individual, by virtue of his or her race or sex, bears responsibility for actions committed in the
by other members of the same race or sex; (8) any individual should f[illegible]ilt
anguish, or any other form of psychological distress on acc[illegible]
meritocracy or traits such as a hard work ethic are racist [illegible]or were created by a pa
race to oppress another race." *Id.*

"Divisive concepts" also is defined to include "any other form of race or sex stereo
or any other form of race or sex scapegoating." Exec. Order, 8[illegible]
Executive Order uses the term "race or sex stereotyping [illegible]scribing character trai
values, moral and ethical codes, privileges, status, or b[illegible] race or sex, or to an indiv
because of his or her race or sex." *Id.* "Race or sex s[illegible]ng" is defined to mean "a
fault, blame, or bias to a race or sex, or to members of [illegible]sex because of their r[illegible]
similarly encompasses any claim that, consciously or un[illegible]is or
race or sex, members of any race are inherently racist or are [illegible]to oppress others,
or that members of a sex are inherently sexist or inclined to oppress others." *Id.*

Section 3, "Requirements for the United States Uniformed Services," directs that the United States Uniformed Services "shall not teach, instruct, or train" their members "to believe any of the divisive concepts" identified in Section 2. Exec. Order, 85 Fed. Reg. at 60685.

Section 4, "Requirements for Government Contractors," requires that all government contracts include certain express provisions.[2] Exec. Order, 85 Fed. Reg. at 60685-86. The contractor must ag0 ẘ ´ [illegible]m ing."

United States District Court
Northern District of California

United States District Court

influence a worker's conduct or speech and be perceived by others as offensive." *Id.*

Another FAQ is, "How can I file a complaint alleging unlawful training programs?" DOL FAQs, https://www.dol.gov/agencies/ofccp/faqs/executive-order 652.78 Tm0 g0 G[(-)] TJETQq0.0000091

United States

funding, including funding from the Centers for Disease Control and Prevention, the National Institutes of Health, the National Endowment for the Humanities, and the National Council on the Arts. *Id*. ¶ 7. "Some of these funds are federal grants that are pass-through funds administered by state or local governments, such as the Pennsylvania Department of Health." *Id*.

Plaintiff NO/AIDS Task Force d/b/a CrescentCare ("CrescentCare") is a nonprofit located in New Orleans, Louisiana. Riener Decl. ¶ 1,

United States Dist4

United States District Court
Northern District of California

have shown

subcontractors, and employees of Federal contractors and subcontractors concerning workplace trainings involving prohibited r

discussing a case in which multiple plaintiffs challenged a law that criminalized teaching communism. *Lopez*, 630 F.3d at 787. "[T]hree of the plaintiffs, who had not alleged that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, but merely that they felt inhibited in advocating political ideas or in teaching about communism, did not have standing." *Id.* (quotation marks and citation omitted). Here, Plaintiffs have presented evidence showing that enforcement of the Executive Order against them is likely.

b. Intent to Violate

The Ninth Circuit stated in *Lopez* that "pre-enforcement plaintiffs who failed to allege a concrete intent to violate the challenged law could not establish a credible threat of enforcement." *Lopez*, 630 F.3d at 787. Because something more than a hypothetical intent is required, the Ninth Circuit held that plaintiffs must articulate a "concrete plan" to violate the challenged law by providing details about their future speech. *Id.* The Government contends that Plaintiffs have not articulated a "concrete plan" to violate the Executive Order, and thus they have not established standing to challenge it.

The Court finds the Government's argument on this point to be unpersuasive. Some years after *Lopez* issued, the Supreme Court clarified that "[n]othing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact

the possibility of a First Amendment claim arises." *Id.* "The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.* When the government restricts the speech of an independent contractor rather than an employee, any differences in the parties' relationships may be considered during the *Pickering* balancing. *See Umbehr*, 518 U.S. at 678 ("We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors.").

At the first step of the *Pickering* balancing test, determining whether the employee spoke as a citizen on a matter of public concern, courts consider the scope of the employee's job responsibilities. *See Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008). "[S]tatements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." *Id.* at 1127 n.2 (quotation marks, citations, and alterations omitted). Under Section 4 of the Executive Order, a federal contractor must agree not to "use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating," including enumerated "divisive concepts." Exec. Order, 85 Fed. Reg. at 60685.

On its face, this restriction on the contractor's training of its *own* employees applies regardless of whether the federal contract has anything to do with diversity training or the identified "divisive concepts," and is untethered to the use of the federal funds. Moreover, the restricted speech, addressing issues of racism and discrimination, goes to matters of public concern. *See Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 926-

United States ‡2 (is)-3eos‡12 (is)eo2gshQq‡

agency may impose the speech restrictions described in Section 5, including grant programs unrelated to providing workplace training. *See id.*

Requiring federal grantees to certify that they will not use grant funds to promote concepts the Government considers "divisive," even where the grant program is wholly unrelated to such concepts, is a violation of the grantee's free speech rights. *See AID*, 570 U.S. at 218. Like the statute struck down in *AID*, Section 5 of the Executive Order authorizes, as a condition of federal funding, a speech restriction that by its nature "cannot be confined within the scope of the Government program." *See id.* at 221. While Section 5 merely directs agency heads to identify the grant programs on which the unconstitutional condition may be imposed, the record evidence leaves no doubt that such identification is merely the first step in actually imposing the condition on as many grant programs as possible.

The Court concludes that Plaintiffs have shown a likelihood of success on their First Amendment claim grounded in Section 5. At the very least, Plaintiffs present serious questions going to the merits of that claim. Under the alternative formulation of the preliminary injunction standard, Plaintiffs may obtain injunction relief with respect to Section 5 if they demonstrate that the balance of hardships tips sharply in their favor, and establish the other two *Winter* factors. *See Alliance for the Wild Rockies*, 632 F.3d at 1131-32. Plaintiffs do make that showing, as discussed below.

b. Claim 2 VioT/F1 12 tech restriction that by its nature

Fed. Reg. at 60686.

As set forth in Plaintiffs' declarations and discussed above, training on unconscious bias is critical to Plaintiffs' missions and their work. *See, e.g.*, Shanker Decl. ¶ 10 ("Training health care professionals, and others, on implicit bias, systemic racism, sexism, and intersectionality helps health care professionals to provide better and more affirming care to their LGBT patients."), ECF 51-4; Brown Decl. ¶ 14 ("It is impossible for me to conduct trainings given the nature of my work, and the clients who hire me to perform this work for them, if I have to do so with a list of banned terms and concepts, such as intersectionality, unconscious bias, or systemic racism. . . ."), ECF 51-5; Carpenter Decl. ¶ 16 ("As health care providers, we also must explicitly acknowledge and confront the role of implicit bias among health care workers as a contributor to medical mistrust and health disparities and inequities. Implicit or unconscious biases are embedded stereotypes about groups of people that are automatic, unintentional, deeply engrained, universal, and able to influence behavior."), ECF 51-9. Plaintiffs do not know whether they can continue with this critical training, or if it runs afoul of Sections 4 and 5. *See* Shanker Decl. ¶ 13; Brown Decl. ¶ 15; Carpenter Decl. ¶ 18.

The ambiguity regarding the conduct prohibited by Sections 4 and 5 is only exacerbated by the DOL FAQs. With respect to training on unconscious bias, the FAQs state that "[u]nconscious or implicit bias training is prohibited to the extent it *teaches or implies* th rn28612 7926400 G[792 reW* n

the Executive Order. *See* Davis Decl. ¶ 22, ECF 51-2; Meyer Decl. ¶ 14, ECF 51-8. The frustration of Plaintiffs' ability to carry out their core missions is itself irreparable harm. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (finding that ongoing harms to the plaintiffs' organizational missions as a result of challenged statute established likelihood of irreparable harml1 12 Tf1 12 Tf1 0 0 1 349.18 700.8 Tm0e4dnBT/F1 12 Tf1 0 0 E. BayhCovenant [T8 Tr

both the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. Moreover, with respect to their First Amendment challenge to Section 5, the Court makes an alternate finding that Plaintiffs have have shown at least the existence of serious questions going to the merits and that the balance of hardships tips sharply in their favor.

The Government argues that Plaintiffs' motion does not provide a basis to enjoin the Executive Order as a whole, and it asserts that any injunctive relief should be limited to Section 4(a), governing federal contractors, and nothing more. For the reasons discussed herein, the Court agrees with the Government that relief must be consistent with "the general rule" requiring "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation marks and citation omitted). It is for that reason that the Court has limited the relief granted to Sections 4 and 5 of the Executive Order. Although the Government suggests that enjoining Section 4(a) would be sufficient to grant Plaintiffs complete relief, the Government does not explain why that is so when Sections 4(b) and (c) provide means for enforcing Section 4(a). Section 5 addresses grantees, and as discussed above, Plaintiffs have demonstrated entitlement to injunctive relief as to Section 5 as well as Section 4.

In addition, the Government asserts that this Court lacks power to enjoin President Trump. Generally, courts lack "jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion) (quotation marks and citation omitted). Some courts have suggested that the President may be enjoined in narrow circumstances. *See, e.g., Rosebud Sioux Tribe v. Trump*, 428 F. Supp. 3d 282, 291 (D. Mont. 2019) (stating that courts have authority to grant injunctive relief when "the President has no authority to act in the first place"). This Court need not determine whether it could issue a preliminary injunction against the President in this case, because Plaintiffs expressly disclaim any request to enjoin President Trump. The Complaint seeks "[p]reliminary and permanent injunctions enjoining Defendants other than the President from implementing and enforcing the Executive Order." Compl. Prayer at 50, ECF 1. Plaintiffs reiterate that position in their reply. *See* Reply at 15, ECF 70.

The Government also suggests that a class action suit would be a more appropriate vehicle for Plaintiffs' claims. This suggestion iD1 Tf1ggestdh25 42.45 275.75 reSq25.56 224.96 27.36 282.26 reV

Executive Order. *See* Davis Decl. ¶ 22, ECF 51-2. In the same time frame, the organizer of a

one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). The Government's reliance on *Mendoza* is misplaced, as the relief granted by the present order is not a "final adjudication" but rather preliminary injunctive relief. As of the filing of this order, counsel for the government defendants have not appeared in that case, nor have the plaintiffs in that case sought a preliminary injunction. Under these circumstances, the Court is not persuaded that the pendency of precludes it from granting a preliminary injunction here.

In reaching this conclusion, this Court is mindful of the Ninth Circuit's most recent decision involving nationwide injunctive relief, *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.* ("*USCIS*"), --- F.3d ----, No. 19-17213, 2020 WL 7052286 (9th Cir. Dec. 2, 2020). *USCIS* involved challenges to a rule ("the Rule") issued by the Department of Homeland Security ("DHS"), providing that "[f]oreseeable participation for an aggregate of twelve months" in certain non-cash federal government assistance programs within a three-year span "renders an immigrant inadmissible as a public charge and ineligible for permanent resident status." *USCIS*, 2020 WL 7052286, at *3. In a "cascade of litigation,"

nationwide, and otherwise affirmed the Eastern District's injunction. *Id.* at 15. The Ninth Circuit reasoned that "[w]hatever the merits of nationwide injunctions in other contexts," such an injunction was not appropriate in the case before it, "because the impact of the Rule would fall upon all districts at the same time, and the same issues regarding its validity have been and are being litigated in multiple federal district and circuit courts." *Id.*

The circumstances of the present case are markedly different from those addressed in *USCIS*. There has been no "cascade of litigation" or "chorus of preliminary injunctions" regarding the Executive Order. As discussed above, only one other suit challenging to the Executive Order has been filed,