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Attorneys for Plaintiff State of California
 8

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION
 12

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

Plaintiff,

16 v.
 17

18 **JEFFERSON B. SESSIONS, in his official**
 19 **capacity as Attorney General of the United**
 20 **States, et al.,**

Defendants.
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3:17-cv-04701-WHO

DECLARATION OF LEE SHERMAN IN
SUPPORT OF PLAINTIFF STATE OF
CALIFORNIA'S MOTION TO
ENFORCE NOVEMBER 20, 2018
AMENDED JUDGMENT AND ORDER

Date: December 21, 2018
 Time: 10:00 am
 Dept.: 2
 Judge: Honorable William H. Orrick
 Action Filed: August 14, 2017

1 I, LEE SHERMAN, declare and state as follows:

2 1. I am an attorney licensed to practice law in the State of California and before this
3 Court. I am a Deputy Attorney General with the California Department of Justice, counsel for the
4 State of California, plaintiff in the action *State of California v. Sessions, et al.*, Case No. 17-cv-
5 4701, filed in this District on August 14, 2017. I have personal knowledge of the facts stated
6 herein, and if called as a witness, I would testify competently thereto.

7 2. I file this Declaration in support of the State of California's Motion to Enforce the
8 November 20, 2018 Amended Judgment and Order.

9 3. Attached as **Exhibit A** is a true and correct copy of e-mail correspondence regarding
10 Project Safe Neighborhoods ("PSN") funding that occurred between counsel for the State of
11 California and Defendants from October 29 and October 31, 2018.

12 4. Attached as **Exhibit B** is a true and correct copy of e-mail correspondence regarding
13 PSN funding that occurred between counsel for the parties from November 19, 2018 to November
14 22, 2018.

15
16 I declare under penalty of perjury under the laws of the State of California and the United
17 States that the foregoing is true and correct, and that this declaration was executed on November
18 28, 2018 at Los Angeles, California.

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21 LEE SHERMAN
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EXHIBIT A

From: [Lee Sherman](#)
To: [Simpson, Scott \(CIV\)](#); [Konkoly, Antonia \(CIV\)](#); [Mauler, Dan \(CIV\)](#); [Percival, James \(OASG\)](#)
Cc: [Sarah Belton](#); [Eisenberg, Sara \(CAT\)](#); [Mere, Yvonne \(CAT\)](#); [Cherokee Melton](#); [Garrett Lindsey](#)
Subject: RE: California v. Sessions, No. 17-cv-4701 and No. 18-cv-5169
Date: Wednesday, October 31, 2018 1:02:16 PM

Thank you, Scott. We appreciate that.

From: Simpson, Scott (CIV) <Scott.Simpson@usdoj.gov>
Sent: Wednesday, October 31, 2018 1:01 PM
To: Lee Sherman <Lee.Sherman@doj.ca.gov>; Konkoly, Antonia (CIV) <Antonia.Konkoly@usdoj.gov>; Mauler, Dan (CIV) <Dan.Mauler@usdoj.gov>; Percival, James (OASG) <James.Percival@usdoj.gov>
Cc: Sarah Belton <Sarah.Belton@doj.ca.gov>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Cherokee Melton <Cherokee.Melton@doj.ca.gov>; Garrett Lindsey <Garrett.Lindsey@doj.ca.gov>
Subject: RE: California v. Sessions, No. 17-cv-4701 and No. 18-cv-5169

Lee, OJP is granting a 30-day extension for acceptance of the Title II award. OJP will be contacting your client directly to that effect. I'll address your other questions as soon as I can.

Scott

From: Lee Sherman [<mailto:Lee.Sherman@doj.ca.gov>]
Sent: Wednesday, October 31, 2018 2:07 PM
To: Simpson, Scott (CIV) <SSimpson@CIV.USDOJ.GOV>; Konkoly, Antonia (CIV) <ankonkol@CIV.USDOJ.GOV>; Mauler, Dan (CIV) <dmauler@CIV.USDOJ.GOV>; Percival, James (OASG) <jpercival@jmd.usdoj.gov>
Cc: Sarah Belton <Sarah.Belton@doj.ca.gov>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Cherokee Melton <Cherokee.Melton@doj.ca.gov>; Garrett Lindsey <Garrett.Lindsey@doj.ca.gov>
Subject: RE: California v. Sessions, No. 17-cv-4701 and No. 18-cv-5169

Scott:

Thank you for your e-mail below and for discussing these issues today during our 26(f) conference. We wanted to confirm that we are awaiting Defendants' response on the following:

- Defendants will be confirming, in response to San Francisco and California's question, that Defendants do not consider the TRUTH Act as violating the "condition against public disclosure of certain law enforcement-sensitive information" contained in the FY 2018 JAG and CGIC award documents. You mentioned that you may be able to get us an answer to that question today, which we would very much appreciate.
- Defendants will be confirming that they are willing to grant the California Board of State and Community Corrections a 30 day extension (until December 16) to accept its Title II Juvenile

Justice Formula Grant.

- Defendants will be providing California with more information about the basis upon which they have withheld PSN funding from California and whether Defendants plan on issuing PSN funding to California in light of Judge Orrick's October 5 Order.
- Defendants will be providing its position on the proposal of entering a stipulated judgment on portions of the FY 2018 case that were decided as part of Judge Orrick's October 5 Order.

We also wanted to respond to Defendants' proposal on the release of FY 2017 and FY 2018 JAG awards. As for FY 2017, California is fine with Defendants' release of those award documents this week. Thank you for agreeing to inform us when the award documents have been released.

California is also fine with the proposal for Defendants to release FY 2018 award documents around November 16. However, we would like to ask whether Defendants would be willing to grant the BSCC or any political subdivision of the State an extension on acceptance of the awards until the resolution of the FY 2018 litigation if that entity or jurisdiction requests one. Like with the FY 2017 awards, California also requests that counsel be notified when the FY 2018 award documents have been released to the BSCC and the State's political subdivisions. Please let us know Defendants' position on both of those issues.

Thank you.

Lee

From: Simpson, Scott (CIV) <Scott.Simpson@usdoj.gov>

Sent: Tuesday, October 30, 2018 1:16 PM

To: Lee Sherman <Lee.Sherman@doj.ca.gov>; Konkoly, Antonia (CIV) <Antonia.Konkoly@usdoj.gov>; Mauler, Dan (CIV) <Dan.Mauler@usdoj.gov>; Percival, James (OASG) <James.Percival@usdoj.gov>

Cc: Sarah Belton <Sarah.Belton@doj.ca.gov>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>

Subject: RE: California v. Sessions, No. 17-cv-4701 and No. 18-cv-5169

Lee:

Thanks for your message below. To address your questions:

1. Defendants intend to submit our letter regarding Item 3 on Friday, Nov. 2.

2. Based on Judge Orrick's bench ruling regarding Item 1 (inclusion of the conditions in the awards), OJP intends to issue the FY 2017 Byrne JAG awards to California and its political subdivisions around the end of this week. We do not believe it will be necessary to await issuance of the Court's written amended judgment, although we are open to any contrary thoughts on that issue. I will inform you when the awards have been issued.

3. In relation to your questions about defendants' legal authority for including immigration-related conditions in other grant programs, defendants will be addressing those issues, as appropriate, in our letter of Nov. 2.

4. Defendants are considering whether they can issue the Project Safe Neighborhoods funding to California in light of the court decisions in the FY 2017 litigation. We will get back to you on this question as soon as possible.

5. As indicated during the meet and confer after last Friday's argument, OJP will not be enforcing the notice, access, and 1373/1644 conditions in the Byrne JAG Program for FY 2018 in light of the court rulings regarding the FY 1017 conditions. We will be enforcing the condition against public disclosure of certain law enforcement-sensitive information. (You will see the precise nature of this condition in the actual award documents.) OJP intends to issue the FY 2018 Byrne JAG awards to California and its subdivisions around November 16.

6. We are open to discussion regarding the best way to resolve plaintiffs' challenge to the public disclosure condition. It may be best to discuss that issue after the awards have been issued. The best approach may be for defendants to file a dispositive motion, followed by a cross-motion from the plaintiffs. We intend to explain defendants' authority for that condition in our filings.

Scott

From: Lee Sherman [<mailto:Lee.Sherman@doj.ca.gov>]

Sent: Monday, October 29, 2018 12:13 PM

To: Simpson, Scott (CIV) <SSimpson@CIV.USDOJ.GOV>; Konkoly, Antonia (CIV) <ankonkol@CIV.USDOJ.GOV>; Mauler, Dan (CIV) <dmauler@CIV.USDOJ.GOV>; Percival, James (OASG) <jpercival@jmd.usdoj.gov>

Cc: Sarah Belton <Sarah.Belton@doj.ca.gov>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>

Subject: California v. Sessions, No. 17-cv-4701 and No. 18-cv-5169

Counsel:

We would like to address several items that came up in the hearing on the motion to amend judgment on Friday before Judge Orrick, and in the meet and confer between counsel after the hearing. We hope that some of these issues can be easily addressed, and the rest can be discussed during our scheduled call on Wednesday morning in connection with and/or in addition to the other items that are required to be discussed as part of our 26(f) conference.

Proposed Modified Judgment

Judge Orrick directed California to send red-lines to the proposed amended judgment that was filed by Defendants. In looking back through my e-mail, I see that a word version of the document was not sent to us. Please circulate a word version of that document at your earliest convenience.

Briefing Schedule on Item 3 of Defendants' Request to Modify the Judgment

At the hearing on Friday, Judge Orrick asked Defendants to submit a three-page letter brief on Item 3 of Defendants' request to modify the judgment regarding their plans to require compliance with the terms of Section 1373 to other grants, and their statutory authority for doing so. Judge Orrick asked that the brief be submitted by Friday, November 2. Please confirm that Defendants' plan on filing on Friday, November 2. If Defendants do so, California will file its response by Friday, November 9.

FY 2017 JAG Awards

At the hearing, counsel for Defendants represented that now that Item 1 of Defendants' request to modify the judgment is close to resolution, Defendants will soon be in a position to issue FY 2017 JAG awards to the Board of State and Community Corrections and the State's political subdivisions. How long after there is an agreement on the proposed language on Item 1 of Defendants' request to modify the judgment, will Defendants be releasing FY 2017 JAG awards to the BSCC and the State's local jurisdictions? California requests that we receive notice from Defendants when the awards are actually sent as well.

Defendant's Addition of Section 1373 Compliance to Other Grants

During the short meet and confer between myself and Mr. Percival after the hearing, I raised California's concerns with Defendants' addition of the requirement to comply with 8 U.S.C. § 1373 to other grants besides JAG, and that Defendants appear to have withheld funding from California for at least one grant on the basis of Defendants' belief that California does not comply with Section 1373. In an attempt to narrow disputes between the parties, we would appreciate the following information for our Wednesday morning scheduled call:

1. What is Defendants' legal authority for adding paragraphs 36 and 37 as conditions to Title II Juvenile Justice Formula Grant funding, as evident in Exhibit K of California's Request for Judicial Notice in support of its Opposition to the Motion to Amend Judgment?
2. What is Defendants' legal authority for requiring compliance with, and certification of compliance with, 8 U.S.C. § 1373 to receive Project Safe Neighborhoods (PSN) funding?
3. What is Defendants' basis for withholding PSN funding from California, while awarding funding to judicial districts in nearly every other state (*see* <https://www.bja.gov/Programs/PSN/FY-2018-Project-Safe-Neighborhoods-Funding-Allocation-Amounts-rev.pdf>)?
4. Do Defendants intend to now award PSN funding to California in light of the outcome in the FY 2017 litigation?

FY 2018 Litigation

Also, during that meet and confer, Mr. Percival mentioned that Defendants are planning on issuing FY 2018 JAG awards to California and its political subdivisions, will not be enforcing the Section 1373, Section 1644, access and notification requirements contained in those awards, but will enforce the 8 U.S.C. § 1324 requirement attached to those awards. Please confirm whether this is Defendants' position, and if so, please let us know when Defendants plan on issuing the FY 2018 JAG awards.

If that is accurate, we would be interested in understanding Defendants' proposal for handling California's FY 2018 complaint. Aside from that, Mr. Percival mentioned that the reason why Defendants will still seek to enforce the 8 U.S.C. § 1324 requirement is that Defendants believe they have separate statutory authority for imposing that condition than the statutory authority that exists for the other requirements. Furthermore, we understand that San Francisco asked Defendants to confirm that the TRUTH Act, California Government Code section 7283.1, does not violate a similar condition added to a different U.S. Department of Justice grant, and has not yet received a response.

Again, in an effort to narrow the disputes between the parties, for our Wednesday morning meet and confer, we would appreciate the following information related to the 8 U.S.C. § 1324 FY 2018 JAG requirement:

1. What is Defendants' legal authority for adding paragraph 44 of the FY 2018 state JAG awards, which refers to 8 U.S.C. § 1324 and is entitled "Noninterference (within the funded 'program or activity') with federal law enforcement: No public disclosure of certain law enforcement sensitive information"?
2. Can Defendants please confirm that they do not consider the TRUTH Act as violating paragraph 44 of the FY 2018 state JAG awards?

We look forward to your response.

Lee

Lee I. Sherman
Deputy Attorney General
Civil Rights Enforcement Section
California Department of Justice
300 S. Spring Street
Los Angeles, CA 90013
Please note new telephone number:
Telephone: (213) 269-6404
Facsimile: (213) 897-7605
E-mail: Lee.Sherman@doj.ca.gov

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EXHIBIT B

From: [Simpson, Scott \(CIV\)](#)
To: [Lee Sherman](#); [Sarah Belton](#); [Cherokee Melton](#); [Garrett Lindsey](#)
Cc: [Eisenberg, Sara \(CAT\)](#); [Mere, Yvonne \(CAT\)](#); [Konkoly, Antonia \(CIV\)](#); [Mauler, Dan \(CIV\)](#)
Subject: Re: Project Safe Neighborhoods
Date: Thursday, November 22, 2018 7:39:46 AM

Lee:

Thanks for your further emails below on this subject. As noted in my email of Nov. 19, Project Safe Neighborhoods is a competitive, highly discretionary program, very different from Byrne JAG or any other formula grant program. The Department of Justice weighs several factors in making awards under this program. One of those factors is the extent to which a given applicant is willing and able to “work[] in partnership with a wide range of engaged stakeholders.” The courts have made very clear that a lump-sum appropriation not tied to an established program confers significant discretion on the administering agency. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

To answer the other questions in your emails of Nov. 19 and Nov. 20:

- California is not being singled out as an applicant in the PSN program. Awards for more than a dozen other jurisdictions are still pending because of concerns about the applicants’ willingness and ability to act in partnership with federal law enforcement.

- The Department is emphatically not withholding funding from California on the basis of any finding or concern regarding the State’s compliance with the statutory obligations of 8 U.S.C. § 1373. As noted, one of the pillars of the PSN program is “robust partnership[]” among federal, state, and local law enforcement. Recent events have created doubt as to California’s willingness and ability to work in full partnership with federal law enforcement officials.

- We cannot agree to hold a portion this discretionary funding pending California’s satisfaction. The purpose of this funding is, in part, to advance the Department’s own law enforcement interests. That is why the funding is so closely coordinated with local U.S. Attorney’s offices. The amount of the overall appropriation is limited, and retaining a portion of the funding would harm the interests of federal law enforcement. As with any competitive grant program, the Department has discretion to choose among the various applicants, and retaining funds for one jurisdiction diminishes the funds available for other jurisdictions.

Please let me know if you have further questions.

Scott

----- Original message -----

From: Lee Sherman <Lee.Sherman@doj.ca.gov>

Date: 11/20/18 7:25 PM (GMT-06:00)

To: "Simpson, Scott (CIV)" <SSimpson@CIV.USDOJ.GOV>, Sarah Belton <Sarah.Belton@doj.ca.gov>, Cherokee Melton <Cherokee.Melton@doj.ca.gov>, Garrett Lindsey <Garrett.Lindsey@doj.ca.gov>
Cc: "Eisenberg, Sara (CAT)" <Sara.Eisenberg@sfcityatty.org>, "Mere, Yvonne (CAT)" <Yvonne.Mere@sfcityatty.org>, "Konkoly, Antonia (CIV)" <ankonkol@CIV.USDOJ.GOV>, "Mauler, Dan (CIV)" <dmauler@CIV.USDOJ.GOV>
Subject: RE: Project Safe Neighborhoods

Scott,

As you know, today, the Court issued the attached Amended Judgment and Order in *California v. Sessions*, No. 17-cv-4701. In that order, Judge Orrick enjoins Defendants from “[r]equiring compliance with 8 U.S.C. § 1373 as a grant condition against any California state entity or political subdivision . . . on the basis of 8 U.S.C. § 1373’s independent statutory obligations.” It is California’s position that requiring certification of compliance with 8 U.S.C. § 1373 for PSN, and withholding funding from California on that basis, is inconsistent with the Amended Judgment and Order that was issued today.

We understand your November 19, 2018 e-mail below as asserting that it is Defendants’ position to withhold PSN funding from California regardless of “wherever the courts may ultimately land on the constitutionality of 8 U.S.C. § 1373.” Therefore, it is our understanding that Judge Orrick’s Amended Judgment and Order today would not change Defendants’ position.

If we are mistaken, and Defendants intend to reconsider their position and award California PSN funding in light of today’s order, we ask that you inform us of such by no later than 5 pm EST tomorrow. We also ask for responses to our questions below by tomorrow, some of which extend back to my October 29 e-mail.

Thank you.

Lee

From: Lee Sherman
Sent: Monday, November 19, 2018 4:31 PM
To: 'Simpson, Scott (CIV)' <Scott.Simpson@usdoj.gov>; Sarah Belton <Sarah.Belton@doj.ca.gov>; Cherokee Melton <Cherokee.Melton@doj.ca.gov>; Garrett Lindsey <Garrett.Lindsey@doj.ca.gov>
Cc: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Konkoly, Antonia (CIV) <Antonia.Konkoly@usdoj.gov>; Mauler, Dan (CIV) <Dan.Mauler@usdoj.gov>
Subject: RE: Project Safe Neighborhoods

Scott,

Thank you for your message. We disagree with you that U.S. DOJ has statutory authority to require compliance with 8 U.S.C. § 1373 to receive PSN funding. And we are troubled that Defendants have

made such a determination while we are awaiting a final decision by Judge Orrick on the scope of the judgment in the FY 2017 case. But, putting those important issues aside for the moment, we would like answers to the following questions:

- In my October 29 e-mail, which is attached, I asked, “What is Defendants’ basis for withholding PSN funding from California, while awarding funding to judicial districts in nearly every other state?” We have still not received a response to that question. Therefore, we request that you provide a response to this question at your earliest convenience.
- Are Defendants withholding funding from California because of concerns with California’s compliance with 8 U.S.C. § 1373? If so, what is Defendants basis for this position in light of Judge Orrick’s October 5, 2018 declaratory judgment finding that the Values Act, TRUST Act, TRUTH Act, and State Confidentiality statutes comply with 8 U.S.C. § 1373?
- While we agree with Defendants that the parties should avoid unnecessary litigation, we are concerned that Defendants’ actions may make further litigation unavoidable. As a result, we would like to know whether Defendants are willing to enter a stipulation agreeing to reserve the PSN funding that California has applied for pending resolution of this matter. Since Defendants have been enjoined from enforcing 8 U.S.C. § 1373 under the currently operative final judgment, we believe that this funding should not have been spent already, and therefore are hopeful that we can come to an agreement on a stipulation. Please let us know Defendants’ position on this issue.

Thank you.

Lee

From: Simpson, Scott (CIV) <Scott.Simpson@usdoj.gov>

Sent: Monday, November 19, 2018 7:19 AM

To: Lee Sherman <Lee.Sherman@doj.ca.gov>; Sarah Belton <Sarah.Belton@doj.ca.gov>; Cherokee Melton <Cherokee.Melton@doj.ca.gov>; Garrett Lindsey <Garrett.Lindsey@doj.ca.gov>

Cc: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Konkoly, Antonia (CIV) <Antonia.Konkoly@usdoj.gov>; Mauler, Dan (CIV) <Dan.Mauler@usdoj.gov>

Subject: Project Safe Neighborhoods

Lee et al.:

We wanted to get back to you about Project Safe Neighborhoods funding for California.

Defendants do not intend to issue PSN funding to the State in light of Judge Orrick’s October 5, 2018, judgment in *California v. Whitaker*, 3:17-cv-04701-WHO.

We believe PSN grants are fundamentally different from the Byrne JAG grants that have been litigated by California and other jurisdictions. Unlike Byrne JAG grants, PSN grants are entirely

discretionary. See generally Discretionary Grant, Grant Terminology, <https://www.grants.gov/web/grants/learn-grants/grant-terminology.html>. In that regard, wherever the courts may ultimately land on the constitutionality of 8 U.S.C. § 1373 would have no bearing on the ability of the Department of Justice, within its discretion, to require compliance with the substance of what is set forth in Section 1373, regardless of whether Section 1373 itself is constitutional as an independent, statutory matter. Moreover, even among discretionary grants, the PSN program is unique in that it is a specific appropriation from Congress to the Department to advance the Attorney General's priorities related to reducing violent crime. See <https://www.justice.gov/opa/press-release/file/1001581/download>; Pub. L. No. 115-141, 132 Stat. 348 (2018) (appropriating \$20,000,000 "for competitive and evidence-based programs to reduce gun crime and gang violence"). One of the five principles of PSN is "working *in partnership* with a wide range of engaged stakeholders." In light of this unique history, we think it is well within the Attorney General's discretion to consider the extent to which PSN fiscal agents and sub-grantees are willing to "work in partnership" with "all levels of law enforcement," including by sharing information with DHS related to criminal aliens. We also believe there is abundant case law to support DOJ's position here, see, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), which we would be happy to discuss further in the hope of avoiding unnecessary litigation.

Scott

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