17-2991

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CITY OF CHICAGO,

Plaintiff-Appellee,

—v.—

JEFFERSON B. SESSIONS III, Attorney General of the United States,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
NO. 1:17-cv-05720
HONORABLE HARRY D. LEINENWEBER

BRIEF *AMICI CURIAE* OF ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND IMMIGRATION LAW SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLEE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2991

Short Caption: Chicago v. Sessions

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Administrative Law, Constitutional Law, and Immigration Law Scholars (see Appendix A to brief for complete list)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Patterson Belknap Webb & Tyler LLP

Barack Ferrazzano Kirschbaum & Nagelberg LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Harry Sandick Date: January 4, 2018

Attorney's Printed Name: Harry Sandick

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Jamison Davies Date: January 4, 2018

Attorney's Printed Name: Jamison Davies

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Attorney's Signature: s/ Michael D. Schwartz Date: January 4, 2018

Attorney's Printed Name: Michael D. Schwartz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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PRELIMINARY STATEMENT AND INTEREST OF *AMICI CURIAE*

This case concerns the limits on the federal executive branch's authority to co-opt states and localities into administering the executive's regulatory agenda rather than addressing their own public safety priorities. Since the Founding, "[t]he promotion of safety of persons and property [has been] unquestionably at the core of [the states'] police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). The Constitution reserves this police power to the states as well as localities. *See id.* (treating state and local governments equivalently). In today's era of expansive federal spending, however, the federal government has vast power to influence state and local policy by attaching conditions to federal grants. The Constitution protects federalism by limiting the types of conditions Congress may impose on federal grants and the manner in which they may be imposed, and by denying the Executive Branch unilateral authority to impose new conditions. The District Court correctly applied these basic constitutional principles in enjoining the Attorney General from imposing notice and access conditions on law enforcement funding under the Edward Byrne Justice Assistance Grant ("Byrne JAG") program.

Amici, who are listed in Appendix A, are scholars of administrative, constitutional, and immigration law. They have a professional interest in the proper construction and enforcement of constitutional and statutory limits on federal executive power and provide a unique perspective on the larger ramifications of the Court's decision for federal executive authority. A similar brief filed by these *amici* was accepted in the District Court, and other briefs were accepted in cases arising out of the same policies brought by the City of Philadelphia and the State of California. *See City of Chicago v. Sessions*, No. 17-cv-5720, ECF No. 53 (N.D. Ill. Aug. 31, 2017); *City of Philadelphia v. Sessions*, No. 17-cv-3894, ECF No. 77 (E.D. Pa. Nov. 15, 2017); *State of California v. Sessions*, No. 17-cv-4701, ECF No. 47 (N.D. Cal. Nov. 29, 2017).

The parties have consented to the filing of this *amici curiae* brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae* and their counsel, has contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The rules that deny federal agencies unilateral authority to impose conditions on federal spending are well settled and of considerable importance. Congress offers federal funding to states and localities in areas ranging from policing to healthcare, and states and localities increasingly depend upon federal funding to provide government services. The ubiquity of federal funding makes judicial enforcement of constitutional and statutory limits on federal spending conditions crucial to protecting state and local sovereignty.

Article I of the Constitution grants the power of the purse to Congress, not to the President or to the Attorney General. U.S. Const. art. I, § 8, cl. 1. The Department of Justice does not have freewheeling authority independent from Congress to impose spending conditions under the Constitution. And for good reason. Over the course of the last year, the Administration—in an effort to fulfill the President's campaign promise to "end" sanctuary cities[1]—has already tried to bypass the limits on the federal spending power multiple times. The Attorney General's announcement of intrusive demands on states and localities that receive Byrne JAG grants is only one recent example.

No provision of the Byrne JAG statute—or any other statute—gives the Attorney General sweeping discretion to condition Byrne JAG funding on implementing the President's immigration policies. Congress did not authorize the Attorney General to impose the notice and

[1] Full Text: Donald Trump Immigration Speech in Arizona (Aug. 31, 2016) (hereinafter "August 31 Speech"), *available at* http://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614.

access conditions on Byrne JAG grants. To the contrary, Congress intended Byrne JAG recipients to tailor law enforcement programs to local needs. It is thus unsurprising that the Attorney General has yet to identify any provision within the Byrne JAG statute that serves as textual authority for his announcement of the notice and access conditions. *See* SA 13.[2]

None of the statutory provisions that the Attorney General now points to on appeal provides the necessary congressional authorization. Rather than identify clear and specific statutory authority, the Attorney General raises a new argument that certain detention and removal statutes in the Immigration and Nationality Act (INA) contain an "implicit premise" that states and localities would implement the notice and access conditions. Sessions Br. at 11; *see also id.* at 16. But the Attorney General misconstrues the detention and removal statutes. In enacting the statutes, Congress imposed obligations on the *federal government*, not states and localities. The Constitution requires that Congress speak clearly before states and localities are burdened with a spending condition. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). That has not occurred here. Because a federal agency may not impose spending conditions without congressional authorization, the District Court rightly concluded that the Attorney General's notice and access conditions "violate the separation of powers doctrine and are *ultra vires*." SA 19.

The Attorney General invites this Court to hold that a federal agency may impose its own conditions on a funding program unless a statute "precludes" them, *see* Sessions Br. at 12, even when those conditions are inconsistent with Congress's purposes in enacting the funding

[2] "Sessions Br." refers to the Attorney General's opening brief (Dkt. 39). "SA" refers to the Attorney General's Short Appendix included with his opening brief.

program. Should the Court accept this invitation, it would set a dangerous precedent that goes far beyond the current bid to force Byrne JAG recipients to implement the President's and Attorney General's immigration policies. Administration officials would be given the green light to disregard the balance between state and federal authority and require states and localities to administer whatever unrelated priorities the executive wants to pursue in any fiscal year. This case confirms the need for federal courts to protect federalism by enforcing the constitutional limits on federal executive power.

ARGUMENT

I. THE ATTORNEY GENERAL HAS DISREGARDED CONSTITUTIONAL LIMITS ON THE EXERCISE OF FEDERAL SPENDING POWER THAT PROTECT STATES AND LOCALITIES

Article I of the Constitution grants Congress the power to tax and to spend: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Congress "alone has access to the pockets of the people"—the executive branch has no authority to spend under Article I, for "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." The Federalist, No. 48, at 148 (James Madison); U.S. Const., art. I, § 9, cl. 7. It is for Congress to enact spending measures and authorize conditions on federal grants, leaving to the federal executive the task of implementing those programs. Since the executive has no independent spending power, it thus also has no independent authority to create new conditions on federal funds once appropriated by Congress.

The Framers adopted a carefully calibrated separation of powers that protects both individual liberty and federalism by limiting the authority of each branch of the federal government. These constitutional limits protect states and localities against the very sort of

executive branch dysfunction that has been on display in this case, culminating in the Attorney General announcing, unilaterally and without authority, new conditions on Byrne JAG grants.

The Attorney General has not identified specific statutory authorization for these new conditions. Instead, he has suggested that whether the notice and access conditions are proper depends upon whether Congress *precluded* the Attorney General from adopting them when it created the Byrne JAG program. *See* Sessions Br. at 12, 17 ("The district court mistakenly concluded that the statute *precludes* the Assistant Attorney General from conditioning receipt of law enforcement funds on an assurance that the recipient will not thwart federal law enforcement"; "The district court seriously erred in construing the statute to *preclude* such conditions") (emphases added). But this flips the rule on its head. The Constitution assigns the spending power to Congress, not to the Attorney General, and requires specific statutory *authorization* before the Attorney General may condition federal spending on the notice and access conditions.

A. The Spending Clause and the Separation of Powers Deny Federal Agencies the Ability to Independently Force States and Localities to Accept Spending Conditions

To ensure that states and localities are protected from arbitrary and unpredictable changes in federal grantmaking, the executive branch may not withhold funds based on a grant condition unless Congress has clearly authorized it: "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. Moreover, a reviewing court "must carefully inquire" into the legislative scheme before concluding that the executive branch can order states and localities to comply with particular conditions to receive federal grants. *Id.* at 18. This clear-statement rule ensures that a state has "voluntarily and knowingly" agreed to the spending condition. *Id.* at 17.

To ensure political accountability and protect federalism, the Framers not only limited Congress's Article I authority over spending. They also denied to the executive branch independent Article II authority to impose conditions of its own making, or unilaterally to refuse to spend appropriated funds for its own policy ends. The executive's duty is to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. In carrying out that duty, the executive departments, like administrative agencies, are creatures of statute whose "power to act . . . is authoritatively prescribed by Congress." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013). Neither the President nor an executive agency has the "constitutional authority to withhold" funds that Congress has designated for a particular purpose—indeed, withholding such funds "violates [the] obligation to faithfully execute the laws duly enacted by Congress." *County of Santa Clara v. Trump*, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017) (citing *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (striking down Line Item Veto Act, which purported to give President authority to cancel specific types of spending provisions)); *see also In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (holding that the President "does not have unilateral authority to refuse to spend the funds" that Congress has appropriated).

By limiting congressional and executive authority over spending, the Constitution protects states and localities. With the power to spend comes the power to make policy by imposing substantive conditions on the acceptance of federal funds. The finely-wrought procedures of federal lawmaking preclude a single person—whether the President or a Department head—from arrogating to himself power over "the pockets of the people." The Federalist, No. 48, at 148 (James Madison). Instead, the Spending Clause and separation-of-powers rules together ensure that the concurrence of Congress is necessary before the federal government can impose a spending condition. *See* Bradford R. Clark, *Separation of Powers as a*

Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1391 (2001) (explaining that "federal lawmaking procedures," including those limiting federal spending, "safeguard federalism"). These political safeguards, and their enforcement by the judiciary, are essential to the federal system.

B. The Dysfunctional Administrative Process in this Case Underscores the Need for Judicial Enforcement of Constitutional Limits on Federal Spending Power

When the federal government announces conditions on federal grants, states and localities can normally take any concerns they have to Congress, or, in the alternative, lodge them with the executive. *See Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 550-52 (1985) (explaining that the "shape of the constitutional scheme" of federal lawmaking protects states' "'residuary sovereignty'" (quoting The Federalist No. 62, at 408 (B. Wright ed. 1961))). But when spending conditions are announced unilaterally and without any formal process, it leaves states and localities without any recourse but to the federal courts.

From the inception of the Byrne JAG program until 2016, the federal government disbursed hundreds of millions of dollars of grant funds without any immigration-related funding conditions. The Attorney General's imposition of the challenged conditions was a substantial departure from past practice, with high stakes for states and localities. Nevertheless, the Attorney General did not use any formal procedures, such as notice-and-comment rulemaking, that would have facilitated transparency and consultation.

That the Administration took such a drastic step without consulting state and local jurisdictions is unsurprising. "End[ing]" so-called "sanctuary cities" has been a preoccupation of

President Trump since before he took office. *See* August 31 Speech, *supra* n.1.[3] To that end, the Administration has tried several times to bypass limits on executive authority to threaten such jurisdictions with funding cut-offs, without regard for congressional intent or for state and local sovereignty. Within one week of taking office, the President issued Executive Order 13,768, directing Administration officials to "ensure that jurisdictions that . . . refuse to comply with 8 U.S.C. § 1373 . . . are not eligible to receive Federal grants."[4] Local governments promptly challenged the move in federal court. In April 2017, a district court in California found that plaintiffs were likely to succeed on the merits of their constitutional challenge and entered a nationwide preliminary injunction. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539-40 (N.D. Cal. 2017). The court observed that Congress had "repeatedly, and frequently, declined to broadly condition federal funds or grants on compliance with 8 U.S.C. § 1373 or other federal immigration laws" and found the President's power to therefore be "at its lowest ebb." *Id.* at 531.[5]

[3] *See also* Donald J. Trump, Donald Trump's Contract with the American Voter (Oct. 2016), *available at* https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf (promising to "cancel all federal funding to sanctuary cities" in the first 100 days of his presidency).

[4] Exec. Order 13,768, Enhancing Public Safety in the Interior of the United States § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (hereinafter "Interior Enforcement Executive Order"), *available at* https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

[5] The district court later made the preliminary injunction permanent following a grant of summary judgment in favor of the plaintiffs. *Cty. of Santa Clara v. Trump*, 2017 WL 5569835, at *17 (N.D. Cal. Nov. 20, 2017). Among other things, the court found the Executive Order "an improper attempt to wield Congress's exclusive spending power and . . . a violation of the Constitution's separation of powers principles." *Id.* at *12.

Undeterred, the Administration then switched course. In July 2017, the Attorney General announced the Byrne JAG funding conditions challenged in this case.[6] The Attorney General did not engage in notice-and-comment rulemaking, which would have allowed states and localities to raise their federalism concerns directly with the Department of Justice. Many agencies have voluntarily conducted notice-and-comment rulemaking when making substantive changes to grant conditions.[7] Indeed, in the Byrne JAG statute, Congress instructed the Attorney General to "issue rules to carry out" the Byrne JAG program. 34 U.S.C. § 10155. Nonetheless, when the Attorney General adopted the new and intrusive conditions on the Byrne JAG program at issue here, he informed state and local jurisdictions for the first time by press release.

After the Attorney General announced the three new Byrne JAG conditions, several jurisdictions filed suit. In September 2017, the District Court ordered a nationwide preliminary injunction against the notice-and-access conditions based on a finding that the executive lacked authority to impose them. *See City of Chicago v. Sessions*, 2017 U.S. Dist. LEXIS 149847, at *44 (N.D. Ill. Sept. 15, 2017). Even then, the Attorney General did not give up. Following the District Court's ruling, the Department of Justice issued letters to five jurisdictions, including Chicago, finding those jurisdictions to be "preliminarily" in violation of 8 U.S.C. § 1373, the federal statute that serves as the basis for the remaining Byrne JAG condition that is not at issue

[6] U.S. Dept. of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[7] *See* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 Yale L.J. 248, 325 n.394 (2014) (noting agency practice of waiving Administrative Procedure Act exemption from rulemaking for grants). The executive branch has also previously directed federal agencies to have an "open exchange of information and perspectives" with state and local officials when creating new policies. Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3821-22 (Jan. 18, 2011).

in this appeal.[8] In doing so, the Attorney General adopted an expansive interpretation of § 1373 that would effectively implement de facto the notice and access conditions that the District Court enjoined him from imposing directly. On the same date that the Attorney General suffered another loss in court in Philadelphia, *see City of Philadelphia v. Sessions*, 2017 U.S. Dist. LEXIS 188954 (E.D. Pa. Nov. 15, 2017) (recognizing the preliminary injunction as to the notice and access conditions already entered by the District Court in this case, and enjoining the Attorney General from withholding Byrne JAG funding from the City of Philadelphia based on the condition requiring compliance with 8 U.S.C. § 1373), the Department of Justice issued a second set of § 1373 letters to another 29 jurisdictions.[9]

The Administration's attack on so-called sanctuary jurisdictions appears to be part of a broader policy platform of mass deportations, itself marked by a tendency towards executive overreach. To achieve its policy end, the Administration recognizes that it must obtain the acquiescence of state and local jurisdictions, including Chicago, and persuade them to open up their jails to immigration officials and redirect policing resources towards immigration enforcement. In its quest to press state and local criminal justice actors into the federal government's service, the Administration has yet to identify congressional authorization for its threats to deny federal funding to states and cities that adopt policies to disentangle state and local law enforcement from federal immigration machinery. This war on so-called sanctuary

[8] *See* U.S. Dept. of Justice, Justice Department Provides Last Chance for Cities to Show 1373 Compliance (Oct. 12, 2017), *available a*t https://www.justice.gov/opa/pr/justice-department-provides-last-chance-cities-show-1373-compliance.

[9] *See* U.S. Dept. of Justice, Justice Department Sends Letters to 29 Jurisdictions Regarding Their Compliance with 8 U.S.C. 1373 (Nov. 15, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373.

jurisdictions is also a war on the constitutional prerogatives of states and localities, and it will not stop unless the judiciary enforces constitutional limits on the executive's authority.

II. CONGRESS DID NOT AUTHORIZE THE NOTICE AND ACCESS CONDITIONS THAT THE ATTORNEY GENERAL SEEKS TO IMPOSE ON BYRNE JAG FUNDING

The Attorney General's newly minted conditions on Byrne JAG funding violate statutory limits on his authority and constitutional constraints on the federal government's spending power. No act of Congress contains the type of clear statement required to permit the Attorney General to condition Byrne JAG funds on compliance with the Department of Justice's notice and access conditions. Accepting the Attorney General's interpretation of the Department's authority would therefore set a dangerous precedent not only for the Byrne JAG program, but also for the myriad other federal grant programs on which states and localities have come to rely.

A. The Byrne JAG Statute Does Not Authorize the Attorney General's Conditions

There is no indication in the Byrne JAG statute that Congress intended for the Attorney General to have any authority to impose immigration-related requirements on grantees of the type contemplated here. Indeed, the statutory text does not even authorize the Department of Justice to impose criminal justice mandates on local law enforcement actors, much less to leverage Byrne JAG funding to require participation in the enforcement of civil immigration laws. To the contrary, the statute's structure, purpose, and history all confirm that Congress intended the Department to defer to state and local policy choices.

The Byrne JAG program is largely a formula grant created for criminal law enforcement, and the statutory structure reflects that purpose. *See* 34 U.S.C. § 10152(a)(1) (authorizing Attorney General to "make grants to States and units of local government" to support "criminal justice," but "in accordance with the formula established under section 3755 of this title"). By

statute, the Attorney General may design a "form" for Byrne JAG applications, "reasonably require" applicants to "maintain and report . . . data, records, and information (programmatic and financial)," and develop a "program assessment component." *See id.* §§ 10152-53. Congress specified a few prohibited uses of Byrne JAG funding, but generally allowed states and localities to adapt the program's funding to their specific needs. *See id.* § 10152(d) (listing prohibited uses); H.R. Rep. No. 109-233, at 89 (explaining that Congress's purpose was to "give State and local governments more flexibility"). Options, not mandates, are the bedrock of the Byrne JAG program.

The Byrne JAG program's purpose and history also confirm that Congress did not authorize the Attorney General to impose civil immigration enforcement mandates on grantees. Since 2005, when Congress created the program, its focus has been on improving the criminal justice system, including policing, adjudication, and incarceration, not on immigration policy. *See id.* § 10152. It would run counter to the program's purpose to permit the Attorney General to use it as a tool to carry out the Administration's immigration agenda.

In fact, Congress has declined to adopt any conditions on Byrne JAG funding related to immigration enforcement, despite numerous attempts to do so by individual legislators. *See, e.g.*, Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3(b) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2(b)(2) (2015). To the contrary, in 2006, Congress *repealed* the only arguably immigration-related requirement in the Byrne JAG statute: the requirement that grantees provide certified records of criminal "convictions of aliens." *See* Immigration Act of 1990, Pub. L. No. 101-649, tit. V, § 507(a), 104 Stat. 4978, 5050-51 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, tit. III, § 306(a)(6), 105 Stat. 1733, 1751 (1991) (repealed in 2006); 34 U.S.C.

§ 10153(a). Thus, Congress has deliberately declined to impose immigration-related mandates in the current Byrne JAG program.

B. No Other Statute Authorizes the Attorney General's Conditions

In light of the Byrne JAG statute's text, structure, purpose, and legislative history, something more than stray statutory phrases is required to authorize the Attorney General's notice and access conditions. *See Pennhurst*, 451 U.S. at 17. On appeal, the Attorney General does not point to specific authorization within the Byrne JAG statute. Instead, he argues that the notice and access conditions are proper because they are not "preclude[d]" by the Byrne JAG statute and are necessary to ensure "basic cooperation in immigration enforcement, which the Attorney General has identified as a federal priority." Sessions Br. at 15, 17. This argument proceeds from the flawed premise that when Congress has created a spending program, an agency may impose whatever spending conditions it believes are a "federal priority" for that program, unless Congress specifically precludes those conditions. To the contrary, as the District Court rightly held, "[w]hether the new conditions on the Byrne JAG grant are proper depends on whether Congress conferred authority on the Attorney General to impose them." SA 11.

The Attorney General cites to 34 U.S.C. § 10102(a)(6), but this provision is not a grant of authority to impose conditions on Byrne JAG funding. Instead, it does no more than assign to the Assistant Attorney General for the Office of Justice Programs whatever "powers and functions [are] vested in [the AAG] pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." *Id.* The Attorney General reads the second clause as an independent grant of sweeping authority to create spending conditions, but it plainly is not. This section would only

be relevant if Congress had vested statutory authority in either the Attorney General or the Assistant Attorney General to implement any of the Department's immigration-related Byrne JAG requirements. But Congress did not do so.[10] Tellingly, the Attorney General never identifies limits on the discretion he claims exists under § 10102(a)(6), nor does he explain why the notice and access conditions are "special conditions" within § 10102(a)(6)'s meaning. Instead, the Attorney General asserts "some [unspecified amount of] discretion over grants in general and formula grants in particular." Sessions Br. at 19. That assertion of unspecified and sweeping authority cannot be reconciled with the constitutional limits on the spending power.

The Attorney General further suggests that Congress contemplated state and local participation in immigration enforcement when it enacted the INA and that this somehow creates authorization for the Attorney General's Byrne JAG funding conditions. *Id.* at 11, 16. It does not. First, the Attorney General misconstrues 8 U.S.C. § 1226(c)(1) and § 1231(a)(1)(B), the two detention and removal statutes on which he relies. Congress enacted 8 U.S.C. § 1226(c)(1) in 1996 in response to what it perceived to be a "wholesale failure by *the INS*" to remove deportable noncitizens who had been convicted of criminal offenses by "fail[ing] to detain those [noncitizens] during their deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 518-21 (2003) (emphasis added). Congress directed that certain noncitizens taken into federal custody and placed in removal proceedings upon release from criminal custody are to be mandatorily

[10] In the same Act that added the cited Section 3712 language, Congress set forth a number of new conditions on grant funds, none of which are related to immigration enforcement. *See generally* Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, Pub. L. No. 109-162, 119 Stat. 2960 (2006). Congress also identified *other* factors—unrelated to immigration enforcement—that are given priority in the allocation of formula grants. *See, e.g.*, *id.* § 505(f). Some cross-cutting spending conditions that Congress *has* approved include those related to compliance with various civil rights and nondiscrimination laws. *See, e.g.*, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in "any program or activity receiving Federal financial assistance"); 42 U.S.C. § 2000cc-1 (protecting free exercise rights of institutionalized persons in any "program or activity that receives Federal financial assistance").

detained, whereas those apprehended after returning to the community for some time or under other circumstances are to be detained at the discretion of immigration authorities. *Compare* 8 U.S.C. § 1226(c) *with* 8 U.S.C. § 1226(a). Section 1231(a)(1)(B) requires federal immigration authorities to act quickly to remove a noncitizen at the conclusion of his/her removal proceedings. If an order of removal becomes final while a noncitizen is still confined in criminal custody, then the removal period does not begin to run, however, until after the noncitizen is released. *See* 8 U.S.C. § 1231(a)(1)(B)(i)-(iii).[11]

Both 8 U.S.C. § 1226(c)(1) and 8 U.S.C. § 1231(a)(1)(B) impose obligations exclusively on *federal* officials. Contrary to the Attorney General's assertion, the statutes say nothing about "allowing state criminal proceedings to take precedence over federal immigration proceedings based on [an] *implicit premise* that states and localities will not use this precedence to frustrate federal immigration enforcement." Sessions Br. at 11 (emphasis added). The Attorney General cites no authority for this assertion, and can point to no language in the INA that supports it.[12] These statutes were not intended to disturb the prerogative of state and local officials to decide whether they would voluntarily cooperate with requests from federal immigration authorities.[13] Indeed, if they were intended to command the participation of states and localities, they would likely run likely afoul of the Tenth Amendment. *See New York v. United States*, 505 U.S. 144,

[11] Noncitizens are also subject to mandatory detention during the removal period. 8 U.S.C. § 1231(a)(2). If they are not removed after 90 days, then they may be released by immigration authorities on an order of supervision. *Id.* § 1231(a)(3).

[12] Such a *quid pro quo* would not make sense, since in many cases it is a state criminal conviction that *makes* a noncitizen removable. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 361-64 (2010).

[13] In other statutory provisions, Congress has recognized that state and local law enforcement may *choose* to cooperate in specific ways with federal immigration officials, subject to federal supervision and state-law authorization. *See* 8 U.S.C. §§ 1103(a)(10), 1252(c), 1324(c), 1357(g).

188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

Second, 8 U.S.C. § 1226(c)(1) and 8 U.S.C. § 1231(a)(1)(B) do not authorize the Attorney General to impose the notice-and-access conditions on Byrne JAG funding. Neither says *anything* about federal funding, much less Byrne JAG funding. Even if the detention and removal statutes reflected an "implicit premise" that states and localities would voluntarily respond to requests for individuals' release dates and provide federal officials with access to state or local detention facilities, Sessions Br. at 11, the absence of any mention of funding means Congress has not given the required authorization for the Attorney General's conditions. *See Pennhurst*, 451 U.S. at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). And because an agency may not impose spending conditions in the absence of statutory authorization, it would violate the separation of powers for the Executive Branch to transform an *implicit* premise in a collateral statutory scheme into a condition on Byrne JAG funding.

If Congress intended to authorize new, substantive policy conditions on Byrne JAG grants, then it would have had to speak far more clearly than it did in the statutory provisions on which the Attorney General relies. *Id.*; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). The Attorney General offers *no* limiting principle to his purported authority to impose substantive conditions on Byrne JAG grants. In the Attorney General's view, the executive could withhold funds on almost *any* basis, whether or not related to criminal justice, that he sees fit. That is

counter to Congress's explicit intent to give Byrne JAG grantees maximum flexibility and is not the scheme that Congress created.

C. Congress Did Not and Could Not Authorize the Attorney General to Violate Constitutional Limits on the Federal Government's Spending Power

Even if Congress *had* authorized the conditions at issue here, such conditions would raise serious constitutional problems. This Court should avoid an interpretation of the Byrne JAG statute that would violate the constitutional limits on Congress's spending power. *See DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

When Congress authorizes a spending condition, it must be "germane[]" to the grant's public purposes. *South Dakota v. Dole*, 483 U.S. 203, 207-08 & n.3 (1987). If the condition is not related to the program's purpose, then it is an unconstitutional regulation of states and localities. *See N. Ill. Chapter of Assoc. Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1006 (7th Cir. 2005) ("Conditions on spending may become regulation if they affect conduct other than the financed project."). The Byrne JAG grant is a criminal justice program intended to provide states and localities with flexibility in criminal justice policy. The notice and access conditions are unrelated to, and indeed inconsistent with, that purpose.

Immigration enforcement is not co-extensive with crime control, and should not be treated as such. "Immigration law has nothing to do with the enforcement of local criminal laws." *City of Philadelphia*, 2017 U.S. Dist. LEXIS 188954, at *145. While a person's criminal history can trigger immigration consequences, thus making "[c]riminal law . . . integral to immigration law," it does not follow that the federal government's immigration agenda drives criminal justice functioning, particularly at the local level. *See id.* at *139-47 (analyzing germaneness of immigration-related condition to JAG program purposes and concluding that

"[t]he federal interest in enforcing immigration laws falls outside of the scope of the Byrne JAG program").

Indeed, as the International Association of Police Chiefs recently explained, entangling local police with immigration enforcement may *impede* efforts to combat violent crime. "Police Chiefs to Trump: Don't Punish Sanctuary Cities," NBC News (Mar. 29, 2017), *available at* https://perma.cc/L4BD-7G9H.[14] The Administration's effort to paint immigrants with a broad brush of criminality has been part and parcel of its strategy to maximize immigration enforcement. President Trump began his campaign by branding Mexican immigrants as rapists and drug dealers.[15] He repeated this identification of immigrants with criminality in his attack on sanctuary cities and the "needless deaths" they have supposedly caused,[16] comments that the Attorney General has echoed when he has blamed sanctuary cities for the deaths of "[c]ountless Americans."[17] While the myth of immigrant criminality—which at times has taken on an explicitly racialized tone[18]—may be a persistent one,[19] it is unsupported by empirical evidence

[14] *See also* Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Ctr. for American Progress & Nat'l Immigr. Law Ctr. 6 (Jan. 26, 2017), *available at* https://perma.cc/B57Q-XGTE (finding that "[c]rime is . . . significantly lower in sanctuary counties compared to nonsanctuary counties").

[15] Here's Donald Trump's Presidential Announcement Speech, Time (June 16, 2015), *available at* http://time.com/3923128/donald-trump-announcement-speech/.

[16] August Speech, *supra* note 1; see also Christopher Ingraham, *Trump says sanctuary cities are hotbeds of crime. Data say the opposite*, Wash. Post (Jan. 27, 2017), *available at* https://www.washingtonpost.com/news/wonk/wp/2017/01/27/trump-says-sanctuary-cities-are-hotbeds-ofcrime-data-say-the-opposite/.

[17] U.S. Dept. of Justice, Attorney General Jeff Sessions Delivers Remarks (Mar. 27, 2017), *available at* https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions.

[18] *See* Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 New Eng. J. on Crim. & Civ. Confinement 159, 173-75 (2016) (describing use of death of Kate Steinle during the Trump

and "[u]ndermin[es] the development of reasoned public responses to both crime and immigration." Rubén Rumbaut & Walter Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation*, Immigration Policy Center 1 (2007); *see also The Integration of Immigrants into American* Society, Nat'l Academies of Sciences, Engineering, and Medicine 326-31 (2015). It does not provide a sound basis upon which to conclude that Congress intended to authorize the Attorney General to condition Byrne JAG funding on compliance with the notice and access conditions.

CONCLUSION

Federal agencies play an important role in implementing spending programs, but not by creating new spending conditions whenever it suits the President's policy preferences. Permitting an agency such unbridled authority "would threaten the political accountability key to our federal system." *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012). *Amici* urge the Court to reject the Administration's latest bid for unilateral executive power and affirm the District Court's order granting a preliminary injunction.

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campaign); Complaint, *State of New York v. Trump.*, No. 1:17-cv-05228, ECF No. 1, at 45-48 (E.D.N.Y. Sep. 6, 2017) (recounting Trump's "history of disparaging Mexicans").

[19] *See* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 Ariz. St. L.J. 1431, 1452-53, 1474-75 (2012) (explaining why myths about immigrant criminality and sanctuary cities persist).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 29 because it contains 5844 words. This brief also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word in Times New Roman 12-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2018, I electronically filed the foregoing Brief *Amici Curiae* of Administrative Law, Constitutional Law, and Immigration Law Scholars in Support of Plaintiff's Motion for a Preliminary Injunction using the CM/ECF system, which will send notification of such filing to all parties of record. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk with seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with Circuit Rule 31.

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