IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF EVANSTON and THE UNITED STATES CONFERENCE OF MAYORS, Plaintiffs, v. MATTHEW G. WHITAKER,[1] as Acting Attorney General of the United States, Defendant.	Case No. 18-cv-4853

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The United States Conference of Mayors (the "Conference") and the City of Evanston, Illinois ("Evanston") (collectively, "Plaintiffs"), for their amended complaint against defendant Matthew G. Whitaker, in his capacity as appointed Acting Attorney General of the United States, ("Defendant" or the "Attorney General"), state as follows:

INTRODUCTION

1. The Conference and Evanston bring this action to stop the federal government's aggressive and escalating effort to force cities into becoming the deportation arm of the federal government. The Conference and Evanston seek to enjoin the Attorney General of the United States from imposing sweeping and unlawful conditions on the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG")—an established federal grant program that provides crucial support for law enforcement in hundreds of cities nationwide.

[1] On November 7, 2018, Attorney General Jefferson B. Sessions III resigned from office. Shortly thereafter, President Trump appointed Matthew Whitaker as the Acting Attorney General. Under Federal Rule of Civil Procedure 25(d), Whitaker is automatically substituted as party defendant for Sessions, and the Department of Justice and United States are bound by his admissions and pleadings in this action. Plaintiffs have amended the case caption in their filings accordingly. However, they do so without waiving any objection to Whitaker's authority to act as Attorney General. As the State of Maryland maintains in a recent lawsuit, *State of Maryland v. United States*, D. Md. Case No. 1:18-cv-02849-ELH, Whitaker's appointment may violate 28 U.S.C. § 508 and the Appointments Clause of the Constitution, U.S. Const. art. II, § 2.

2. The Department of Justice ("Department") first sought to impose three immigration-related conditions on the fiscal year ("FY") 2017 Byrne JAG funds under a cloud of uncertainty created by the Department's increasingly aggressive positions. As a condition of receiving FY 2017 Byrne JAG funds, the Department requires that: (1) cities give the Department of Homeland Security ("DHS"), which includes U.S. Immigration and Customs Enforcement ("ICE"), 48 hours' notice, or at least as much notice "as practicable" prior to releasing any alien in custody to allow ICE to take custody of that individual (the "notice condition"); (2) cities give DHS officials unlimited access to local law enforcement facilities to interrogate any suspected non-citizen held there, effectively federalizing city facilities (the "access condition"); and (3) comply with, and certify such compliance with, 8 U.S.C. § 1373 ("Section 1373"), a federal statute that purports to bar local governments from restricting the sharing of immigration status information with the federal government (the "compliance condition").

3. In August 2018, this Court issued a preliminary injunction that prohibits the Attorney General from imposing the notice, access, and compliance conditions on Evanston and the Conference's other member cities. Indeed, courts throughout the country have enjoined the Attorney General from imposing the conditions.

4. Faced with numerous rulings that prohibit the Attorney General from imposing the unlawful conditions, the Attorney General ignored the courts and doubled-down. On October 1, 2018, the Attorney General began issuing FY 2018 Byrne JAG award notifications to hundreds of cities and other local jurisdictions. The FY 2018 award documents contain three conditions that are materially identical to the FY 2017 conditions preliminarily enjoined by this Court. Beyond that, the FY 2018 award documents include new unlawful conditions.

5. As a condition of receiving FY 2018 Byrne JAG funds, the Department requires cities to (1) provide 48 hours' advance notice, or at least as much notice as practicable, to DHS prior to releasing an alien from custody, just like the notice condition the Court preliminarily enjoined in this case and set aside as unlawful in Chicago's and Illinois' cases; (2) provide federal authorities with "access to any correctional facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his right to be or remain in the United States," just like the access condition the Court preliminarily enjoined in this case and set aside as unlawful in Chicago's and Illinois' cases; (3) comply with Section 1373, which this Court already held facially unconstitutional, and comply with 8 U.S.C. § 1644 ("Section 1644"), which prohibits the same conduct as Section 1373, and is therefore unconstitutional for the same reasons (the "compliance condition"); (4) not publicly disclose federal law enforcement information in an attempt to conceal, harbor, or shield from detection fugitives from justice or undocumented immigrants, even where such disclosure would not violate the law (the "harboring condition"); and (5) provide additional information about communications with federal immigration authorities in an apparent attempt to help the Department enforce its other unlawful immigration-related conditions (the "questionnaire condition"). In connection with the conditions, the Department requires recipients to certify compliance with the conditions and various federal statutes, including 8 U.S.C. §§ 1226(a) and (c), 1231(a), 1324(a), 1357(a), 1366(1) and 1366(3), 1373, and 1644. (The conditions and certifications required to receive FY 2017 and FY 2018 Byrne JAG funds are collectively referred to as the "challenged conditions.")

6. The challenged conditions are facially unauthorized and unconstitutional. The FY 2018 conditions are just as harmful as those that the Court struck down, and in precisely the same ways. The Attorney General once again seeks to dictate local policy by imposing

unauthorized conditions on a critical source of local government funding. Neither federal law nor the United States Constitution permit the Attorney General's actions.

7. The challenged conditions are also directly at odds with Conference policy resolutions, which collectively represent the views of the nation's cities and their mayors. In 2017 and 2018, the Conference adopted policy resolutions addressed to the federal government's efforts to force localities to engage in federal immigration enforcement. The resolutions called for: (a) an end to unconstitutional funding threats to cities in an effort to coerce and compel them into implementing federal immigration law; (b) the end of the Department's unconstitutionally broad interpretation of Section 1373; and (c) the award of Byrne JAG funds to municipalities without the imposition of unconstitutional conditions.

8. Because of the Department's imposition of the challenged conditions, Evanston and the Conference's other members face a Hobson's choice: agree to accept the Department's unconstitutional grant conditions or stand on their rights and forfeit crucial Byrne JAG funds.

9. The Conference and Evanston seek a declaration that the challenged conditions are unlawful. The Conference and Evanston also seek an injunction preventing the Department from imposing the challenged conditions on FY 2017 Byrne JAG funds, FY 2018 Byrne JAG funds, and from including the conditions in future applications and awards. To prevent the endless cycle of litigation, in which the Attorney General imposes unlawful conditions on the receipt of federal grant funds each year until the Conference and Evanston sue and the Court intervenes, the requested relief should cover FY 2017, FY 2018, and all future grant years. The Conference and Evanston also request that the Court order the Attorney General to pay fees, expenses, and costs to the Conference and Evanston.

PARTIES

10. Plaintiff The United States Conference of Mayors is a non-profit association organized under the laws of Illinois and with its offices in the District of Columbia. As the official non-partisan organization of United States cities with populations of 30,000 or more, the Conference represents the interests of over 1,400 cities in the United States. This includes numerous cities in this federal district and in every other jurisdiction in the country. Nearly 150 million people reside in these cities.

11. Plaintiff Evanston is a municipal corporation and home rule unit of government organized and existing under the constitution and laws of the State of Illinois. Evanston was incorporated in 1857, and is home to approximately 74,895 residents, including a vibrant immigrant community.

12. Defendant Matthew G. Whitaker has been appointed as the Acting Attorney General of the United States. He is sued in his official capacity. The Attorney General is the federal official in charge of the United States Department of Justice, which took, and threatens imminently to take, the governmental actions at issue in this lawsuit.

JURISDICTION AND VENUE

13. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1346. The Court is authorized to issue the relief sought here under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, 706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

14. Venue is proper in the Northern District of Illinois under 28 U.S.C. § 1391(e). Defendant is a United States officer being sued in his official capacity. Evanston resides in this judicial district and substantial events giving rise to this action occurred in this judicial district. The Conference consents to adjudication of these issues in this district.

FACTUAL ALLEGATIONS

A. The Byrne JAG program provides critical funds to cities.

15. Congress established the Byrne JAG program in 2005 to serve as the primary source of federal criminal justice funding for states and localities. The Office of Justice Programs ("OJP") within the Department oversees the program.

16. The goal of the Byrne JAG program is to allow states and local governments the "flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" for local policing. H.R. Rep. No. 109-233, at 89 (2005).[2] To that end, the Byrne JAG program is structured as a formula grant, which awards funds to all eligible grantees according to a prescribed formula. *See* 34 U.S.C. § 10156(d)(2)(A).

17. The Byrne JAG program requires that the Attorney General "shall allocate to each unit of local government," funds in accordance with a formula based on population and relative levels of violent crime. 34 U.S.C. §§ 10156(d)(2)(A). The Byrne JAG distribution formula for states is a function of population and violent crime. *Id.* § 10156(a). The formula for local governments is a function of the state's allocation and the ratio of violent crime in the locality to violent crime in the state. *Id.* § 10156(d).

18. The Attorney General must follow the statutory formula to determine allotments for each state and local government. 34 U.S.C. § 10156. The formula-based approach entitles cities to their share of the Byrne JAG formula allocation so long as their proposed programs meet at least one of eight broadly defined goals, *see* 34 U.S.C. § 10152(a)(1)(A)-(H) (listing eligible programs such as general law enforcement, prevention and education, drug treatment, and mental

[2] The Byrne JAG program was created in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006), which in turn amended the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

health), and their applications contain a series of statutorily required certifications and attestations. *Id.* § 10153(a).

B. The Conference was formed to address the intersection of federal and local policy and has resolved to oppose the Attorney General's actions.

19. In 1932, during the midst of the Great Depression, the nation's cities were close to bankruptcy and their residents were largely unemployed and without access to sufficient food, housing, law enforcement, and other necessities. In response to the appeals of mayors across the country, Congress created a $300 million federal assistance program for cities, marking the first time in the nation's history that federal relief was provided directly to cities. A few weeks later, the Conference was founded to coordinate its cities' interactions with the federal government.

20. Today the Conference's member cities are home to immigrant populations that are both recent arrivals and multigenerational families. The Conference proudly recognizes that cities are diverse, multicultural centers, and that their diversity reflects core American values, fosters economic prosperity and opportunity, enriches cities' cultures, and keeps our nation competitive and strong.

21. The Conference's primary roles include safeguarding the interests, rights, and privileges of municipalities; promoting the development of effective national city and metro-area-focused policy; strengthening federal-city relationships; ensuring that federal policy meets urban needs; providing mayors with leadership and management tools that allow them to do their jobs better; and creating a forum in which mayors share ideas, information, and best practices, and through which cities coordinate on shared policy goals.

22. Conference members speak with a united voice on organizational policies and goals. Mayors contribute to the development of national urban policy by serving on one or more

of the Conference's standing committees or in another leadership role. A list of member cities whose mayors currently serve in leadership roles is attached as Exhibit A to this complaint.

23. The adoption of a resolution is the principal means by which the Conference speaks on matters of policy. The policy positions adopted at the Conference's annual meetings collectively represent the views of the nation's cities.

24. Conference members met from June 23-26, 2017 for the 2017 annual meeting. Over 250 mayors representing cities across the country, including those from nearly every state and the Commonwealth of Puerto Rico, attended the meeting.

25. At the 2017 annual meeting, the Conference's members passed three resolutions recognizing the importance of immigrants to their communities, supporting immigrant rights, standing against policies that target immigrant communities, and opposing the administration's punitive welcoming city policies.

26. First, the Conference passed a resolution titled "Opposing Punitive Sanctuary Jurisdiction Policies" (attached as Exhibit B). This resolution reflects the Conference members' considered judgment that, among other things:

(a) Many local jurisdictions determined that their local law enforcement efforts and personnel have neither the authority, the priority, nor the resources to serve as immigration enforcement officers;

(b) Trust between local law enforcement and the communities they serve is critical to preventing, solving, and prosecuting crimes, and many jurisdictions determined that having local law enforcement officers serve as immigration officers would break that trust;

(c) Many local jurisdictions and authorities lack the law enforcement resources to act as immigration officers at the expense of local law enforcement priorities; and

(d) Cities and other local government entities must have the discretion to make individualized determinations relative to local values, expenditure of resources, priorities, and liabilities assumed, all taking into account that immigrants residing in the nation's cities must be able to trust all of city government that their Fourth Amendment rights will be guaranteed, and that local law enforcement efforts to

> build trust and supportive relationships with all communities are essential to preventing and prosecuting crime and helping victims.

(Ex. B at 1-2.)

27. Accordingly, the Conference resolved to:

(a) Oppose punitive sanctuary jurisdiction policies that limit local control and discretion;

(b) Urge Congress, the administration, and states to pursue immigration enforcement policies that recognize that local law enforcement has limited resources and community trust is critical to local law enforcement and community safety; and

(c) Oppose federal and state policies that commandeer local law enforcement or require local authorities to (i) violate, or be placed at risk of violating, a person's Fourth Amendment rights; (ii) expend limited resources to act as immigration agents; or (iii) otherwise assist federal immigration authorities beyond what is determined by local policy.

(*Id.* at 2-3.)

28. Second, the Conference passed a resolution titled "Supporting Immigrants, Refugees and Asylum Seekers and Standing Against Discriminatory and Harmful Policies that Target These Vulnerable Communities" (attached as Exhibit C). This resolution recognizes that cities are home to immigrant populations, including recent arrivals and multigenerational families; that immigrants contribute to cities in important ways; and that the administration has nonetheless antagonized and intimidated immigrant communities through executive orders and by threatening punitive actions against welcoming cities. (Ex. C at 1.) The Conference resolved to call on Congress to act against policies that discriminate against and target immigrants, and to oppose "the Administration's efforts to hold immigrants hostage as bargaining chips to threaten withholding federal funding from cities across the nation." (*Id.* at 1-2.)

29. Third, the Conference passed a resolution titled "Supporting Immigrant Rights" (attached as Exhibit D). This resolution recognizes that: the United States is enriched by the diversity of immigrants; cities are diverse, multicultural centers that reflect core American values

and foster economic prosperity; and data show that welcoming cities are stronger economically and safer than other cities. (Ex. D at 1.) In addition, the resolution recognizes that the federal government seeks to restrict funding to welcoming jurisdictions and coerce cities into becoming the deportation arm of the federal government, which undermines cities' abilities to ensure community safety by eroding trust between local law enforcement and residents. (*Id.* at 1-2.) The Conference thus resolved to "call for an end to unconstitutional federal funding threats to states and local governments in an effort to coerce and compel them into implementing federal immigration law," and to "urge members of Congress to withdraw legislation that attempts to cut local law enforcement funding necessary to ensure the safety of our communities." (*Id.* at 2.)

30. From June 8-11, 2018, Conference members met in Boston for the 2018 annual meeting. More than 240 mayors representing cities across the country attended, including those from nearly every state and the Commonwealth of Puerto Rico.

31. At the 2018 annual meeting, the Conference passed a resolution titled "Opposing Unconstitutional Requirements Placed on Byrne JAG Funding and Urging the Immediate Awarding of FY 2017 Byrne JAG Grants" (attached as Exhibit E). The resolution states that cities "will not be bullied, intimidated or coerced into making a false choice between grants with offensive conditions attached, on the one hand, and our values as welcoming cit[ies] and the principles of community policing, on the other." (Ex. E at 1.) The resolution recognizes that the Department has no authority to impose new conditions on a grant program created by Congress and "cannot commandeer local law enforcement to carry out federal immigration law functions." (*Id.* at 2.) The Conference resolved to call on the Department "to award Byrne JAG funds to municipalities without imposing additional unconstitutional conditions." (*Id.* at 3.)

32. Each of these resolutions passed with a wide majority of the Conference members present for the meetings. In fact, after conclusion of a vote on a proposed resolution that passes, a mayor who attended the vote may request to be recorded as having voted "No" on that specific resolution. Only five mayors in attendance at the annual meeting recorded a no vote as to any of the three 2017 resolutions. Only one mayor in attendance at the 2018 annual meeting recorded a no vote as to the 2018 resolution.

C. Conference members rely on Byrne JAG funds.

33. Many Conference members rely on Byrne JAG funds for critical law enforcement needs. As such, the Conference has long supported the Byrne JAG program. (*See* Ex. F (2012 Conference resolution reaffirming the Conference's strong support for the Byrne JAG program and noting that the program is "critical to the safety of our cities").)

34. Over the past decade, Conference members have routinely applied for and received Byrne JAG funds.

35. Evanston, a Conference member, first received Byrne JAG funds in 2009 and has received funds every year since. Evanston uses Byrne JAG funds to train officers through the Police Learning Institute, pay personnel, and to purchase equipment. In FY 2016, Evanston received $14,685 through the Byrne JAG program.

36. Evanston receives its Byrne JAG funds through the application submitted by Chicago, Illinois. Because Chicago's costs of preventing and investigating violent crimes exceed those of surrounding jurisdictions, 34 U.S.C. § 10156(d)(4) obligates Chicago to file a Byrne JAG application on behalf of itself and other, neighboring communities, including Evanston.

37. Many of the Conference's members use Byrne JAG funds for diverse purposes, reflecting both the varied law enforcement needs of different communities and Congress's intent

to preserve local discretion and flexibility in Byrne JAG-funded law enforcement programs.

These include, for example, the following Conference members:

(a) Iowa City, Iowa (population 74,398) uses Byrne JAG funds to promote traffic safety, to establish a search and rescue program aimed at individuals at risk for wandering, to partially fund a drug task force, and to purchase equipment.

(b) Los Angeles, California (population 3,792,621) uses Byrne JAG funds for its Community Law Enforcement and Recovery (CLEAR) program, which aims to reduce gang violence in the city and rehabilitate communities that experienced significant crime. The program promotes and funds special criminal investigative units, an aggressive vertical prosecutorial program, probation and parole officers, youth intervention organizations, and schools.

(c) New Orleans, Louisiana (population 391,495) uses Byrne JAG funds on gun violence reduction initiatives, alternatives to incarceration for municipal court, diversion programs for eligible defendants with mental illness, pre-trial and probation advocacy, domestic violence monitoring court, and technology upgrades including body cameras and audio surveillance equipment for its police force.

(d) New York, New York (population 8,175,133) uses Byrne JAG funds to support a wide range of programs, including efforts to improve the collection, organization and evaluation of criminal justice data; a specialized unit that investigates illegal hotels, building violations, and illegal adult establishments; initiatives to reduce the number of people with mental and behavioral needs who cycle through the criminal justice system by connecting them with interventions and services; and initiatives to ensure the safety of students and reduce crime in schools. In addition, the City's five District Attorneys use Byrne JAG funds to support many programs, including the Kings County Drug Treatment Alternative-to-Prison program, which diverts hundreds of nonviolent offenders to community-based residential drug treatment programs, and the New York County Cybercrime and Identity Theft Bureau, which protects the public and institutions from organized cybercrime and identity theft schemes.

(e) Portland, Oregon (population 639,863) has used Byrne JAG funds to support its New Options for Women (NOW) program, which provides services to women who experienced sexual exploitation while working in the commercial sex industry.

(f) Providence, Rhode Island (population 178,042) uses Byrne JAG funds to pay personnel to conduct targeted enforcement patrols and to contract with Family Service of Rhode Island for the services of a part-time Bilingual Police Liaison.

(g) Sacramento, California (population 493,025) uses Byrne JAG funds to support the ongoing maintenance and operations of its Police Department's helicopter program.

38. Many other Conference members receive Byrne JAG funds and use them for still different, but no less critical, law enforcement purposes. These members include cities listed separately on Exhibit A, and many other cities like them.

D. The Conference, Evanston, and other Conference members promote policies of cooperation between local law enforcement and immigrants.

39. In exercising its discretion over local law enforcement policy, Evanston made the considered judgment that devoting local resources to federal civil immigration enforcement would be detrimental to community safety, and that concerns for safety are best addressed by promoting a policy of cooperation between local law enforcement and immigrants. This policy judgment is codified in Evanston's "Welcoming City Ordinance." Evanston City Code § 1-22.

40. Evanston's Welcoming City Ordinance reflects the Evanston City Council's findings that "the cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City's goals of protecting life and property, preventing crime and resolving problems" and that one of Evanston's "most important goals is to enhance the City's relationship with the immigrant communities." *Id.* § 1-22-2.

41. In its current form, the Welcoming City Ordinance, codified as Chapter 22 of the Evanston City Code, contains several key provisions relevant to this lawsuit, including:

(a) Subject to certain exceptions, no Evanston agent or agency shall "[s]top, arrest, search, detain or continue to detain a person solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation." §1-22-10(A)(1).

(b) Subject to certain exceptions, no Evanston agent or agency shall "[d]etain, or continue to detain, a person based upon an immigration detainer, when such immigration detainer is based solely on a violation of a civil immigration law." § 1-22-10(A)(3).

(c) Nothing in section 1-22-10 "prohibits communication between federal agencies or officials and law enforcement or officials." §1-22-10(D).

(d) Except as otherwise provided by federal law, no Evanston agent or agency shall disclose citizenship or immigration status information "unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains." § 1-22-8.

42. These and the other provisions of the Welcoming City Ordinance play a vital role in strengthening the relationship between Evanston's government, its police force, and its immigrant community. It is essential that Evanston's police officers have the flexibility needed to engage the immigrant community in their crime-fighting initiatives without projecting a constant threat of deportation.

43. Evanston is not alone. Many other Conference members have adopted similar policies. These include, for example, Gary, Indiana; Los Angeles, California; New Orleans, Louisiana; New York, New York; Philadelphia, Pennsylvania; Providence, Rhode Island; and Boston, Massachusetts. [3]

44. Welcoming city policies and similar policies are sound. One study found that "crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties . . . controlling for population characteristics."[4] Indeed, a broad coalition of police

[3] Gary – Ordinance No. 9100; The Los Angeles Police Department & Federal Immigration Enforcement: Frequently Asked Questions, http://assets.lapdonline.org/assets/pdf/immigrationfaq.pdf; New Orleans – New Orleans Police Department Operations Manual, Chapter 41.6.1, https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-41-6-1-Immigration-Status-approval.pdf/; New York – Executive Order Nos. 34 and 41, https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-34.pdf and https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-41.pdf; Philadelphia – Executive Order No. 16, https://www.ilrc.org/sites/default/files/resources/2016-01_philadelphia_pep_order.pdf; Providence – Resolution of the City Council, https://www.ilrc.org/sites/default/files/resources/providence_resolution.pdf. Boston – An Ordinance Establishing a Boston Trust Act.

[4] Tom K. Wong, Center for American Progress, *The Effects of Sanctuary Policies on Crime and the Economy* 6 (2017), http://tinyurl.com/y75lsykd.

chiefs explained that "build[ing] trusting and supportive relations with immigrant communities . . . is essential to reducing crime and helping victims."[5]

45. Welcoming city policies are rooted in the judgment that restricting entanglement with ICE secures and enhances community trust in local law enforcement. Local law enforcement relies upon all community members (regardless of immigration status) to report crimes, serve as witnesses, and assist in investigations and prosecutions. Indeed, in the Conference members' experience, even the perception that local law enforcement is assisting in immigration enforcement can erode trust, disrupt lines of communication, and make law enforcement's job much more difficult.

46. For these reasons, the Conference has for years opposed the federal government's attempts to penalize cities that adopt welcoming city policies such as those cited above. In 2015, for example, the Conference opposed Senate Bill 2146, the "Stop Sanctuary Policies and Protect Americans Act," which proposed to deny Community Development Block Grants and other federal aid to cities that adopted policies like those identified above.

47. Shifting the federal responsibility of enforcing civil immigration law to local governments diverts critical resources from their law enforcement agencies, compromises public safety, and hinders local police department policies. The Conference continues to oppose similar legislation when proposed (none of which Congress passed).

E. The Department imposed unlawful conditions on FY 2017 Byrne JAG funds.

48. For over a decade, the Department administered the Byrne JAG program as Congress intended: funding critical local law enforcement initiatives without seeking to leverage funding to conscript local agencies to enforce federal immigration law. But now the Department

[5] Press Release, Major Cities Chiefs Ass'n, U.S. Mayors, Police Chiefs Concerned with Sanctuary Cities Executive Order (Jan. 25, 2017), http://tinyurl.com/y8zqhypw.

seeks to impose three conditions on FY 2017 Byrne JAG funds: (1) the notice condition; (2) the access condition; and (3) the compliance condition. In conjunction with the conditions, the Department also requires applicants to submit certifications signed by its chief legal officer and chief executive (*i.e.*, the mayor). Each condition is facially unauthorized and unconstitutional.

1. The notice condition

49. The FY 2017 Byrne JAG local solicitation (attached as Exhibit G) states that the awards will be conditioned on grant applicants providing "at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act." (Ex. G at 30, https://www.bja.gov/Funding/JAGLocal17.pdf.)

50. The FY 2017 Byrne JAG award documents revise and expand on what the notice condition entails. (A copy of the Department's sample award document is attached as Exhibit H.) From the date a city accepts the award and throughout the time of the award's performance, each city must have in place an "ordinance, -rule, -regulation, -policy, or -practice . . . designed to ensure that, when a local-government (or local-government-contracted) correctional facility receives from DHS a formal written request . . . that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and – as early as practicable . . . provide the requested notice to DHS." (Ex. H at 19.) The award documents specify that DHS currently requests notice "as early as practicable (at least 48 hours, if possible)." (*Id.* at 18.)

2. The access condition

51. The FY 2017 Byrne JAG solicitation states that the awards will also be conditioned on grant applicants permitting "personnel of the [DHS] to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and

inquire as to his or her right to be or remain in the United States." (Ex. G at 30.) The requirement appears to mandate that federal immigration agents be given unprecedented and unfettered access to local law enforcement facilities and to any person being held there.

52. The FY 2017 Byrne JAG award documents revise and expand on what the notice condition entails. From the date a city accepts the award and throughout the time of the award's performance, each city must have in place an "ordinance, -rule, -regulation, -policy, or -practice … designed to ensure that [any] agents of the United States … are given access [to] a local-government (or local-government-contracted) correctional facility" to permit the federal "agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States." (Ex. H at 19.)

3. The compliance condition

53. The FY 2017 Byrne JAG solicitation states that to validly accept an award, a local government must certify compliance with Section 1373. In fact, the application requires certifications by both a city's chief legal officer and its chief executive. (Ex. G at 22-23.)

54. Section 1373 provides that state and local entities may not "prohibit, or in any way restrict" their entities and officials from sending or receiving citizenship or immigration status information from or to DHS. 8 U.S.C. § 1373(a). Section 1373 further states that no person or agency may "prohibit, or in any way restrict" state and local entities from sending, requesting, or receiving immigration status information from or to DHS; maintaining immigration status information; or exchanging immigration status information with other entities. *Id.* § 1373(b).

55. The FY 2017 Byrne JAG award documents revise and expand on what the compliance condition entails. The compliance condition is set forth in multiple award conditions. (Ex. H at 15-17.) The condition requires a recipient to submit a certification of compliance with Section 1373 signed by the chief legal officer, as well as a certification by the chief executive

adopting the chief legal officer's certification. (*Id.* at 15.) The condition also requires ongoing compliance with Section 1373, and requires subrecipients (*i.e.*, those who receive their funds through another applicant) to certify compliance with Section 1373. (*Id.* at 16.)

F. The Department imposed unlawful conditions on FY 2018 Byrne JAG funds.

56. To date, this Court has enjoined the Attorney General from imposing the notice, access, and compliance conditions in three separate lawsuits, including this case. ECF No. 23; *City of Chicago v. Sessions*, No. 17-cv-5720, 2018 WL 3608564, at *17 (N.D. Ill. July 27, 2018) (Leinenweber, J.) (permanently enjoining the Attorney General from imposing the notice, access, and compliance conditions); *see also City of Chicago v. Sessions*, No. 17-cv-5820, ECF No. 211 (same); *State of Illinois v. Sessions*, No. 18-cv-4791, ECF No. 25 (same). This Court is not alone. *See City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 321 (E.D. Pa. 2018); *City and Cty. of San Francisco v. Sessions*, No. 17-cv-04642-WHO, 2018 WL 4859528, at *1 (N.D. Cal. Oct. 5, 2018).

57. The Attorney General, however, continues to insist upon forcing the conditions on cities, states, and other local governments. The FY 2018 Byrne JAG local solicitation, required certifications, and award documents reflect the Attorney General's decision to re-impose the notice, access, and compliance conditions, as well as new conditions similarly designed to conscript state and local officers into the service of federal immigration-enforcement priorities.

1. The notice condition

58. The FY 2018 Byrne JAG local solicitation (attached as Exhibit I) states that the awards will require recipients to not "impede the exercise of the authority of the federal government under 8 U.S.C. § 1266(a) & (c) … and 8 U.S.C. § 1231(a)(4)" by specifically requiring recipients to provide "at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the recipient's custody when DHS requests such notice in

order to take custody of the alien pursuant to the Immigration and Nationality Act." (Ex. I at 36-37.)

59. The FY 2018 Byrne JAG award documents revise and expand on what the notice condition entails. (A copy of the 2018 award documents sent to Albuquerque, New Mexico is attached as Exhibit J.) The FY 2018 Byrne JAG award documents require that from the date a city accepts the award and throughout the time of the award's performance, each city, agency, and official must not "interfere with the 'removal' process by failing to provide – as early as practicable … – advance notice to DHS of the scheduled release date and time for a particular alien, if a State or local government (or government-contracted) correctional facility receives from DHS a formal written request pursuant to the INA that seeks such advance notice." (Ex. J at 21.) The award documents specify that DHS currently requests notice "as early as practicable (at least 48 hours, if possible)." (*Id.*) The conduct required by this condition is identical to the conduct the Attorney General attempted to require with the FY 2017 notice condition.

2. The access condition

60. The FY 2018 Byrne JAG solicitation states that the awards will require recipients "not to impede the exercise by DHS agents … of their authority under 8 U.S.C. § 1357(a)(1)" by specifically requiring recipients to "permit DHS agents to have access to any correctional facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his right to be or remain in the United States." (Ex. I at 37.)

61. The FY 2018 Byrne JAG award documents require that from the date a city accepts the award and throughout the time of the award's performance, each city, agency, and official must not "imped[e] access to any State or local government (or government-contracted) correctional facility by [federal] agents for the purpose [of] 'interrogat[ing] any alien or person believed to be an alien as to his [or her] right to be or to remain in the United States.'" (Ex. J at

20.) The award documents define the term impede to include "taking or continuing any action, or implementing or maintaining any law, policy, rule, or practice that (a) is designed to prevent or to significantly delay or complicate, or (b) has the effect of preventing or of significantly delaying or complicating." (*Id.*) The conduct required by this condition is identical to the conduct the Attorney General attempted to require with the FY 2017 notice condition.

3. The compliance condition

62. The FY 2018 Byrne JAG solicitation states that the awards will be conditioned on the recipient complying with Section 1373 and Section 1644, as well as certifying compliance with those provisions. (Ex. I at 27, 36, 42, 57.)

63. Section 1644 proscribes the exact same conduct as Section 1373. Section 1644 provides that no state or local entities "may be prohibited, or in any way restricted, from sending … or receiving … information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644.

64. The compliance condition is set forth in multiple FY 2018 award conditions. (Ex. J at 16-18.) The compliance condition requires a local government to submit a certification of compliance with Section 1373 and Section 1644 signed by the chief legal officer, as well as a certification by the chief executive adopting the chief legal officer's certification. (*Id.* at 16.) The condition also requires ongoing compliance with Section 1373 and Section 1644, and requires subrecipients to certify their compliance with Section 1373 and Section 1644. (*Id.* at 17.) This condition is materially identical to the FY 2017 compliance condition.

4. The harboring condition

65. The FY 2018 Byrne JAG solicitation states that the Byrne JAG awards will be conditioned on the applicant agreeing "[n]ot to violate, or aid or abet any violation of, 8 U.S.C. § 1324(a) (forbidding any 'person,' in 'knowing or in reckless disregard of the fact that an alien

has come to, entered, or remains in the United States in violation of law,' to 'conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection, such alien in any place . . .' or to 'engage in any conspiracy to commit any of the preceding acts … or aid or abet the commission of any of the preceding acts')." (Ex. I at 36.)

66. The FY 2018 Byrne JAG award documents require that from the date a city accepts the award and throughout the time of the award's performance, "no public disclosure may be made of any federal law enforcement information in a direct or indirect attempt to conceal, harbor, or shield from detection" any undocumented immigrant, even when doing so would not violate any statute. (Ex. J at 19.)

5. The questionnaire condition

67. The FY 2018 Byrne JAG solicitation states that an applicant "will not be able to access award funds (and its award will include a condition that withholds funds)" until it responds to the following questions: (1) "Does your jurisdiction have any laws, policies, or practices related to whether, when, or how employees may communicate with DHS or ICE?"; and (2) "Is your jurisdiction subject to any laws from a superior political entity (e.g., a state law that binds a city) that meet the description in question 1?" (Ex. I at 27-28, 52.) If the answer to either question is yes, the applicant must provide a copy of each law or policy, describe each practice, and explain how the law, policy, or practice complies with Section 1373. (*Id.*) Direct recipients must also collect this information from all of their subrecipients. (*Id.* at 28, 52.)

68. The FY 2018 Byrne JAG award documents state that a direct recipient may not make a subaward "unless it first obtains from the proposed recipient responses to the questions identified in the program solicitation" and all subrecipient responses "must be made available to DOJ upon request." (Ex. J at 22.)

6. Certifications signed by city mayors and chief legal officers

69. The Department will not provide Byrne JAG funds to applicants unless they certify compliance with the challenged conditions. The current versions of the certifications are attached as Exhibit K-M.[6]

70. In addition to the certification of compliance with Section 1373 and Section 1644 signed by the applicant's chief legal officer, applicants must submit two additional certifications, one signed by the chief legal officer and another signed by the chief executive (in the case of cities, the mayor). (Ex. I at 1.) A city's chief legal officer must certify compliance with Sections 1373 and 1644, as well as with 8 U.S.C. § 1226(a) and (c), 1231(a)(4), 1324(a), 1357(a), & 1366(1) and (3). (Ex. K; Ex. L.) The certification signed by a city's chief executive (*i.e.*, mayor) adopts the chief legal officer's certifications and certifies compliance with additional grant conditions. (Ex. M.)

G. The conditions are ambiguous, arbitrary, and without justification.

71. The challenged conditions represent a sharp break with past agency practice. The Department never before imposed any conditions of this nature on Byrne JAG funds. The Department imposed the challenged conditions without any explanation, reasoning, or opportunity for exchange with local governments or law enforcement.

72. In late July 2017, shortly before the Byrne JAG application for FY 2017 was set to go online, the Department suddenly announced significant changes to the Byrne JAG application process in a two-paragraph press release and accompanying press "backgrounder" document.[7] The Department's press release failed to explain how the Department arrived at the

[6] The most up-to-date certifications for FY 2017 and FY 2018 are available at https://www.bja.gov/Jag/ (last visited Nov. 30, 2018).

[7] *See* Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25,

new conditions or what alternatives it considered. The press release was silent as to the Byrne JAG program's purpose and how the notice, access, and compliance conditions relate to, let alone serve to advance, the program's interests. The Department also failed to provide any guidance as to how the conditions would operate in practice.

73. In 2018, the administration sought to weaponize Section 1324 against jurisdictions seeking to prioritize local law enforcement. In January 2018, then-Acting Director of U.S. immigration and Customs Enforcement Thomas Homan stated that he asked the Department to "[l]ook into criminal charges for elected officials with sanctuary policies" because they are harboring illegal aliens. During testimony before the Senate Judiciary Committee, Secretary of Homeland Security Kirstjen Nielsen confirmed that the Department "is reviewing what avenues may be available" to prosecute local elected officials under Section 1324.[8]

74. Since Section 1324 was enacted almost 70 years ago, the federal government has never attempted to prosecute an elected official acting in his or her official capacity for violating that statute. For much of this time, Conference members declined to participate in federal immigration enforcement without any indication that doing so violated any criminal statute. The attempt by this administration to criminalize local policy choices represents a significant threat to cities' abilities to enact policies intended to foster public safety.

75. The challenged conditions are ambiguous, leaving cities uncertain as to how to comply. The ambiguity threatens to induce unconstitutional action. For example, the notice condition would require cities to detain individuals longer than they otherwise would, potentially

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2017), https://tinyurl.com/y9ttqhsl; U.S. Dep't of Justice, Backgrounder on Grant Requirements, https://tinyurl.com/ycfgbgl4.

[8] Katie Benner, *Democrats Question Justice Dept. Power to Charge Sanctuary City Leaders*, N.Y. Times, Jan. 12, 2018, https://www.nytimes.com/2018/01/18/us/politics/justice-department-sanctuary-cities-criminal-charges-elected-offiicals.html.

violating the individuals' Fourth Amendment rights and state law and thereby expose these cities to liability; the access condition would demand that cities open their facilities to federal officials without regard to local detention needs. Evanston Police Department regulations and those of many Conference member cities' police forces require that individuals arrested without a warrant be released or transferred to court without unnecessary delay, but in any event no later than 48 hours after arrest. *See, e.g.*, Evanston Police Department Policy Manual § 900.3. Such matters are also informed by the law of many states, which require that certain detainees be released within 48 hours. *See, e.g.*, Ill. Admin. Code §§ 720.30, 720.150.

76. Just as fundamentally, complying with the challenged conditions would undermine public safety. Welcoming city policies assist effective policing by building trust between law enforcement officers and the immigrant community. Conversely, policing suffers when community members, whatever their immigration status, do not feel free to report crimes, assist in investigations, or testify as witnesses. The Department's insistence that cities nationwide give immigration enforcement agents on-demand access to their detention facilities to investigate potential civil immigration violations, and that cities detain individuals solely so to allow the investigation of possible civil immigration violations, undermines public trust, cuts local law enforcement efforts off at the knees, and makes everyone in these cities less safe.

H. The Department lacks any authority to impose the challenged conditions.

77. The Byrne JAG statute gives the Department no authority to impose additional substantive grant conditions on Byrne JAG funds, including the notice and access conditions. ECF No. 23 at 8; *City of Chicago v. Sessions*, 888 F.3d 272, 285 (7th Cir. 2018); *City of Chicago v. Sessions*, 2018 WL 3608564, at *12-13 (concluding that the Attorney General has no authority to impose the notice and access conditions or to demand compliance with Section 1373).

78. Indeed, federal law prohibits the Department from using the Byrne JAG program to "exercise any discretion, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof." 34 U.S.C. § 10228.

79. Congress repeatedly demonstrates its ability (when it so desires) to expressly confer agency discretion to add substantive conditions to federal grants. In the same statute that includes the Byrne JAG program, Congress created a different grant program that expressly authorized administering agencies to impose reasonable grant conditions. *See* 34 U.S.C. § 10446(e)(3) (Attorney General may "impose reasonable conditions on grant awards . . . ."). And Congress expressly conferred such authority in other federal grant programs. *See, e.g.*, 47 U.S.C. § 1204(b)(2) (Under Secretary of Commerce can "establish such conditions . . . as may be appropriate to ensure the efficiency and integrity of the grant program"); 25 U.S.C. § 1652(b) (similar).

80. The Byrne JAG statute restricts the Attorney General's authority to define or modify the components of the application submitted by local governments wishing to receive a grant. The statute gives the Attorney General limited ministerial authority to specify the "form" of the application. 34 U.S.C. § 10153(A) (requiring jurisdictions to submit an application containing the enumerated components "in such form as the Attorney General may require"). Although the Attorney General may require applicants to "comply with all provisions of this part and all other applicable Federal laws," *id.* § 10153(a)(5)(D), that phrase refers to the host of laws that regulate the conduct of federal grant recipients as grant recipients.[9]

[9] *See, e.g.*, 41 U.S.C. § 4712(a)(1) ("An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body . . . information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds . . . ."); 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

81. The text, history, and structure of 34 U.S.C. § 10153—which appears in a section of the Byrne JAG statute enumerating the responsibilities of grant recipients, and authorizes the United States Attorney General to require applicants to certify compliance "with all provisions of this part and all other applicable Federal laws," 34 U.S.C. § 10153(a)(5)(D)—establishes that "applicable Federal laws" refers only to the body of laws that by their express text apply to federal grants. It does not refer to every section of the U.S. Code that could possibly apply to a state or local government.

82. Section 1373 and Section 1644 are not applicable laws within the meaning of 34 U.S.C. §§ 10153(a)(5)(D). Those provisions concern only information-sharing with federal authorities, contain no limits on the use of federal funds, and are textually unconnected to the Byrne JAG program.

83. Sections 1226(a) and (c), 1231(a), 1357(a), and 1366(1) and (3) are not applicable laws within the meaning of the Byrne JAG statute. By their terms, those provisions apply to the federal government, not individual cities and states. Section 1324 does not apply to state or local governments. These provisions are textually unconnected to the Byrne JAG program.

84. None of the challenged conditions concern applicable federal requirements. Each condition addresses civil immigration enforcement, which is wholly inapplicable to criminal justice grants. For example, there is no federal law requiring cities to provide ICE with "at least 48 hours' advance notice" before releasing anyone in custody, and no federal law requires local police departments to give DHS officials access to detention facilities.

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program or activity receiving Federal financial assistance."); 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

85. In fact, Congress considered, but did not pass, legislation that would penalize cities for seeking to set their own law enforcement priorities. *See* Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (2015) (proposing funding cuts for any sanctuary jurisdiction that violates Section 1373 or "prohibits any government entity or official from complying with a detainer"). Notably, however, Congress never passed legislation authorizing the executive branch to impose any penalty on local jurisdictions based on the refusal to comply with detainer or other immigration enforcement requests.

86. The challenged conditions also violate core constitutional principles. Separation of powers principles operate as independent restraints on cooperative federalism arrangements like the Byrne JAG program. The Constitution gives the spending power to Congress, not the executive branch. Federal agencies therefore may not invent funding conditions out of whole cloth.

87. The challenged conditions run afoul of the Tenth Amendment. The anti-commandeering principle ensures that the sovereign states are free to legislate as they see fit to promote the safety and welfare of their residents. The principle forbids Congress to "unequivocally dictate[] what a state [or local] legislature may and may not do." *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

88. Section 1373 and Section 1644 "unequivocally dictate[]" to cities that they may not promulgate policies or regulations that prohibit local officials from sharing immigration status information with federal officials. *Id.*; *see, e.g.*, *City of Philadelphia v. Sessions*, No. 17-3894, 2018 WL 2725503, at *28-33 (E.D. Pa. June 6, 2018); *accord United States v. California*, No. 2:18-cv-490-JAM-KJN, 2018 WL 3301414, at *14 (E.D. Cal. July 5, 2018) ("The Court finds the constitutionality of Section 1373 highly suspect.").

89. The challenged conditions dictate what actions local law enforcement entities must take to accommodate federal immigration policies.

90. The compliance and questionnaire conditions impermissibly commandeers local governments. Using Section 1373 and 1644, the Attorney General attempts to commandeer cities by directing how their personnel act and handle data under local control in order to advance a federal program.

91. The notice and access conditions "unequivocally dictate[]" to cities that they must enact ordinances or policies concerning the administration of detention facilities and providing advance notification to federal officials. The notice condition seeks to fundamentally reorganize the way the Conference's members balance their Fourth Amendment obligations against their interest in effective law enforcement. The access condition requires a fundamental restructuring of police procedures and functions to accommodate on-demand access to detainees by federal agents. The harboring and questionnaire conditions commandeer cities by directing how their personnel must act and handle data under local control in order to advance a federal program.

92. The federalization of bedrock local government functions violates the Tenth Amendment's anti-commandeering principle. *See Murphy*, 138 S. Ct. at 1477 ("The Federal Government may not command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.") (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)).

I. The Department's unlawful conditions will injure Evanston and the Conference's other members, forcing them to choose between vital law enforcement funding and their constitutional rights.

93. Evanston and the Conference's other members now face an impossible choice: sacrifice their sovereignty and their residents' safety by acceding to unlawful funding demands that will undermine community-officer trust and cooperation, or forfeit crucial monies used to

fund essential policing operations. The Department cannot force the Conference's members to choose between their right to exercise municipal sovereignty and their right to receive formula grant funds that Congress allocated to them.

94. The importance of Byrne JAG funds and the choice cities now face is underscored by the number of local governments challenging the conditions. In August 2017, the City of Chicago, a member of the Conference, filed a lawsuit challenging the notice, access, and compliance conditions. *City of Chicago v. Sessions*, Case No. 17-cv-5720 (N.D. Ill.) (Leinenweber, J.). In addition to Chicago, the State of Illinois, City of Philadelphia, City and County of San Francisco, City of Los Angeles, State of California, City of Providence, City of Central Falls, City of New York, and City of West Palm Beach filed lawsuits challenging the Byrne JAG conditions.[10]

95. On September 15, 2017, the district court granted Chicago's motion for a nationwide preliminary injunction as to the notice and access conditions because Chicago was likely to succeed on its claims that the Department lacked the authority to impose those conditions. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 943, 951 (N.D. Ill. 2017) ("The notice and access conditions exceed statutory authority, and, consequently, the efforts to impose them violate the separation of powers doctrine and are *ultra vires*.").

96. On September 26, 2017, the Attorney General filed a motion to stay the nationwide preliminary injunction. *Chicago*, No. 17-cv-5720, ECF No. 80. Two days later, on September 28, 2017, counsel for the Conference appeared at the presentment of the Attorney

[10] *State of Illinois v. Sessions* (No. 18-cv-4791, N.D. Ill.); *City of Philadelphia v. Sessions* (No. 17-3894, E.D. Pa.); *City & County of San Francisco v. Sessions* (No. 17-4642, N.D. Cal.); *City of Los Angeles v. Sessions* (No. 17-7215, C.D. Cal.); *State of California v. Sessions* (No. 17-4701, N.D. Cal.); *City of Providence & City of Central Falls v. Sessions* (No. 18-cv-437, D.R.I.); *City of New York v. Sessions* (No. 18-cv-6474, S.D.N.Y.); *City of West Palm Beach v. Sessions* (No.18-cv-80131, S.D. Fla.).

General's motion to stay and alerted the court that the Conference intended to seek leave to intervene in the case. The Conference filed its motion to intervene on October 6, 2017. *Id.*, ECF No. 91.

97. On November 16, 2017, the district court denied the Conference's motion to intervene. At that time, the district court explained that the Conference "can represent the interests of its members who may suffer an impending injury caused by the defendant's acts." *Chicago*, 2017 WL 5499167, at *5 (N.D. Ill. Nov. 16, 2017). However, the court denied intervention because the nationwide injunction in place at the time protected the Conference's member cities' interests. *Id.* at *9-10 ("Unless and until the status of the nationwide injunction changes, there is no reason to permit an intervention that will further complicate this litigation.").

98. On April 19, 2018, the United States Court of Appeals for the Seventh Circuit affirmed the district court's grant of a nationwide injunction as to the notice and access conditions. *City of Chicago v. Sessions*, 888 F.3d at 293. The panel unanimously concluded that "the district court did not err in determining that the City established a likelihood of success on the merits of its contention that the Attorney General lacked the authority to impose the notice and access conditions on receipt of the Byrne JAG grants," and two of the three judges held that the district court "did not abuse its discretion in granting the nationwide preliminary injunction." *Id.*

99. The Attorney General subsequently filed a petition for rehearing en banc as to the scope of the preliminary injunction, which the Seventh Circuit subsequently vacated. *Chicago*, No. 17-2991, ECF No. 119 and ECF No. 154. Notably, the Attorney General did not request rehearing on the Seventh Circuit's decision that Chicago established a likelihood of success on its claims that the Attorney General lacked authority to impose the notice and access conditions.

100. This Court ultimately granted summary judgment in Chicago's favor on all three conditions, concluding that the notice, access, and compliance conditions were *ultra vires* and unconstitutional. *City of Chicago v. Sessions*, 2018 WL 3608564, at *12-13, 17.

101. Even though the Attorney General did not appeal the Seventh Circuit's decision that Chicago was likely to succeed on the merits of its claims that the Attorney General lacks the authority to impose the notice and access conditions, the Department began issuing FY 2017 Byrne JAG award notification documents as soon as the Seventh Circuit stayed the preliminary injunction as to geographic areas outside the City of Chicago. A few hours after the Seventh Circuit stayed the nationwide injunction, on June 26, 2018, the Department issued FY 2017 Byrne JAG award notifications to Conference member cities.

102. In July 2018, Evanston and the Conference sought a preliminary injunction to prevent the Attorney General from imposing the notice, access, and compliance conditions on Byrne JAG funds. ECF No. 10. On August 9, 2018, this Court issued a preliminary injunction prohibiting the enforcement of the notice, access, and compliance conditions against Evanston and the Conference's other members. ECF No. 23 at 11. This Court held that Evanston and the Conference had standing to seek the requested injunctive relief and were "likely to prevail on the merits of their claims" that the Attorney General lacks authority to impose the conditions on Byrne JAG funds. *Id.* at 3-8. Notwithstanding its finding that the elements of injunctive relief had been established with respect to the Conference's members, the Court was "disinclined to issue" a program wide (or nationwide) injunction "absent further guidance from the court of appeals." *Id.* at 8. Noting its own "keen interest in deferring to the guidance of higher courts," the Court "stay[ed] the injunction as to the Conference, which, by virtue of its membership, demands an injunction of near-nationwide effect." *Id.* at 10-11.

103. On August 29, 2018, the Seventh Circuit granted the Conference's emergency motion to lift the stay, explaining that "the injunction is limited to the parties actually before the court who have demonstrated a right to the relief," and ordering that the injunction "shall be in effect as originally ordered by the district court." Appeal No. 18-2374, ECF No. 13 at 2.

104. After the Seventh Circuit lifted the stay, the Department began issuing FY 2017 award documents to Conference member cities that had not yet received them. The Department has issued FY 2017 awards containing the notice, access, and compliance conditions to hundreds of municipalities.[11]

105. Despite numerous courts enjoining the Attorney General from imposing the notice, access, and compliance conditions, the Department began issuing FY 2018 Byrne JAG award documents with the challenged conditions to Conference member cities on October 1, 2018. However, the Department continues to withhold FY 2018 Byrne JAG award documents from many Conference member cities. The Department's refusal to disperse the FY 2018 funds to certain states and local governments adds confusion and uncertainty to the award process.

106. The Department's imposition of the challenged conditions and its continued refusal to issue awards to certain cities pose a threat of imminent harm to Evanston and the Conference's other members. Without Byrne JAG funds, Evanston and the Conference's other members will have to shut down important local programs; change program staffing, scope, or goals; or divert funds from other policing objectives to sustain the programs.

COUNT ONE: ULTRA VIRES

107. Plaintiffs incorporate by reference the preceding paragraphs' allegations.

108. The Attorney General may only exercise authority conferred by statute.

[11] *See* https://ojp.gov/funding/Explore/OJPAwardData.htm.

109. The Byrne JAG statute does not authorize the Attorney General to impose the challenged conditions on the receipt of Byrne JAG funds, or to deny funds to states or local governments that fail to comply with those conditions. Indeed, such authority is at odds with the text, structure, and purpose of the Byrne JAG statute. These conditions are not "applicable Federal law" and do not deal with the administration and spending of funds.

110. The Attorney General may not demand that cities and other local governments comply with Section 1373 or Section 1644 as a condition of receiving Byrne JAG funds because Section 1373 and Section 1644 are unconstitutional. The Byrne JAG statute sanctions only the imposition of applicable federal laws; as unconstitutional laws, Section 1373 and Section 1644 no longer fall within that category. Therefore, the Attorney General has no authority to demand compliance with Section 1373 or Section 1644 under the Byrne JAG statute.

111. In addition, Section 1373 and Section 1644 are not applicable federal laws within the meaning of 34 U.S.C. § 10153(a)(5)(D) because they are not relevant to the administration and spending of funds. Section 1373 and Section 1644 concern only information-sharing with federal authorities, contain no limits on the use of federal funds, and are textually unconnected to the Byrne JAG program. Thus, Section 1373 and Section 1644 are not applicable laws within the meaning of 34 U.S.C. § 10153(a)(5)(D).

112. The Attorney General does not have the authority to demand compliance with Sections 1226(a) and (c), 1231(a), 1324(a), 1357(a), 1366(1) and 1366(3). Those provisions are not applicable federal laws within the meaning of 34 U.S.C. § 10153(a)(5)(D) because they are not relevant to the administration and spending of funds. In addition, the harboring condition specifically states that it applies even where disclosure of information would not violate federal anti-harboring laws.

113. The Byrne JAG program's formula-grant structure contradicts the Department's purported authority to promulgate the challenged conditions. Unlike discretionary grants, which agencies award on a competitive basis subject to agency discretion, formula grants are awarded pursuant to a statutory formula. If the Department had the authority to impose new substantive conditions on all grantees, the effect would be to contradict Congress's formula and reallocate funds to jurisdictions that adopted the Department's preferred policy. It would also contradict Congress's intent to give states and local governments the "flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005).

114. In addition, the challenged conditions are invalid under 34 U.S.C. § 10228(a), which prohibits executive branch officials from using law enforcement grants to exert "any direction, supervision, or control" over any local police force or criminal justice agency.

115. As a direct and proximate result of these unlawful conditions, Evanston and the Conference's other members will be forced to accept unlawful and unconstitutional grant conditions or forego Byrne JAG funds and shut down the programs the funds support.

116. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, Evanston and the Conference are entitled to a declaration that the Attorney General is without authority to impose the challenged conditions on FY 2017 Byrne JAG funds, FY 2018 Byrne JAG funds, or materially identical conditions in future grant years; an order that the challenged conditions be set aside; and a permanent injunction preventing the conditions from going into effect.

117. Pursuant to 28 U.S.C. § 2412(d)(1)(A), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the challenged conditions is not substantially justified

because, among other reasons, it contravenes the Court's order setting aside materially identical conditions the Attorney General attempted to impose on FY 2017 Byrne JAG funds.

118. Pursuant to 28 U.S.C. § 2412(b), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the FY 2018 notice, access, and compliance conditions demonstrates bad faith and an attempt to undermine or avoid the Court's order setting aside materially identical conditions the Attorney General attempted to impose on FY 2017 Byrne JAG funds.

COUNT TWO: SEPARATION OF POWERS

119. Plaintiffs incorporate by reference the preceding paragraphs' allegations.

120. The Constitution vests the spending power in Congress, not the executive branch. U.S. Const. art. I § 8, cl. 1. Absent a statutory provision or express delegation, only Congress is entitled to attach conditions to federal funds.

121. When an agency acts "contrary to constitutional right, power, privilege, or immunity," a reviewing court must "hold unlawful and set aside" the challenged action. 5 U.S.C. § 706.

122. The executive branch "does not have unilateral authority to refuse to spend . . . funds" that Congress already appropriated "for a particular project or program." *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013); *see also Train v. City of New York*, 420 U.S. 35, 44 (1975). Imposing a new condition on a federal grant program amounts to refusing to spend money appropriated by Congress unless that condition is satisfied.

123. None of the challenged conditions were imposed by Congress; rather, the Department imposed these conditions. Therefore, the challenged conditions amount to an improper usurpation of Congress's spending power by the executive branch.

124. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, the Conference and Evanston are entitled to a declaration that the challenged conditions for the FY 2017 and FY 2018 Byrne JAG funds, as well as any materially identical conditions the Attorney General may impose in future grant years, violate the constitutional principle of separation of powers and impermissibly arrogate to the executive branch power that is reserved to the legislative branch; and a permanent injunction preventing the conditions from going into effect.

125. Pursuant to 28 U.S.C. § 2412(d)(1)(A), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose challenged conditions is not substantially justified because, among other reasons, it contravenes the Court's order setting aside materially identical conditions the Attorney General attempted to impose on FY 2017 Byrne JAG funds.

126. Pursuant to 28 U.S.C. § 2412(b), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the FY 2018 notice, access, and compliance conditions demonstrates bad faith and an attempt to undermine or avoid the Court's order setting aside materially identical conditions.

COUNT THREE: SPENDING CLAUSE

127. Plaintiffs incorporate by reference the preceding paragraphs' allegations.

128. Not only did Congress not authorize (expressly or impliedly) the challenged conditions; but Congress could not have authorized the conditions because they do not satisfy additional requirements of the Spending Clause.

129. ***First***, the challenged conditions are not germane to the stated purposes of the Byrne JAG funds. None of the conditions are relevant to the federal interest in the Byrne JAG funds that Conference members receive or to the Byrne JAG program generally.

130. The notice and access conditions are not relevant to the federal interest in the Byrne JAG funds the Conference's members receive. Information about when detainees will be released, and policies related to access for federal agents bear no relevance to the uses to which Conference members put Byrne JAG funds.

131. The compliance condition is not relevant to the federal interest in the Byrne JAG funds the Conference's members receive. Sharing information about immigration status with federal officials bears no connection to the uses to which Conference members put Byrne JAG funds.

132. The harboring condition is not relevant to the federal interest in the Byrne JAG funds the Conference's members receive. By regulating public disclosure by public entities, the harboring condition appears so far-reaching as to instruct state and local governments how to govern in myriad and complex ways, none of which bear any connection to the uses to which Conference members put Byrne JAG funds.

133. The questionnaire condition is not relevant to the federal interest in the Byrne JAG funds the Conference's members receive. The information sought is not relevant to the Byrne JAG program. The apparent purpose of the questionnaire is to help the Department enforce its other unlawful immigration-related conditions.

134. The challenged conditions relate to civil immigration enforcement and are not relevant to the federal interest in the Byrne JAG program more generally. The program is intended to provide funding to states and local governments for criminal justice purposes. The challenged conditions actively undermine Congress's goals of dispersing funds across the country, targeting funds to combat violent crime, and respecting local judgment in setting law enforcement strategy.

135. ***Second***, the challenged conditions would impermissibly induce Byrne JAG recipients to engage in unconstitutional activity.

136. The Spending Clause prohibits the federal government from imposing spending conditions to "induce the States to engage in activities that would themselves be unconstitutional." *S. Dakota v. Dole*, 483 U.S. 203, 210 (1987). The challenged conditions seek to require Byrne JAG recipients to engage in unconstitutional activity.

137. ***Third***, the challenged conditions are unconstitutionally ambiguous.

138. Federal restrictions on state and local funding must be articulated unambiguously to allow the recipient to knowingly accept the conditions and ascertain what is expected.

139. All of challenged conditions are ambiguous as to what is expected of grant recipients, particularly given Evanston's and other Conference members' welcoming city policies and other relevant policies and practices. The conditions do not provide cities with notice to make a choice knowingly and cognizant of the consequences of their participation.

140. Many interpretations of the challenged conditions raise serious constitutional concerns. Where a grant recipient must resolve tension between the Constitution and a federal agency's informal interpretation announced in a guidance document to ascertain what is expected of it, a condition cannot be characterized as unambiguous.

141. The compliance condition is ambiguous, and many interpretations of the condition raise serious constitutional concerns. Section 1373 and Section 1644 use sweeping language with no discernable limiting principle. The Department added to the confusion by suggesting without explanation that Section 1373 implicates a wide range of state and local governance practices, from formal laws to informal cultural norms. In addition, the Department

compounded the confusion by questioning the compliance of many jurisdictions with Section 1373 without deciding whether the Department believes those jurisdictions' policies comply.[12]

142. The other challenged conditions are likewise ambiguous. For example, the Department has offered no guidance on how a city's disclosure of information could constitute "conceal[ing], harbor[ing], or shield[ing] from detection" any individual.

143. ***Fourth***, the challenged conditions are unconstitutionally coercive.

144. The Spending Clause prohibits grant conditions that are "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (citation omitted).

145. As a direct and proximate result of the challenged conditions, the Conference's members are forced to either accept unlawful and unconstitutional grant conditions or forego Byrne JAG funds. The challenged conditions threaten financial consequences that exceed the point at which pressure turns to constitutionally impermissible compulsion.

146. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, the Conference and Evanston are entitled to a declaration that the challenged conditions for the FY 2017 and FY 2018 Byrne JAG funds, as well as any materially identical conditions the Attorney General may impose in future grant years, violate the Constitution's Spending Clause; and a permanent injunction preventing the conditions from going into effect.

147. Pursuant to 28 U.S.C. § 2412(d)(1)(A), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the challenged conditions is not substantially justified because, among other reasons, it contravenes the Court's order setting aside materially identical conditions the Attorney General attempted to impose on FY 2017 Byrne JAG funds.

[12] Press Release, U.S. Dep't of Justice, Department of Justice Reviewing Letters from Ten Potential Sanctuary Jurisdictions (July 6, 2017), http://tinyurl.com/ybdhf7vy.

148. Pursuant to 28 U.S.C. § 2412(b), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the FY 2018 notice, access, and compliance conditions demonstrates bad faith and an attempt to undermine or avoid the Court's order setting aside materially identical conditions.

COUNT FOUR: COMMANDEERING

149. Plaintiffs incorporate by reference the preceding paragraphs' allegations.

150. The Tenth Amendment prohibits the federal government from requiring states and localities "to administer or enforce a federal regulatory program." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018). The anti-commandeering principle prevents the federal government from shifting the costs of regulation to states and local governments. *Id.* Where the "whole object" of a federal statutory provision is to "direct the functioning" of state and local governments, that provision is unconstitutional and must be enjoined. *Printz v. United States*, 521 U.S. at 898, 932, 935 (1997); *New York v. United States*, 505 U.S. 144, 186-187 (1992). That description precisely fits each of the challenged conditions.

151. Section 1373 is facially unconstitutional. When Congress enacted Section 1373, it sought to ensure that "[t]he acquisition, maintenance, and exchange of immigration-related information by State and local agencies" could be used to enforce federal law. S. Rep. No. 104-249, at 19-20 (1996). In doing so, it sought to "require [state and local officers] to provide information that belongs to the State and is available to them only in their official capacity"—in other words, to engage in unconstitutional commandeering. *Printz*, 521 U.S. at 932 n.17.

152. Section 1644 is facially unconstitutional. Section 1644 is substantially identical to Section 1373. Section 1373 and Section 1644 prohibit state and local governments from engaging in a core aspect of governing: controlling the actions of their own employees.

Compliance with Sections 1373 and 1644 result in the federal government commandeering cities by directing how city personnel should act and handle data under local control to advance a federal program. In fact, the Department instructed that states and local governments may need to provide affirmative instruction to employees to comply.[13] Section 1373 and Section 1644 require local officers to follow federal directives and usurp the local policymaking process.

153. Because Section 1373 and Section 1644 are facially unconstitutional, they cannot be validly enforced against Byrne JAG funding recipients as "applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D).

154. The challenged conditions impermissibly commandeer cities and cannot be validly imposed on Byrne JAG funding recipients.

155. As a direct and proximate result of these unconstitutional conditions, the Conference's members will be forced to accept unlawful and unconstitutional grant conditions or forego Byrne JAG funds and shut down or materially alter the programs the funds support.

156. Pursuant to 28 U.S.C. § 2201, the Conference and Evanston are entitled to a declaration that 8 U.S.C. §§ 1373 and 1644 violate the Tenth Amendment and cannot be validly imposed as conditions on the Byrne JAG program.

157. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, the Conference and Evanston are entitled to a declaration that the challenged conditions for the FY 2017 and FY 2018 Byrne JAG funds, as well as any materially identical conditions the Attorney General may impose in future grant years, violate the Tenth Amendment; a declaration that the challenged conditions

[13] *See* Memorandum from Michael E. Horowitz, Inspector Gen., U.S. Dep't of Justice, to Karol V. Mason, Assistant Attorney Gen., Office of Justice Programs, U.S. Dep't of Justice, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients 6 (May 31, 2016), https://tinyurl.com/y9rpwge4.

cannot be validly imposed as conditions on the Byrne JAG program; and a permanent injunction preventing the conditions from going into effect.

158. Pursuant to 28 U.S.C. § 2412(d)(1)(A), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the challenged conditions is not substantially justified because, among other reasons, it contravenes the Court's order setting aside materially identical conditions the Attorney General attempted to impose on FY 2017 Byrne JAG funds.

159. Pursuant to 28 U.S.C. § 2412(b), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the FY 2018 notice, access, and compliance conditions demonstrates bad faith and an attempt to undermine or avoid the Court's order setting aside materially identical conditions.

COUNT FIVE: ADMINISTRATIVE PROCEDURE ACT
(Arbitrary and Capricious)

160. Plaintiffs incorporate by reference the preceding paragraphs' allegations.

161. In addition to the Attorney General lacking statutory and constitutional authority to impose the challenged conditions, the conditions are arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

162. The Department's decision to condition FY 2017 Byrne JAG funds and FY 2018 Byrne JAG funds on compliance with the challenged conditions deviates from past agency practice without reasoned explanation or justification. The Department failed to rely on reasoned decision-making and, to the extent it cited reasons at all, those reasons are contradicted by evidence.

163. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, the Conference and Evanston are entitled to a declaration that the challenged conditions for the FY 2017 and FY 2018 Byrne JAG funds, as well as any materially identical conditions the Attorney General may impose in future grant years, violate the APA; and a permanent injunction preventing those conditions from going into effect.

164. Pursuant to 28 U.S.C. § 2412(d)(1)(A), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the challenged conditions is not substantially justified because, among other reasons, it contravenes the Court's order setting aside materially identical conditions the Attorney General attempted to impose on FY 2017 Byrne JAG funds.

165. Pursuant to 28 U.S.C. § 2412(b), Evanston and the Conference are entitled to an award of their costs, attorney fees, and expenses associated with this litigation. The Attorney General's attempt to impose the FY 2018 notice, access, and compliance conditions demonstrates bad faith and an attempt to undermine or avoid the Court's order setting aside materially identical conditions.

PRAYER FOR RELIEF

WHEREFORE, The United States Conference of Mayors and the City of Evanston pray that this Court:

a) Declare that the challenged conditions for the FY 2017 and FY 2018 Byrne JAG programs are unlawful;

b) Preliminarily and permanently enjoin the Attorney General from imposing the challenged conditions on the FY 2017 and FY 2018 Byrne JAG funds, and from imposing the challenged conditions, as well as materially identical conditions, on future Byrne JAG funds;

c) Retain jurisdiction to monitor the Department's compliance with this Court's judgment;

d) Award Plaintiffs their reasonable attorney fees, expenses, and costs as permitted by federal law, including the Administrative Procedure Act and 28 U.S.C. § 2412; and

e) Grant such other relief as this Court may deem proper.

Dated: December 10, 2018

Respectfully submitted,

THE UNITED STATES CONFERENCE OF MAYORS and CITY OF EVANSTON

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2018, I electronically filed the foregoing document by using the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

By: /s/ Brian C. Haussmann
Brian C. Haussmann