19-267(L)

19-275(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STATE OF NEW YORK, STATE OF CONNECTICUT,
STATE OF NEW JERSEY, STATE OF WASHINGTON,
COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF VIRGINIA,
STATE OF RHODE ISLAND, CITY OF NEW YORK,

Plaintiffs-Appellees,

—against—

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM P. BARR,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND IMMIGRATION LAW SCHOLARS IN SUPPORT OF REHEARING *EN BANC*

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INTEREST OF *AMICI CURIAE*[1]

This case concerns the limits on the federal executive branch's authority to unilaterally co-opt states and localities into administering the executive's regulatory agenda. In today's era of expansive federal spending, the federal government has the ability to greatly influence state and local policy. However, the Constitution protects federalism by, among other things, denying the executive branch the power to impose conditions not authorized by Congress. Here, the panel decision disregarded this constitutional principle in holding that the Attorney General was authorized to impose three conditions on law enforcement funding under the Edward Byrne Justice Assistance Grant ("Byrne JAG") program. The panel split from every other federal court to have considered the challenged conditions—including the First, Third, Seventh, and Ninth Circuits—all of which concluded that the Attorney General's actions were unauthorized by Congress.

Amici, listed in Appendix A, are scholars of administrative, constitutional, and immigration law who have a professional interest in the proper construction of limits on executive power. This brief provides their unique perspective on the

[1] The parties have consented to the filing of this *amici curiae* brief. *See* Fed. R. App. P. 29(a)(2). 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 to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(e).

ramifications of the Court's decision for federalism and executive authority. Similar briefs filed by *amici* have been accepted in other cases involving the Byrne JAG program. *See City of Chicago v. Sessions*, No. 18-2885, Dkt. 45 (7th Cir. November 15, 2018); *City of Philadelphia v. Sessions*, No. 17-cv-3894, Dkt. 77 (E.D. Pa. Nov. 15, 2017).

PRELIMINARY STATEMENT

It is a bedrock principle of our constitutional system that Congress, not the executive, has the authority to impose conditions on federal spending. Article I grants the power of the purse to Congress, not the President or the Attorney General. U.S. Const. art. I, § 8, cl. 1. The Constitution precludes 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 (James Madison).

By contrast, the executive's duty is to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. With respect to expenditures, the executive's "power to act . . . is authoritatively prescribed by Congress." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). When the executive withholds appropriated funds, he "violates [the] obligation to faithfully execute the laws duly enacted by Congress." *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017). By limiting executive authority to withhold funds for unauthorized reasons, the Constitution protects states and localities. *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").

The panel decision undermines this careful constitutional balance. It gives the Attorney General unbridled discretion to impose conditions on the Byrne JAG program that Congress never authorized. In doing so, the panel's interpretation creates serious constitutional problems that can be avoided if the Court follows other circuits and holds these conditions to be impermissible.

This decision has importance beyond the current bid to force Byrne JAG recipients to implement the President's immigration agenda. It gives a green light to officials in this and future administrations to thrust any federal policy preferences onto states and localities by imposing new and unrelated conditions on grants upon which they have come to rely. If the executive can impose spending conditions on its own, states and localities will be subjected to an ever-changing and ever-expanding list of conditions. States will face uncertainty year-to-year. Rather than endorse this approach, the Court should enforce constitutional limits on federal executive power. For the reasons discussed herein, this is that rare case in which en banc consideration is necessary. *See* Fed. R. App. P. 35(b) (providing for en banc consideration when a decision conflicts with decisions of the Supreme Court or other federal circuits).

ARGUMENT

I. THE PANEL DECISION THREATENS FEDERALISM AND SEPARATION OF POWERS

A. The Panel Permitted the Imposition of Conditions Not Authorized by Congress

Under longstanding Supreme Court precedent, Congress must "unambiguously" state any conditions it places on federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This clear-statement rule ensures that states accept the conditions attached to federal funds "voluntarily and knowingly." *Id.* Here, however, none of the Attorney General's three conditions on Byrne grants is clearly authorized by the statute.

It does not matter, contrary to the panel's suggestion, that the *Attorney General* provided the plaintiffs with advance notice of the new conditions. Op. 48. The focus of the clear-statement rule is Congress, not the executive. It is "the Congress [that] must have affirmatively imposed [the] condition in clear and unmistakable statutory terms." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 563 (4th Cir. 1997). It is one thing for the executive to fill the interstices while implementing Congress's broader directive; it is another for the executive to invent conditions out of whole cloth. The Attorney General did the latter here. The Supreme Court has never suggested that the executive may impose conditions on its own accord. *Cf. Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions

of vast 'economic and political significance.'" (quoting *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).

Congress, not the executive, holds the power of the purse. The panel's interpretation allows the executive to usurp that power by using phrases like "applicable federal laws" to pick and choose whichever conditions it wants from among the hundreds, if not thousands, of federal laws that might apply to states and localities. *See City of Chicago v. Barr*, No. 18-2885, 2020 WL 2078395, at *17 (7th Cir. Apr. 30, 2020) (rejecting panel's interpretation; "nothing in those statutes [] even hints that Congress intended to make those grants dependent on the Attorney General's whim as to which law to apply"). Such "discretion unmoored by any legislative general policy or boundaries of authority" raises a serious nondelegation problem that this Court must avoid. *Id.*, at *18.

B. The Panel Interpretation Allows Conditions Unrelated to the Grant's Purpose

The panel decision threatens federalism in another way. Federal grant conditions "must be reasonably related to the purpose of the expenditure." *South Dakota v. Dole*, 483 U.S. 203, 213 (1987). The relatedness requirement, like the clear-statement rule, protects federalism by preventing the federal government from using its spending power to dictate policy to states and localities. The panel opinion, however, runs roughshod over this requirement by allowing the Attorney General to condition Byrne funds on compliance with *any* of the numerous federal

laws applicable to states or localities, *regardless* of the law's relevance to local criminal law enforcement.

The panel perfunctorily dismissed any relatedness problem, noting that the Attorney General's certification condition "promotes the respect for law necessary to the general welfare," and thus "reasonably relates to the Byrne Program, whose focus, after all, is law enforcement." Op. 58 n.28. But for much of our history, and at least after the enactment of federal statutes regulating immigration in the nineteenth century, there has been a demarcation of spheres of responsibility between state and local criminal law enforcement, on the one hand, and federal immigration enforcement, on the other. *See* Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1719-21 (2008). If promoting "respect for law" suffices here, then nearly any two policy areas can be related, thus eviscerating the constitutional requirement for relatedness. *See generally* Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1267-68 (2019). That is not permitted under the Constitution.

The panel decision, if it stands, will greatly increase federal leverage over state and local governments and lead to increased homogenization of state and local public policy in ways never intended by Congress. This administration may

be pushing for increased restrictions on immigration, but the next could condition grants on adopting gun control laws. *See Chicago*, 2020 WL 2078395, at *17. The Court should enforce the constitutional constraints on executive power in order to protect federalism today and in the future.

C. The Panel Decision Undermines the Anticommandeering Rule

As the Supreme Court recently reaffirmed in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), the Constitution "withhold[s] from Congress the power to issue orders directly to the states." *Id.* at 1475. Like the statute at issue in *Murphy*, Section 1373 impermissibly restricts the authority of states and localities to "regulate in accordance with the views of the local electorate." *New York v. United States*, 505 U.S. 144, 169 (1992).

The panel decision suggests that because the federal government holds "broad" and "preeminent" power in the area of immigration, there is no relevant authority that is reserved to the states under the Tenth Amendment that could raise a commandeering issue in the first instance. Op. 54. But such reasoning misunderstands the constitutional question. The issue is not whether Section 1373 restricts states' ability to make substantive immigration policy, but whether it constrains their ability to control the activities of their own employees, which has implications for a range of state and local policy prerogatives. Co-opting local and state criminal justice actors to execute federal civil immigration policy inflicts

precisely the harm that the Supreme Court's anti-commandeering jurisprudence is designed to prevent. *See Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); *see also* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PENN. L. REV. 103, 154 (2012) ("[C]ompelling states to provide [] information incurs the same structural harms as compelling them to provide other services.").[2] Since *Murphy*, courts have overwhelmingly concluded either that Section 1373 violates the anticommandeering rule on its face, or that it should be interpreted narrowly to avoid constitutional problems. *See* Somin, *supra*, at 1279-80. This Court should follow their lead.

II. THE PANEL CREATED UNNECESSARY CONSTITITIONAL PROBLEMS

The panel could easily have avoided the aforementioned constitutional problems. Every other federal court to have considered the issue—including the First, Third, Seventh, and Ninth Circuits—has concluded no statutory provision authorizes the Attorney General to impose the challenged conditions. *See City of*

[2] Nor does the panel's as-applied analysis salvage the certification condition, Op. 56-61, because if Section 1373 is unconstitutional, it cannot be an "applicable federal law" with which an applicant must certify compliance.

Chicago v. Barr, 2020 WL 2078395; *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City of Philadelphia v. Sessions*, 916 F.3d 276 (3d Cir. 2019). As those decisions demonstrate, the panel's interpretation conflicts with the statutory text and structure of the Byrne JAG program.

In concluding that the Attorney General was authorized to impose the challenged conditions, the panel relied heavily on dictionary definitions of "generic" statutory terms at the expense of reading those terms in context. *See Providence*, 954 F.3d at 36-37; *see also Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013) ("The plain meaning is best discerned by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute."). The provisions identified by the panel appear in a "list of assurances and conditions that a Byrne JAG applicant must make with respect to the application and programs to be funded." *Providence*, 954 F.3d at 34. As other circuits have remarked, it is "implausible" that Congress provided the "broad authorization" to direct local officials to enforce immigration law when the surrounding conditions relate only and "unreservedly to the application, grant, and programs to be funded." *Id.*; *see also Philadelphia*, 916 F.3d at 286.

There is a better reading of each of these provisions, as demonstrated by other circuits. For instance, the phrase "applicable Federal laws" in Section

10153(a)(5)(D)—which the panel construed to encompass *all* laws pertaining to the state or locality applying for the grant, *see* Op. 40—more "logically denotes laws that apply to states and localities *in their capacities as Byrne JAG grant recipients*." *Providence*, 954 F.3d at 37; *see also Chicago*, 2020 WL 2078395, at *12-14; *Philadelphia*, 916 F.3d at 289-90.[3] Similarly, the reference to "programmatic" information in Section 10153(a)(4)—which the panel interpreted to include information that "relate[s] in any way to the criminal prosecution, incarceration, or release of persons," Op. 63—is better understood to refer to the Byrne JAG program itself or the specific criminal-justice activities it funds, consistent with the way "program" is used elsewhere in the Byrne JAG statute and others authorizing grant programs. *See Providence*, 954 F.3d at 32-33; *Los Angeles*, 941 F.3d at 944-45. Likewise, the requirement that there "has been appropriate coordination with affected agencies," found in Section 10153(a)(5)(C), refers to coordination in preparing an application with "agencies affected by the programs for which the applicant seeks funding." *Providence*, 954 F.3d at 33; *see also Philadelphia*, 916 F.3d at 285; *Los Angeles*, 941 F.3d at 945. By contrast, under the panel's view, the Attorney General would have unbridled discretion to

[3] Notably, even the Attorney General did not advance an interpretation as broad as that adopted by the panel, arguing that "applicable laws" is limited to those "germane to the grant" itself, as opposed to the grantee. *See* 19-267, Dkt. 160 at 13.

demand cooperation from states relating to *any* person or program that intersects with any aspect of the criminal justice system, usurping Congress's authority to impose conditions on spending.

The panel's interpretation also ignores the statutory context. Congress structured the Byrne JAG program as a formula grant and authorized the Attorney General to depart from that formula only under narrowly defined conditions. *See, e.g.*, 34 U.S.C. §§ 20927(a), 40914(b)(2). Congress plainly did not intend for the Attorney General to disrupt this structure by conditioning funds on a grantee's providing *any* data, coordination, or certifications that the Attorney General would like. *See Providence*, 954 F.3d at 34 ("[I]t is nose-on-the-face plain that Congress intended Byrne JAG to operate as a formula grant program."). At a minimum, the divergent interpretations of other circuits demonstrate that the provisions of the Byrne JAG statute do not unambiguously authorize the imposition of the challenged conditions. *See United States v. Valle*, 807 F.3d 508, 524 (2d Cir. 2015) (if a "sharp division" in statutory interpretation among circuits "means anything, it is that the statute is readily susceptible to different interpretations"). In light of those decisions, there was no need for the panel to adopt an interpretation that departs from the statutory text and structure and also raises serious constitutional concerns. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988) ("[W]here an otherwise

acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

CONCLUSION

For the foregoing reasons, *amici* ask the Court to grant rehearing en banc.

Date: New York, New York
May 11, 2020

Respectfully submitted,

/s/ Harry Sandick

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,598 words, calculating by the word processing system used in its preparation, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface suing Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 11, 2020
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