ASIAN AMERICANS ADVANCING JUSTICE
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SAMPLE RESPONSE TO OJP REQUEST FOR 8 USC 1373 CERTIFICATION

The following is a sample response to a letter that the Office of Justice Programs sent to nine jurisdictions requiring certification of compliance with 8 USC 1373 in regard to FY 2016 Bryne JAG Grants. The certifications are due to OJP by June 30, 2017. Thanks to Professor Christopher Lasch and Jessica Karp at NDLON for their contributions to this sample response.

If you have any questions, please contact: Angela Chan, Policy Director and Senior Staff Attorney, Asian Americans Advancing Justice – ALC at angelac@advancingjustice-alc.org.

Alan R. Hanson
Acting Assistant Attorney General
Office of Justice Programs
810 Seventh Street, NW
Washington, DC 20531

[DATE]

Re: Certification of Compliance with 8 U.S.C. § 1373, FY 2016 Byrne JAG Grant Award 2016-DJ-BX-[XXXX]

Dear Acting Assistant Attorney General Hanson,

I write in response to your letter, dated April 21, 2017, requesting documentation confirming that [JURISDICTION] is compliance with 8 U.S.C. § 1373 under the terms of our FY 2016 Byrne JAG grant funding. While [JURISDICTION] does not agree that 8 U.S.C. § 1373 is constitutional, and does not agree that Congress has made compliance with 8 U.S.C. § 1373 a condition of any federal funding program, notwithstanding these issues. JURISDICTION] is in compliance with 8 U.S.C. § 1373. The following is an official legal opinion from our counsel that supports this certification.

LEGAL OPINION

The Office of Justice Programs cannot condition Byrne JAG grant funding on compliance with 8 U.S.C. § 1373.

As a threshold matter, [JURISDICTION] takes issue with your request for proof of compliance with 8 U.S.C. § 1373 because [JURISDICTION]'s position is that (1) 8 U.S.C. § 1373 is facially unconstitutional and unconstitutional as applied to [JURISDICTION] and its policies, (2) the Executive branch cannot make compliance with 8 U.S.C. § 1373 a condition of funding under the Byrne JAG grant program because Congress did not do so, and (3) even if Congress were to condition funding on compliance with 8 U.S.C. § 1373 it would have to comply with constitutional limitations on the exercise of the Spending Clause power, which it has not.

8 U.S.C. § 1373 does not and cannot require state or local resources to be used for immigration enforcement purposes. [JURISDICTION'S] right to control the use of its own resources is protected by the Tenth Amendment, which prohibits the federal government from commandeering state and local officials to administer federal programs. In *Printz v. United States*, 521 U.S. 898, 933 (1997), the Supreme Court held that the federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 945-46. Indeed, "such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 945. Applying *Printz* to the immigration context, courts have held that "[u]nder the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command state government agencies of the states to imprison persons of interest to federal officials." *Galarza v. Szalczyk*, 745 F.3d 634, 644 (3d Cir. 2014).

The facial and as-applied constitutionality of 8 U.S.C. § 1373 is currently being litigated in federal court. *City and County of San Francisco v. Donald J. Trump et al.,* No. 3:17-cv-00485-WHO, Document 20 (First Amended Complaint for Declaratory and Injunctive Relief) at 18 et seq. (N.D. Cal., filed Feb. 27, 2017) (arguing that 8 U.S.C. § 1373 violates the Tenth Amendment because it regulates States in their sovereign capacity); *id.* at 19 (as-applied argument). The court in this case has already issued a preliminary nationwide preliminary injunction, enjoining enforcement of Section 9(a) of Executive Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) against jurisdictions the administration deems as sanctuary jurisdictions. *See id.* at 29.

Additionally, even if 8 U.S.C. § 1373 can be constitutionally applied to [JURISDICTION] and its policies, the spending power under the Constitution—and with it the limited power to attach conditions to federal funding streams—is vested in Congress, not the Executive branch. *County of Santa Clara v. Donald J. Trump et al.,* No. 3:17-cv-00574-WHO, Document 98 (Order Granting the County of Santa Clara's and City and County of San Francisco's Motions to Enjoin Section 9(a) of Executive Order 13768) at 35-37 et seq. (N.D. Cal., filed Apr. 25, 2017). But "Congress has repeatedly, and frequently, declined to broadly condition federal funds or grants on compliance with Section 1373 or other federal immigration laws," *id.* at 37, and the Executive branch cannot constitutionally impose conditions that Congress has rejected.

Moreover, even if Congress were to condition federal funds or grants on compliance with 8 U.S.C. § 1373, its ability to do so is constrained by constitutional limitations which have not been surmounted here. *See id.* at 22 (holding that Section 9(a) of Executive Order 13768 likely violates at least three restrictions on Congress' Spending Clause powers: (1) conditions must be unambiguous and cannot be imposed after funds have already been accepted; (2) there must be a nexus between the federal funds at issue and the federal program's purpose; and (3) the financial inducement cannot be coercive."); *see also Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-04 (2012) ("The legitimacy of Congress's exercise of the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the contract" at the time Congress offers the money.")

Notwithstanding the legal problems with your conditioning of funding on compliance with 8 U.S.C. § 1373, JURISDICTION] states it is in compliance with 8 U.S.C. § 1373.

[JURISDICTION] ***complies with 8 U.S.C. § 1373.***

8 U.S.C. § 1373 is a narrowly drafted statute that by its text prohibits local and state governments from adopting laws or policies that limit communication with the Department of Homeland Security concerning "information regarding the immigration or citizenship status" of individuals. *Steinle v. City & Cty. of S. F.,* No. 16-cv-02859-JCS, 2017 WL 67064, at *12 (N.D. Cal. Jan 6, 2017. [JURISDICTION] is in full compliance with 8 U.S.C. § 1373 because our [LAW/ORDINANCE/POLICY] does not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Department of Homeland Security information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

8 U.S.C. § 1373 does not mandate compliance with detainer requests

[[JURISDICTION'S LAW/ORDINANCE/POLICY] prohibits the holding of individuals on the basis of Immigration and Customs Enforcement ("ICE") detainer requests. These voluntary requests, issued by ICE to local or state law enforcement, ask agencies to hold individuals for additional time beyond when the individual is eligible for release in a criminal matter. *See* 8 C.F.R. § 287.7(a); *see also Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[S]ettled constitutional law clearly establishes that [immigration detainers] must be deemed requests" because any other interpretation would render them unconstitutional under the Tenth Amendment).

First, 8 U.S.C. § 1373, by its plain terms, does not apply to policies concerning detention, but instead only applies to policies concerning the communication of citizenship or immigration-status information. *Steinle, supra,* 2017 WL 67064, at *12.

Second, an interpretation that 8 U.S.C. § 1373 prohibits limitations on responses to ICE detainer requests is untenable because holding an individual in response to an ICE detainer request would violate his or her Fourth Amendment rights against unreasonable search and seizure. ICE detainers are not supported by judicial determinations of probable cause; rather, they are issued merely by immigration enforcement officers without any judicial involvement. *See Morales v. Chadbourne,* 793 F.3d 208, 215-217 (1st Cir. 2015); *see also Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (holding that plaintiff's detention on an ICE detainer after she would otherwise have been released "constituted a new arrest, and must be analyzed under the Fourth Amendment"). This failure to comply with basic Fourth Amendment protections in the ICE detainer context explains why ICE has mistakenly placed detainers on U.S. citizens and non-removable immigrants. The federal government cannot condition funding on requiring local and state law enforcement agencies to perform acts that violate the Constitution.

Since 8 U.S.C. § 1373 cannot be construed to mandate compliance with detainer requests issued by ICE or prohibit limitations on responses to such requests, [JURISDICTION] is not in violation of 8 U.S.C. § 1373.]

8 U.S.C. § 1373 does not mandate responses to requests for notification of [release times/custody status/criminal case information/contact information/work addresses/home addresses/other information]

[[JURISDICTION'S LAW/ORDINANCE/POLICY] limits the sharing of [RELEASE TIMES/CUSTODY STATUS/CRIMINAL CASE INFORMATION/CONTACT

INFORMATION/WORK ADDRESSES/HOME ADDRESSES/OTHER INFORMATION] to ICE. [JURISDICTION'S LAW/ORDINANCE/POLICY] does not restrict communications regarding immigration or citizenship status in contravention of 8 U.S.C. § 1373.

In a recent case, the U.S. District Court, Northern District of California, rejected the argument that information concerning the release date of a detained individual fell within the scope of 8 U.S.C. § 1373. The court explained that "[t]he statute, by its terms, governs only 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual.' . . . [i]f . . . Congress had intended to bar *all* restriction of communication between local law enforcement and federal immigration authorities, or specifically to bar restrictions of sharing inmates' release dates, it could have included such language in the statute." *Steinle, supra*, 2017 WL 67064, at *12. This analysis also applies to the types of information contemplated in [JURISDICTION'S LAW/ORDINANCE/POLICY], including [CUSTODY STATUS/CRIMINAL CASE INFORMATION/CONTACT INFORMATION/WORK ADDRESSES/HOME ADDRESSES/OTHER INFORMATION]. 8 U.S.C. § 1373 does not regulate communications of *every* kind.

Because 8 U.S.C. § 1373 prohibits local and state governments from adopting laws or policies that limit communication with the Department of Homeland Security concerning "information regarding the immigration or citizenship status" of individuals, and [JURISDICTION'S LAW/ORDINANCE/POLICY] does not limit the exchange of this type of information, [JURISDICTION] is not in violation of 8 U.S.C. § 1373.]

8 U.S.C. § 1373 does not require local agencies to inquire as to immigration status

As discussed above, 8 U.S.C. § 1373 only prohibits local and state governments from enacting laws or policies that limit the exchange of one specific type of information: "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. §§ 1373; *Steinle, supra,* 2017 WL 67064, at *12. The [[JURISDICTION'S LAW/ORDINANCE/POLICY] prohibition on [INVESTIGATING/INQUIRING INTO/OTHER] an individual's immigration status does not violate 8 U.S.C. § 1373.

8 U.S.C. § 1373 does not require states or localities to collect information about citizenship or immigration status or prohibit states or localities from restricting the collection of information about citizenship or immigration status. *See, e.g.*, *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1421 (Ct. App. 2009) (holding that Section 1373 does

not prohibit restrictions on obtaining information about immigration status); *see also* Office of Justice Program Guidance Regarding Compliance with 8 U.S.C. § 1373, *at* https://www.bja.gov/funding/8uscsection1373.pdf ("Section 1373 does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status, nor does it require that states and localities take specific actions upon obtaining such information."). Since 8 U.S.C. § 1373 does not require local or state governments to collect information or prohibit them from limiting the collection of individuals' information, [JURISDICTION] is in full compliance with the statute.

8 U.S.C. § 1373 does not mandate the allocation of local resources

[[JURISDICTION'S LAW/ORDINANCE/POLICY] prohibits the use of state or local resources for immigration enforcement purposes, which may include [MONITORING/STOPPING/QUESTIONING/INTERROGATING/SEARCHING A PERSON/THE USE OF FACILITIES FOR INVESTIGATIVE INTERVIEWS OR OTHER PURPOSES/THE EXPENDITURE OF PERSONNEL TIME AND/OR RESOURCES IN RESPONDING TO ICE INQUIRIES OR COMMUNICATING WITH ICE REGARDING INDIVIDUALS' INCARCERATION STATUS OR RELEASE DATES/OTHER ACTS] for the purpose of determining his or her immigration status. 8 U.S.C. § 1373 does not and cannot require that state or local resources be used for such purposes.

Immigration regulation and enforcement are federal functions. *See Arizona v. United States,* 132 S. Ct. 2492, 2499 (2012). [JURISDICTION'S] right to control the use of its own resources is protected by the Tenth Amendment, which prohibits the federal government from commandeering state and local officials to administer federal programs. The federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 945-46. Indeed, "such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 945.

Courts have held that "[u]nder the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials." *Galarza*, 745 F.3d at 644 (holding that "a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment").] The same reasoning dictates the conclusion that federal immigration officials cannot otherwise "compel state and local agencies to expend funds and

resources" to enforce federal immigration law. *Id; see also* Attorney General Kamala Harris, Information Bulletin No. 2012-DLE-01 ("[N]either Congress nor the federal executive branch can require state officials to carry out federal programs at their own expense. If [immigration] detainers were mandatory, forced compliance would constitute the type of commandeering of state resources forbidden by the Tenth Amendment."); Congressional Research Service, Enforcing Immigration Law: The Role of State and Local Law Enforcement 5 (March 11, 2009) ("Congress cannot compel the states to enforce federal immigration law and to do so in a particular way.").]

Since 8 U.S.C. § 1373 does not and cannot require that state or local resources be used for immigration enforcement purposes, [JURISDICTION] cannot be in violation of 8 U.S.C. § 1373.]

Conclusion

For all the reasons explained above, [JURISDICTION] is in compliance with 8 U.S.C. § 1373.

Sincerely,
[NAME]
[TITLE]
[JURISDICTION]