NO. 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,
The Honorable Harry D. Leinenweber, Judge

BRIEF OF STATES OF CALIFORNIA AND ILLINOIS AS AMICI CURIAE IN SUPPORT OF CITY OF CHICAGO'S RESPONSE TO DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL AND AGAINST THE STAY

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INTRODUCTION AND INTEREST OF AMICI CURIAE

California and Illinois, as amici curiae, urge the Court to deny Defendant-Appellant Attorney General Jefferson B. Sessions' motion for partial stay of the nationwide preliminary injunction ("the Motion") against the new substantive conditions that Defendant has added to the FY 2017 Edward Byrne Memorial Justice Assistance Grant ("JAG") program solicitations. No. 17-02991, ECF No. 8-1 (7th Cir. Oct. 13, 2017). These conditions require applicant jurisdictions to enact an affirmative "statute," "rule," "regulation," "policy," or "practice" that is "designed to ensure" that (a) federal immigration enforcement agents with the Department of Homeland Security ("DHS") have access to detention facilities to interview inmates who are "aliens" or believed to be "aliens" (the "Access Condition"); and (b) upon its request, DHS receives 48 hours' advance notice regarding the scheduled release date of an "alien" (the "Notification Condition"). California, along with other jurisdictions, is litigating its own challenge to the conditions, and has a significant interest in the outcome of the proceedings before this court. As detailed below, California law enforcement is entitled to receive $28.3 million and Illinois law enforcement is entitled to receive $6.5 million in Fiscal Year 2017 JAG funding—money that Defendant's improperly imposed conditions place at risk.

Allowing the Defendant to impose these conditions with respect to all applicant jurisdictions besides Chicago would irreparably harm California, Illinois, and these other jurisdictions. If, in light of these conditions, state and local jurisdictions do not accept the funds authorized by the JAG statute and appropriated by Congress, important programs that serve critical criminal justice needs will be cut. And if these conditions pressure jurisdictions to change their public-safety oriented laws and policies in order to ensure they comply with these unconstitutional conditions, those jurisdictions will have abandoned policies that they have found to be effective in their communities for ensuring public safety. Moreover, removing the nationwide injunction would perpetuate the constitutional injury for those jurisdictions that lack sufficient resources to contest these conditions or whose JAG funding is less than the likely cost of litigating an independent challenge, while effectively allowing those jurisdictions with the resources to successfully oppose these conditions in court the ability to forego complying with them.

ARGUMENT

Although Plaintiff bore the burden in the district court to satisfy the four-factor test to justify the preliminary injunction, Defendant now bears the burden to justify a stay of that injunction pending appeal. *Nken v.*

Holder, 556 U.S. 418, 433-34 (2009). But Defendant cannot satisfy any of the four factors, let alone all of them. In particular, Defendant cannot show that it is "likely to succeed on the merits" or that it "will be irreparably injured absent a stay," the two "most critical" factors. *Id.* at 434. The stay Defendant requests would also "substantially injure the other parties interested in the proceeding" and harm "the public interest." *Id*.

I. DEFENDANT IS UNLIKELY TO SUCCEED UNDER THE SEPARATION OF POWERS

Notably, in seeking a stay of the injunction, Defendant does not argue that it is likely to succeed on the merits of Chicago's ultra vires and separation of powers claims. Instead, in his Motion, Defendant challenges the appropriateness of a nationwide injunction. *See* Mot. at 10-18. This attempt to skirt a discussion of the merits should fail in the first instance because the conditions enjoined by the district court plainly violate the separation of powers. That injury does not stop with Chicago, but "is national in scope," and extends to amici and every jurisdiction in the country that receives JAG funding. Order Denying Def's Mot. to Stay, No. 1:17-cv-05720, ECF No. 98 at 5 (N.D. Ill. Oct. 13, 2017) (the "Order"). For the reasons discussed herein, if the Court concludes that these conditions are likely to be found unconstitutional, there is no reason to subject every

jurisdiction but Chicago to this constitutional injury, and many reasons why a nationwide injunction is appropriate and necessary. *See id.* at 11, 14-15 ("An injunction more restricted in scope would leave the Attorney General free to continue enforcing the likely invalid conditions against all other Byrne JAG applicants," which "flies in the face of the rule of law.").

As the district court identified in the preliminary injunction order, there are serious structural reasons why the obscure administrative provision in 34 U.S.C. § 10102(a)(6) ("Section 10102") does not provide authority to add these conditions. In addition, there are separate and independent reasons why Defendant's imposition of the Access and Notification Conditions is unconstitutional, thus making it unlikely that Defendant will succeed on appeal. It is to Congress that the U.S. Constitution grants the spending power, Art. I § 8, cl. 1, and it follows that Defendant cannot unilaterally insert conditions into grant awards without authorization from Congress. *City of Arlington, Tex. v. FCC*, 569 U.S. 290 (2013) (an agency's "power to act and how they are to act is authoritatively prescribed by Congress"). Because Congress has neither added the Access and Notification Conditions through statute, nor given to Defendant the authority to require JAG recipients to comply with such conditions, the conditions violate the Separation of Powers and must fall.

First, the text, purpose, and legislative history of the JAG authorizing statute do not provide Defendant with the authority to require grantees to comply with the Access and Notification Conditions. The new conditions upset the carefully crafted Congressional design, under JAG, that "*each* State" and "*each* unit of local government" receives an allocation according to a precise statutory formula. 34 U.S.C. § 10156(a), (d)(2) (emphasis added); *cf. In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (despite "policy reasons . . . even the President does not have the unilateral authority to refuse to spend the funds"). The new conditions additionally contradict the overarching goal stated by Congress when adopting the current version of the JAG program: to provide state and local governments with "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" to local law enforcement. H.R. Rep. No. 109-233, at 89 (2005). Further, the legislative history reveals Congressional intent not to condition JAG funding on immigration enforcement related conditions, as shown in 2006 when Congress repealed conditions requiring participation in federal immigration enforcement.[1]

[1] *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

Congress knows how to add conditions by statute, has proven capable of doing so in the JAG authorizing statute, and has evidently chosen not to add the Access or Notification Conditions that Defendant seeks to inject here.[2]

Second, USDOJ has claimed that these new conditions are permitted under 34 U.S.C. §10102, allowing the agency to add "special conditions on all federal grants." But Section 10102 does not endow Defendant or USDOJ with the authority they claim. In 2006, when this provision was amended to permit OJP to "plac[e] special conditions on all grants," the term "special conditions" had a precise meaning. According to a USDOJ regulation in place at the time, it could impose "special grant or subgrant conditions" on "high-risk" or struggling grantees. 28 C.F.R. § 66.12 (removed Dec. 25, 2014). This meaning of special conditions is entirely consistent with other federal statutes and regulations that have also historically identified "special

(1991) (repealed 2006) (required the chief executive office of each state receiving JAG funding to provide "certified records" of criminal convictions of aliens).

[2] *See* 34 U.S.C. §§ 10153 (ministerial requirements and certification for JAG recipients to follow, including that jurisdictions comply with applicable laws); 20927 (permitting ten percent penalty on JAG funds for jurisdiction failing to "substantially implement" the Sex Offender Registration and Notification Act); 30307(e)(2) (permitting five percent penalty on JAG funds if a State fails to adopt national standards under the Prison Rape Elimination Act); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) ("When Congress intended to impose conditions on the grant of federal funds . . . it proved capable of doing so in clear terms.").

conditions" as those that federal agencies may place on particular high-risk grantees who have struggled or failed to comply with grant conditions in the past, and not on all grantees irrespective of performance. *See*, *e.g.*, 20 U.S.C. § 1416(e)(1)(C); 7 C.F.R. § 550.10; 34 C.F.R. § 80.12 (removed Dec. 19, 2014); 45 C.F.R. § 74.14 (removed Dec. 19, 2014). It does not confer any ability to add the Access and Notification Conditions to JAG funds.

The particular meaning of the term "special conditions" in 2006, as referring to conditions for high-risk grantees, is no different today. Defendant's attempt to transform this administrative provision into one providing limitless discretion to the agency disrupts well-settled and fundamental notions of statutory construction that Congress "does not . . . hide elephants in mouseholes," and "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) ("principles of our federal system . . . belie the notion that Congress would use an obscure grant of authority to regulate areas traditionally supervised by the States' police power").

II. DEFENDANT WOULD NOT BE IRREPARABLY HARMED

Defendant laments that the JAG process is already significantly behind the timing of award grants from other years, creating irreparable harm. *See*

Mot. at 19. Yet, the decision of when to send out solicitations and begin the 2017 process was entirely within Defendant's control. Defendant was two to three months behind schedule in releasing the fiscal year 2017 JAG Solicitations when compared to fiscal year 2016. Even knowing it was already delayed, Defendant decided to add—for the first time in the three decade-long history of the various iterations of the JAG program—two completely new, substantive conditions that required jurisdictions to have affirmative policies in place. Moreover, it made this decision with no prior notice to applicants, and gave applicants no opportunity to comment on the new substantive changes to the program. In light of Defendant's complete control over the schedule and form of the 2017 JAG program, its claim that there is irreparable injury to Defendant from delay is unavailing.

Nor does Defendant articulate any actual harm to itself from this delay. The harms from delay that Defendant cites are actually harms that would be suffered by the applicant entities (*e.g.* timely receipt of funding to support law enforcement activity, burdens on localities with relatively small budgets, disruption of state grant-making processes under which states issue sub-awards of Byrne JAG funds)—none of which would be suffered if Defendant chose to simply abide by the injunction and issue grant awards that do not include the enjoined conditions.

Defendant also posits the additional harm from having to choose whether to impose further delay on applicants (which, as discussed, is not actually a harm to Defendant), and sending out the award grants without the enjoined conditions for the FY 2017 grant cycle. Defendant claims injury from the sacrifice of its ability to impose these conditions in 2017, *see* Mot. at 9, 19, but provides no further argument or evidence about what actual harm flows to Defendant from that outcome. This is because there is none. The injunction simply preserves the "status quo" of the JAG program as it has been administered for the last decade, the last time the JAG authorizing statute was amended to expressly eliminate immigration enforcement related conditions. *See* Order at 11. USDOJ does not and cannot point to actual harms it has suffered from not having these conditions as part of the program in the past.

This lack of harm is underscored by the fact that the injunction does not prevent cooperation with federal immigration efforts—the purported goal of the new substantive conditions. Nothing in the injunction prevents a jurisdiction from providing federal immigration officials access to its detention and correctional facilities (the goal of the Access Condition), nor from complying with federal notification requests (the goal of the Notification Condition). If it is true, as Defendant posits, that many

jurisdictions have no problem with these conditions, then they will presumably provide this cooperation voluntarily, and again, Defendant would suffer no harm at all, much less irreparable harm. *See* Order at 12 ("[J]urisdictions remain free to adopt the substance of the notice and access conditions if they wish to do so.").

III. THE STAY WOULD SUBSTANTIALLY INJURE OTHER PARTIES INTERESTED IN THE PROCEEDING

While a stay is not necessary to prevent irreparable injury to Defendant, a stay would cause substantial injury to other parties interested in the proceeding—namely, the other applicant entities who await their award grants and are attempting to protect their constitutional rights. Defendant argues that a stay would allow it to issue awards with the Access and Notification Conditions to all other applicant entities, and then force them to each independently litigate the same legal issues already decided here on a compressed time frame (each would need a decision from a court before the 45-day window for accepting the grant award and the conditions), or forfeit their FY 2017 JAG funding while awaiting resolution of this case. *See* Mot. at 16.

For example, Congress has appropriated $28.3 million in law enforcement funding to amicus curiae California and its political

subdivisions pursuant to the JAG program, with $17.7 million going to the Board of State and Community Corrections ("BSCC"), the entity that receives the formula grant funds that are allocated to the State. BSCC disburses JAG funding using subgrants predominately to local jurisdictions throughout California to fund programs that meet the purpose areas identified in the JAG authorizing statute. Between fiscal years 2015-17, BSCC funded 32 local jurisdictions and the California Department of Justice. Some examples of California jurisdictions' use of JAG funds include: (a) implementing educational programs to improve educational outcomes, increase graduation rates, and curb truancy; (b) providing youth and adult gang members with multi-disciplinary education, employment, treatment, and other support services to prevent gang involvement, reduce substance abuse, and curtail delinquency and recidivism; (c) implementing school-wide prevention and intervention initiatives for some of the county's highest-risk students; (d) providing comprehensive advocacy and reentry services for juvenile probationers after disposition of their case to improve outcomes and reduce recidivism; (e) providing a continuum of alternatives to detention for juvenile offenders who do not require secure detention; and (f) funding diversion and re-entry programs for both minors and young adult

offenders. Without fiscal year 2017 JAG funding, these types of programs will have to be cut in part or entirely.

Moreover, the California Legislature carefully crafted a statutory scheme that allows law enforcement resources to be allocated in the most effective manner to promote public safety for all people in California, regardless of immigration status, national origin, ancestry, or any other characteristic protected by California law. Local governments throughout the State have also enacted their own laws adopting similar policies. Most recently, Governor Edmund G. Brown Jr. signed the California Values Act, Cal. Gov't Code § 7284 *et seq.*, into law, which includes provisions that speak to law enforcement activities covered by the Access and Notification Conditions. The Values Act provides discretion to law enforcement agencies to comply with notification requests if certain conditions are met, and reaffirms procedural protections for inmates before they are subject to interviews with ICE. *See* Cal. Gov't Code §§ 7282.5(a), 7284.6(a)(1)(C) (effective Jan. 1, 2018) [provisions on notification requests]; *id.* §§ 7284.6(b)(5), 7284.10(a) (effective Jan. 1, 2018) [provisions on allowing ICE access to jails]. Laws like the Values Act are intended to strengthen community policing efforts by encouraging undocumented victims to report crimes to local law enforcement so that perpetrators are apprehended before

harming others. *See id.* § 7284.2(b)-(c) (finding that a "relationship of trust" between the State's immigrant communities and LEAs is "central to public safety" and that "trust is threatened when state and local agencies are entangled with federal immigration enforcement").

Thus, if state and local jurisdictions do not accept the funds authorized by the JAG statute and appropriated by Congress due to the grant conditions at issue in this case, important programs will need to be cut. And if these conditions pressure jurisdictions to change their public-safety oriented laws and policies in order to ensure they comply with unconstitutional conditions, they will have abandoned policies that state and local jurisdictions have found to be effective in their communities for ensuring public safety. As a result, States and localities will lose control of their ability to focus their resources on fighting crime rather than federal immigration enforcement, and the trust and cooperation that state laws and local ordinances are intended to build between law enforcement and immigrant communities will be eroded.

Finally, Congress constructed JAG as a formula grant that treats all applicants equally based upon a specific prescription set by Congress. *See* 34 U.S.C. § 10156. Congress guarantees to each state a minimum allocation of JAG funds. *Id.* § 10156(a)(2). In addition to determining the amount of

money received by grantees within each state, Congress set forth how that money is to be shared between state and local jurisdictions, with 60 percent given directly to the state and 40 percent to local jurisdictions. *Id.* § 10156(b)(1), (d)(1). Thus, the amount and specific distribution of the awards is set by Congress, and dependent only on the factors set in federal law. Removing the nationwide injunction would effectively individualize JAG funding, even among jurisdictions in the same State, to allow those jurisdictions with the resources to successfully oppose these conditions in court the ability to forego complying with them, while allowing the constitutional injury of these conditions to persist as to those jurisdictions that lack sufficient resources to contest them. Specifically, many jurisdictions receive JAG funding in amounts significantly less than the likely cost of litigating an independent challenge to the conditions, particularly when Defendant is requiring such litigation to be on an incredibly compressed time schedule. For example, some California subgrants are for less than $50,000, and as USDOJ's own data demonstrates many local jurisdiction grants are even lower, in the range of tens of thousands of dollars.[3] When USDOJ discusses forcing each jurisdiction to

[3] *See, e.g.*, *2017 California Local JAG Allocations*, https://www.bja.gov/Programs/JAG/

independently litigate these challenges, it is requiring jurisdictions to make the untenable choice of forgoing JAG funding, complying with conditions already found unlawful, or rapidly litigating a challenge that likely would require resources in excess of the amount the jurisdiction stands to receive. Such an outcome defies notions of judicial economy and promotes the "unequal treatment of litigants." *See* Order at 11, 14. It also upends the formula grant structure of the program in a manner that causes substantial harm and inequities to other interested parties.

IV. THE STAY WOULD HARM THE PUBLIC INTEREST

A stay will harm the public interest because it will injure a substantial number of government entities, the public safety, and ultimately, state and local residents. The injunction in fact protects the status quo of the JAG program as it has existed for over a decade, while allowing the court to determine whether the new substantive conditions violate applicant jurisdictions' constitutional rights. "[U]pholding constitutional rights surely serves the public interest"; indeed, the government "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is

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jag17/17CA.pdf (listing allocations as low as $10,000 - $11,000); *2017 Illinois Local JAG Allocations*, https://www.bja.gov/Programs/JAG/jag17/17IL.pdf (same).

improved by such an injunction." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (citation omitted).

CONCLUSION

The Court should deny Defendant's motion to stay the nationwide injunction pending appeal.

Dated: October 18, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR 32(c)

The undersigned counsel of record for the Amici Curiae, State of California and Illinois, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 4031 words.

Dated: October 18, 2017

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counsel / party:	address:

s/_____