tentative recommendation than a final and binding determination.”); *New Jersey Hosp. Ass’n. v. United*
22 *States*, 23 F. Supp. 2d 497, 499 (D.N.J. 1998) (no final agency action where settlement letters to hospitals
23 “merely indicate a belief by the DOJ that plaintiff’s member hospitals may have violated” the law).⁹

24
25 ⁹ Notwithstanding, this Court previously found that the Bondi Memo constitutes final agency action
26 because it instructs that the DOJ to “pause the distribution of all funds.” *City & Cnty. of San Francisco v.*
27 *Trump*, 2025 WL 1282637, at **34–35. Under the same reasoning, the Court found that the Bondi Memo
28 was arbitrary and capricious because it “fails to offer a reasonable explanation of the breadth of funding
withheld or the basis for withholding funds that Congress has already appropriated.” *Id.* at *36. As
Defendants asserted at oral argument and continue to preserve that any pause on federal funding applies
to Section II of the memo, which applies to “Non-Governmental Organizations”—*not* to Plaintiffs. This

1 The same is true of grant conditions from HUD, April 4, 2025 Letter from Secretary Turner to
2 Grantees and Stakeholders, Dkt. No. 95-1 at 90 (“going forward, grant agreements will include language
3 that will require compliance with Executive Order 14218”) (emphasis added), and the Department of
4 Homeland Security, Dkt. No. 151-9 at 2-3 (“apply to all *new* federal awards” for fiscal year 2025)
5 (emphasis added). Indeed, Plaintiffs’ speculation about what funding may be impacted, SAC ¶¶ 454–687,
6 in what amount, *id.*, and in what jurisdiction, *id.*, confirms that no final agency action has taken place.¹⁰

7 In sum, these agency documents merely call for internal evaluation of federal funding decisions.
8 *Ukiah Valley Med. Ctr. v. Fed. Trade Comm’n*, 911 F.2d 261, 264 (9th Cir. 1990) (“The general rule is
9 that administrative orders are not final and reviewable ‘unless and until they impose an obligation, deny a
10 right, or fix some legal relationship as a consummation of the administrative process.’”) (citations
11 omitted). Courts have interpreted the “finality” element with an eye toward pragmatism. *See FTC v.*
12 *Standard Oil Co.*, 449 U.S. 232, 239 (1980) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149
13 (1967)). To determine whether an action is “final,” courts “look to whether the action ‘amounts to a
14 definitive statement of the agency’s position’ or ‘has a direct and immediate effect on the day-to-day
15 operations’ of the subject party, or if ‘immediate compliance [with the terms] is expected.’” *Oregon*
16 *Natural Desert Ass’n. v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006) (citation omitted). Neither
17 of these factors is present here and thus Plaintiffs fail to state a claim under the APA. 5 U.S.C. § 704.

18 **2. Allocation of discretionary grant funding is committed to agency discretion and is,**
19 **thus, precluded from APA review.**

20 Because the allocation of discretionary grant funding is committed to agency review and because
21 some of the grant programs managed by the agency are discretionary, Plaintiffs’ APA claim is precluded
22 from APA review under 5 U.S.C. 701(a)(2). Again, Plaintiffs challenge the agency directives, which call
23 for an assessment of federal grant programs to see where immigration conditions may lawfully be
24

25 _____
26 conclusion is further supported by the fact that Plaintiffs’ second preliminary injunction motion continued
27 to be supported by declarations complaining of budgetary uncertainty, *not* a pause of all DOJ funding.

28 ¹⁰ This is also indicative that Plaintiffs’ APA claim is not ripe, as the uncertainty of future harm does not
justify litigation now. *See Texas*, 523 U.S. at 300 (A claim is not ripe “if it rests upon contingent future
events that may not occur as anticipated, or indeed may not occur at all.”); *see also City of Fall River*, 507
F.3d at 6 (review of agency’s conditional project approval was unripe).

1 imposed. And at least some of the grant programs managed by the agencies are discretionary. For these
2 grants, Congress has not directed that a specific amount of funding must be directed to recipients who
3 meet all applicable criteria, terms, and conditions. Instead, Congress has simply appropriated funding for
4 the program generally, for the agency to in turn distribute as appropriate. *See e.g.*, 6 U.S.C. § 112(b)(2)
5 (Congress has given DHS “the authority to make contracts, grants, and cooperative agreements . . . as may
6 be necessary and proper to carry out the Secretary’s responsibilities under this chapter or otherwise
7 provided by law....”). DOT has discretion to “prescribe terms” for the projects it funds with grants. *See*
8 49 U.S.C. § 5334(a)(1) (“In carrying out this chapter, the Secretary of Transportation may--(1) prescribe
9 terms for a project that receives Federal financial assistance under this chapter (except terms the Secretary
10 of Labor prescribes under section 5333(b) of this title.”). HUD has discretion to establish “other terms and
11 conditions” to “carry out [the program] in an effective and efficient manner.” 42 U.S. Code § 11386(b)(8).
12 HUD simply seeks to bring its funding conditions in line with federal law, as 8 U.S.C. § 1611(c)(1)(A)
13 provides “an alien who is not a qualified alien . . . is not eligible for any Federal public benefit” which
14 includes “any grant . . . provided by an agency of the United States or by appropriated funds of the United
15 States.” The APA does not permit judicial review of such discretionary agency action. 5 U.S.C. §
16 701(a)(2). Agencies have broad discretion in creating, awarding, and terminating specific grants, and thus
17 review of the terms and conditions set by agencies, as contemplated by Congress, is outside of the
18 jurisdiction of the Court. At a minimum, the discretionary grants at issue in this case and the discretionary
19 determination as to the conditions of those grants are unreviewable under the APA.

20 In *Lincoln v. Vigil*, the Supreme Court held that the Indian Health Service’s decision to discontinue
21 a program it had previously funded and to instead reallocate those funds to other programs was committed
22 to agency discretion and not reviewable under the APA’s reasoned decision-making standards. 508 U.S.
23 182, 185-88 (1993). The Court stated that the “allocation of funds from a lump-sum appropriation is” an
24 “administrative decision traditionally regarded as committed to agency discretion,” because the “very
25 point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances
26 and meet its statutory responsibilities in what it sees as the most effective or desirable way.” *Id.* at 192.

27 Indeed, “an agency’s allocation of funds from a lump-sum appropriation requires ‘a complicated
28 balancing of a number of factors which are peculiarly within its expertise’: whether its ‘resources are best

1 spent’ on one program or another; whether it ‘is likely to succeed’ in fulfilling its statutory mandate;
2 whether a [] program ‘best fits the agency’s overall policies’; and, ‘indeed, whether the agency has enough
3 resources’ to fund a program ‘at all.’” *Id.* at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985));
4 *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861
5 (D.C. Cir. 1984) (Scalia, J.) (“A lump-sum appropriation leaves it to the recipient agency (as a matter of
6 law, at least) to distribute the funds among some or all of the permissible objects as it sees fit.”).

7 Although *Lincoln* involved lump-sum appropriations, its logic extends to funding programs that
8 leave to the agency “the decision about how the moneys” for a particular program “could best be
9 distributed consistent with” the statute. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002).
10 Such decisions “clearly require[] ‘a complicated balancing of a number of factors which are peculiarly
11 within [the agency’s] expertise.’” *Id.* at 752 (citation omitted); see *Policy & Rsch., LLC v. U.S. Dep’t of*
12 *Health & Human Servs.*, 313 F. Supp. 3d 62, 75-76 (D.D.C. 2018) (Jackson, J.); *Cnty. Action of Laramie*
13 *Cnty., Inc. v. Bowen*, 866 F.2d 347, 354 (10th Cir. 1989) (“Funding determinations are ‘notoriously
14 unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of
15 varied priorities which combine to dictate the wisest dissemination of an agency’s limited budget.”)
16 (quoting *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1536-37 (S.D.N.Y. 1984)). Although
17 an agency “is required to use earmarked funds for their specified purpose, an agency may still exercise
18 discretion *within* the earmark.” *Amica Ctr. for Immigrant Rights, et al. v. U.S. Dep’t of Justice*, No. 25-
19 298 (RDM), 2025 WL 1852762, at *14 (D.D.C. July 6, 2025) (emphasis in original) (agency decision to
20 terminate certain grant programs not subject to judicial review under APA).

21 This case primarily involves discretionary grants that fit within *Lincoln*’s analytical framework for
22 agency discretion. Many of the grants at issue are authorized through annual appropriations that give little
23 guidance to the Agency beyond allocating funding. See, e.g., Pub. L. 118-47, 138 Stat 460, 608 (Mar. 23,
24 2024) (“\$10,800,000 for Regional Catastrophic Preparedness Grants.”); *id.* at 594 (“For necessary
25 expenses of the Office of the Secretary and for executive management for Federal assistance through
26 grants . . . of which \$18,000,000 shall be for targeted violence and terrorism prevention grants . . .”). For
27 such discretionary grants, not only did Congress expressly provide for significant discretion by the
28 executive branch, but it did not provide any “meaningful standard against which to judge the agency’s

1 exercise of discretion.” *See Lincoln*, 508 U.S. at 191. Accordingly, these grant allocation decisions are
2 precluded from APA review. 5 U.S.C. § 701(a)(2).

3 **CONCLUSION**

4 For the foregoing reasons, the Court should dismiss the Second Amended Complaint with
5 prejudice.

6 Dated: August 26, 2025

Respectfully submitted,

7 BRETT A. SHUMATE
8 Assistant Attorney General
9 Civil Division
10 YAAKOV ROTH
11 Principal Deputy Assistant Attorney General
12 DREW C. ENSIGN
13 Deputy Assistant Attorney General

14 LAUREN E. FASCETT
15 Senior Litigation Counsel
16 LINDSAY ZIMLIKI
17 CAROLINE MCGUIRE
18 ANGEL FLEMING
19 Trial Attorneys

20 /s/ Victoria Turcios
21 VICTORIA TURCIOS
22 Trial Attorney
23 United States Department of Justice
24 Civil Division
25 Office of Immigration Litigation
26 General Litigation and Appeals Section
27 450 5th Street, NW
28 Washington, D.C. 20530
202-451-7661
Victoria.E.Turcios2@usdoj.gov

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2025, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and electronic link of the same to all attorneys of record through the Court’s CM/ECF system.

/s/ Victoria Turcios
VICTORIA TURCIOS
Trial Attorney
United States Department of Justice
Office of Immigration Litigation
General Litigation and Appeals Section
Attorney for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28