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, No. 17-cv-5720 (Leinenweber, J.)

BRIEF FOR APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 over federal claims that invoked 5 U.S.C. § 706 and the separation of powers. The district court issued a preliminary injunction on September 15, 2017, and the government timely appealed on September 26, 2017. *See* Fed. R. App. P. 4(a)(1)(B) (60-day time limit). On October 13, 2017, Chicago filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e) with respect to a claim as to which the district court had denied preliminary relief. The district court denied the motion on November 16, 2017. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Each year, the Department of Justice (DOJ) makes grants to states and localities to provide additional funding for law enforcement purposes through the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG Program). These grants are subject to several conditions, two of which are the subject of this appeal. The first condition (referred to as the "notice" condition) is that the grantee have a policy of notifying the Department of Homeland Security (DHS) of the scheduled release date of aliens who have been incarcerated for criminal offenses, after receiving a formal request for notification from DHS. The second condition (referred to as the "access" condition) is that the grantee have a policy of allowing federal agents to meet with an incarcerated alien in order to inquire about the alien's right to remain in the United States. The district court held that these conditions are not authorized by the statute

establishing the Byrne JAG Program or by the Assistant Attorney General's authority to place special conditions on grants and to determine priority purposes for grants, and preliminarily enjoined their application to the City of Chicago, the plaintiff in this action. Although no other grant recipient is a party to this case, the court further made its injunction "nationwide in scope," so that its order is applicable not only to Chicago but to all grant recipients. Merits Op. 41 [Short Appendix (SA) 41]. The questions presented are:

1. Whether the Assistant Attorney General's authority encompasses the notice and access conditions enjoined by the district court.

2. Whether, assuming that the district court properly enjoined application of the conditions to Chicago, it erred in extending the injunction to preclude the government from imposing the conditions on non-plaintiffs.

STATEMENT OF THE CASE

A. The Byrne JAG Program

1. Congress created the Byrne JAG Program in 2006 to provide additional funding to state and local law enforcement agencies. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (DOJ Reauthorization Act). The statute provides that "[f]rom amounts made available to carry out" the program, "the Attorney General may," in accordance with a statutory formula, "make grants to States and units of local government" for

certain criminal justice purposes. 34 U.S.C. § 10152(a)(1).[1] The grant funds are divided among grantees based on a statutory formula, largely premised on population and crime statistics. *Id.* § 10156. States and localities that seek funding under the program must submit an application to the Attorney General, "in such form as the Attorney General may require." *Id.* § 10153(A). Among other things, applicants must certify that they "will comply with all provisions of this part and all other applicable Federal laws," that they will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require," and that "there has been appropriate coordination with affected agencies." *Id.* § 10153(A)(4), (5)(C), (5)(D).

Congress created the Byrne JAG Program within the Bureau of Justice Assistance, which reports to the Assistant Attorney General for the Office of Justice Programs (OJP). *See* 34 U.S.C. §§ 10101-10102, 10141, 10151-10158. In the same bill that created the program, Congress amended the statute that enumerates the powers of the Assistant Attorney General for OJP. The statute had previously authorized the Assistant Attorney General for OJP to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General." 42 U.S.C. § 3712(a)(6) (2000). In the amendment, Congress added that those powers "includ[e] placing special conditions

[1] The provisions at issue here, which previously appeared in Title 42, were recently recodified in Title 34.

on all grants, and determining priority purposes for formula grants." DOJ Reauthorization Act, § 1152(b), 119 Stat. at 3113; 34 U.S.C. § 10102(a)(6).

2. When OJP approves a Byrne JAG grant application, it sends a grant award document to the applicant. The award document enumerates, among other things, the "special conditions" applicable to the award. *See* Hanson Decl., Exs. A-C [Appendix (App.) 46-99]; OJP, *Grant Process Overview*.[2] The applicant then typically has 45 calendar days to review the special conditions and decide whether to accept the award document. *See* OJP, *Grant Process Overview*.

B. Prior Proceedings

1. The City of Chicago brought this suit to challenge three conditions on the receipt of the fiscal year 2017 awards. The two special conditions that are at issue in this appeal were included for the first time in connection with the fiscal year 2017 grants. The conditions both relate to criminal aliens, that is, aliens that have been arrested by state or local authorities for criminal offenses.[3]

The first condition, which the district court referred to as the "notice" condition, requires that, with respect to any "program or activity" funded by the grant, the

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[2] https://ojp.gov/funding/Apply/GrantProcess.htm

[3] OJP announced the conditions when it solicited applications for the fiscal year 2017 grant program. *See* Byrne JAG Program FY 2017 Local Solicitation, at 30 [App. 30]. The precise text of the two new conditions was included in the two fiscal year 2017 award documents that OJP has issued. *See* Hanson Decl., Exs. A-B, ¶¶ 55-56 [App. 62-63, 83-84].

grantee must have a policy designed to ensure that, when DHS provides a formal written request for advance notice of the scheduled release date and time for a particular alien at a particular facility, the facility will "as early as practicable" provide the notice to DHS. Hanson Decl., Ex. A, ¶ 56.1.B [App. 63].[4] This condition is designed to facilitate cooperation when DHS issues an "immigration detainer," which includes a request to a local law enforcement agency that it notify DHS "as early as practicable (at least 48 hours, if possible) before the alien is released from [the agency's] custody." DHS, Form I-247A, Immigration Detainer–Notice of Action (Detainer Form).[5] Although detainers request that, in addition to notifying Immigrations and Customs Enforcement (ICE) about the pending release of an alien, local authorities maintain custody of the alien for a brief period to allow DHS to assume custody, the notice condition at issue in this case explicitly does not require local authorities "to maintain (or detain) an individual in custody beyond the date and time the individual would have been released in the absence of this condition." *See* Hanson Decl., Ex. A, ¶ 55.4.B [App. 62].

ICE authorizes issuance of a detainer only for an alien who has been arrested for a criminal offense, not for an alien "who has been temporarily detained or stopped, but

[4] The term "program or activity" has the same meaning as that phrase under 42 U.S.C. § 2000d-4a. *See* Hanson Decl., Dkt. 32-1, Ex. A, ¶ 53.5.A(3) [App. 60].

[5] https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf

not arrested" by local authorities. *See* U.S. Immigration & Customs Enforcement, Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers (Detainer Policy), § 2.5.[6] The policy also requires that the ICE officer have probable cause to believe that the alien is removable from the United States based on certain categories of reliable information, and it precludes the issuance of a detainer solely based on evidence that the alien is foreign born and the absence of records in available databases. *Id.* § 5.1. The policy requires that the detainer request be accompanied by an administrative warrant issued by a supervisory immigration officer. *Id.* §§ 2.4, 5.2. ICE officers in turn are authorized to arrest an alien on the basis of such a warrant. *See* 8 U.S.C. § 1226(a).

The second condition at issue, which the district court referred to as the "access" condition, requires that, with respect to any "program or activity" funded by the grant, the grantee must have a policy designed to ensure that federal agents are "given access" to correctional facilities for in order to meet with aliens and to "inquire as to such individuals' right to be or remain in the United States." Hanson Decl., Ex. A, ¶ 56.1.A [App. 63].

The third challenged condition, which is not at issue in this appeal, requires certification that the award recipient complies with 8 U.S.C. § 1373. Hanson Decl., Ex. A, ¶ 52 [App. 59]. Section 1373 states that "[n]otwithstanding any other

[6] https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf

provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); *see also id.* § 1373(b) (prohibiting persons or agencies from prohibiting or restricting a government entity from sending to DHS, maintaining, or exchanging with other government entities information regarding immigration status). The district court referred to the condition requiring grant recipients to certify compliance with 8 U.S.C. § 1373 as the "compliance" condition. Compliance with 8 U.S.C. § 1373 was also required (without objection) by Chicago's fiscal year 2016 grant. Hanson Decl., Ex. C, ¶ 52 [App. 99].

In filing suit, Chicago claimed that the notice, access, and compliance conditions were unlawful and sought a preliminary injunction against their imposition nationwide. Chicago alleged that complying with these conditions—which are aimed solely at cooperation with respect to removal of criminal aliens—would destroy the City's goodwill with the immigrant community. *See* Compl. ¶ 70 (Dkt. No. 1); Mot. ¶ 3 (Dkt. No. 21); Mem. 7-9, 21-24 (Dkt. No. 23). Chicago did not claim that it is harmed by application of the conditions to other grant applicants. Nevertheless, Chicago sought a nationwide injunction against imposition of the conditions on all grant applicants. *See* Reply 15 (Dkt. No. 69).

2. The district court concluded that Chicago was likely to succeed on the merits of its challenges to the notice and access conditions because, in the district court's view, the statute establishing the Byrne JAG Program does not provide authority for those conditions. Merits Op. 13 [SA 13].

The court recognized that Congress has explicitly authorized the Assistant Attorney General to "plac[e] special conditions on all grants" and to "determin[e] priority purposes for formula grants." 34 U.S.C. § 10102(a)(6); Merits Op. 13-19 [SA 13-19]. The court believed, however, that the provision was adopted at a different time than the provisions creating the Byrne JAG Program and that the Office of Justice Programs was unrelated to the Bureau of Justice Assistance. The court thus concluded that the provision authorizing inclusion of special conditions did not apply to the Byrne JAG Program. Merits Op. 14 [SA 14]. The court further stated that even if § 10102(a)(6) applied to the Byrne JAG Program, it would not provide authority to impose conditions beyond the authority elsewhere vested in the Attorney General. *Id.* at 18 [SA 18].

The district court accepted Chicago's claim that Chicago would suffer irreparable harm if it accepted grants containing the notice and access conditions. Merits Op. 36-37 [SA 36-37]. The court found that the balance of the equities and the public interest favored neither party because both parties "have strong public policy arguments." *Id.* at 40 [SA 40]. The court granted Chicago a "preliminary injunction

against the Attorney General's imposition of the notice and access conditions on the Byrne JAG grant." *Id.* at 40-41 [SA 40-41].

The court then declared that "[t]his injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction." Merits Op. 41 [SA 41].

The district court rejected Chicago's claim regarding the condition requiring compliance with 8 U.S.C. § 1373. The court found that the condition was constitutional and was authorized by the statutory requirement that Byrne JAG Program grant applicants certify that they "will comply with all provisions of this part and all other applicable Federal laws," 34 U.S.C. § 10153(A)(5)(D). Merits Op. 20-35 [SA 20-35].

3. On September 26, 2017, the government filed a motion in the district court seeking a stay pending appeal of the preliminary injunction as it applies to grant applicants other than Chicago. On October 13, the district court denied the motion. The court stated that it had broad remedial authority to address a constitutional violation, and that the legal issues would not differ from jurisdiction to jurisdiction. Stay Op. 4-6 [App. 103-05]. The court expressed the view that "judicial economy counsels against" requiring other jurisdictions who wished to challenge the rulings "to file their own lawsuits," particularly because some of them had filed amicus briefs. *Id.*

at 11 [App. 110]. The court declared that if the Attorney General wishes to impose the condition on other jurisdictions that are not parties to this case, "he must await a decision that upholds his authority to do so." *Id.* at 12 [App. 111].

On the day the partial stay was denied, the government sought a partial stay in this Court of the injunction as it applied to grant applicants other than Chicago—the only plaintiff in the case. On the same day, Chicago filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e) concerning the denial of an injunction with respect to the compliance condition.

This Court accepted Chicago's contention that the filing of the motion for reconsideration divested this Court of jurisdiction to consider the appeal from the order granting a preliminary injunction with respect to the "notice" and "access" conditions. But the district court denied Chicago's motion for reconsideration on November 16, 2017, and appellate proceedings resumed. This Court denied the government's request for a partial stay on November 21, 2017.

SUMMARY OF ARGUMENT

1. The statute creating the Byrne JAG Program authorizes the Office of Justice Programs to make grants to states and localities to assist in law enforcement activities. The district court held that two of the conditions on the current grant awards exceed the authority of the Assistant Attorney General in administering the grant program. The "notice" condition requires a grant recipient to have a policy of informing ICE of the scheduled release date of an incarcerated alien after receiving a formal request for

notification from DHS. The "access" condition requires that grant recipients have a policy of allowing federal agents to meet with an incarcerated alien in order to inquire about the alien's right to remain in the United States.

It is perhaps surprising that it should be necessary to specify this basic level of cooperation at all. The Immigration and Nationality Act (INA) contemplates that removable aliens may be arrested for criminal offenses by states or localities and then taken into custody and removed by the federal government. For example, for aliens with final orders of removal, Congress designated a "removal period" of 90 days that does not begin, in the case of an alien detained or confined on criminal charges, until after the date of the alien's release. 8 U.S.C. § 1231(a)(1)(B)(iii). Congress has thus allowed state criminal proceedings to take precedence over federal immigration proceedings based on the implicit premise that states and localities will not use this precedence to frustrate federal immigration enforcement by refusing to inform the federal government of release dates or denying federal officials access to persons who may be subject to removal.

It is still more surprising that a city should refuse such minimal cooperation even as it accepts a law enforcement grant, and that a city should claim that there is no basis in law for specifying these conditions. Nothing about the grant program suggests that the federal government is required to make law enforcement grants to cities that have explicitly declared their intention to frustrate federal law enforcement.

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 court compounded its error by effectively reading out of the statute the provision making clear that the powers vested in the Assistant Attorney General for OJP "includ[es] placing special conditions on all grants and determining priority purposes for formula grants." 34 U.S.C. § 10102(a)(6). Congress enacted this provision in the same bill that created the Byrne JAG Program and placed the Program within the Office of Justice Programs. The court nevertheless held that the provision is inapplicable to OJP's administration of the Program, and likewise erred in concluding that, in any event, the provision should be deemed a nullity because it would render superfluous other provisions granting other officers the authority to impose conditions in other circumstances. In the name of avoiding superfluous provisions, the district court mistakenly rendered meaningless the authority vested in the Assistant Attorney General.

2. Even assuming that this Court were to adopt the district court's reasoning, it would be necessary to limit the scope of the court's injunction to Chicago—the only plaintiff in the case. Applying settled principles of Article III standing, this Court in *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997), addressed the same issue presented here and held that a plaintiff lacks standing to seek relief that benefits only third parties. Here, as in *McKenzie*, the plaintiff's interests could be protected by an

injunction limited to the plaintiff, and the district court therefore did not have authority to grant relief to non-parties. In addition, settled equitable principles require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). The portion of the injunction that applies to jurisdictions other than Chicago exceeds the district court's Article III and equitable authority, and should be reversed.

STANDARD OF REVIEW

This Court reviews "the district court's legal determinations *de novo*, its factual findings for clear error, and its ultimate decision [on a preliminary injunction] for abuse of discretion." *Federal Trade Comm'n v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016).

ARGUMENT

I. The Office of Justice Programs Can Properly Condition Law Enforcement Grants on Notice and Access Conditions that Ensure that State Incarceration of Aliens Who May Be Subject to Removal Does Not Impair Federal Enforcement of the Immigration Laws.

A. The Byrne JAG Program provides that the "Attorney General may . . . make grants to States and units of local government" for law enforcement and related purposes. 34 U.S.C. § 10152(a)(1). The relevant statutory provisions set out several specific requirements for grant applicants and further authorize the Assistant Attorney General for Justice Programs to "plac[e] special conditions on all grants, and determin[e] priority purposes for formula grants." *Id.* § 10102(a)(6).

Among other requirements set out in the statute, applicants for grants must certify that they "will comply with all provisions of this part and all other applicable Federal laws," 34 U.S.C. § 10153(A)(5)(D), and agree to undertake various specific and general activities to advance law enforcement goals. For example, applicants must provide an assurance that they will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require," and that "there has been appropriate coordination with affected agencies." *Id.* § 10153(a)(4), (5)(C). Additional conditions established by the Assistant Attorney General in past years include requirements that grantees conform to a package of information technology requirements to promote information sharing and protect privacy, procedures regarding the protection of human research subjects, compliance with conditions relating to Prohibited and Controlled Expenditure Lists, training requirements, and assurance of compliance with § 1373. Hanson Decl., Ex. C, ¶¶ 26, 28, 29, 32-33, 45-50, 52 [App. 95-99].

In connection with grants under the fiscal year 2017 program, the Assistant Attorney General announced that the two conditions at issue in this appeal would be imposed and that compliance with these conditions "will be an authorized and priority purpose of the award." Byrne JAG Program FY 2017 Local Solicitation 30 [App. 30]. The Assistant Attorney General acted well within his discretion in imposing these modest requirements, both of which are designed to ensure that state

incarceration of criminal aliens does not pose an obstacle to enforcement of the immigration laws.

In accepting the "notice" condition, the grant applicant agrees to have a policy providing that, if DHS provides a formal written request for advance notice of the scheduled release date and time for a particular alien at a particular facility, the facility will "as early as practicable" provide the notice to DHS. Hanson Decl., Ex. A, ¶ 56.1.B [App. 63]. An applicant thus agrees to provide the information requested by "immigration detainers," which ICE issues for aliens who have been arrested for a criminal offense (and not for an alien "who has been temporarily detained or stopped, but not arrested" by local authorities). *See* Detainer Policy § 2.5, *supra* n.6. The applicant need not, however, "maintain (or detain) an individual in custody beyond the date and time the individual would have been released in the absence of this condition." Hanson Decl., Ex. A, ¶ 55.4.B [App. 62].

Agency policy requires that a detainer be issued only when an ICE officer has probable cause to believe the alien is removable from the United States based on certain categories of reliable information; a detainer may not issue based solely on evidence that the alien is foreign born and the absence of records in available databases. Detainer Policy § 5.1. The detainer request must be accompanied by an administrative warrant issued by a supervisory immigration officer. *Id.* §§ 2.4, 5.2.

In accepting the "access" condition, an applicant agrees to have a policy providing that federal agents will be "given access" to correctional facilities for the purpose of

meeting with aliens and to "inquire as to such individuals' right to be or remain in the United States." Hanson Decl., Ex. A, ¶ 56.1.A [App. 63]. Aliens are not compelled to talk with ICE agents. But, particularly when aliens do not appear in the relevant databases, voluntary interviews in jails and prisons help ICE to assess an aliens' likely immigration status.

In agreeing to these conditions on law enforcement grants, applicants thus simply agree that their law enforcement activities will not impair the law enforcement activities of the federal government. The structure of the Immigration and Nationality Act contemplates that states and localities may prosecute and incarcerate for criminal offenses aliens who may be in the country illegally and, indeed, aliens as to whom a removal order has already issued, but that such aliens will then be transferred to federal custody. Congress has mandated that certain aliens who have committed criminal offenses be taken into federal custody pending removal proceedings, but only "when the alien is released" from state custody. 8 U.S.C. § 1226(c)(1). With respect to incarcerated aliens subject to a final removal order, the INA establishes a "removal period" of 90 days that begins with the date of the alien's release. *Id.* § 1231(a)(1)(B). It is crucial to this cooperative law enforcement framework that states and their subdivisions respond to requests for release date information and permit federal agents to engage in voluntary interviews with aliens in their custody before releasing them into the general population.

While the district court recognized that Congress intended grant applicants to be compelled to comply with all applicable laws, the court nevertheless concluded that the notice and access conditions are impermissible on the theory that a grant can include no condition that is not expressly established by statute. Nothing in the statute supports the counterintuitive conclusion that applicants can insist on their entitlement to federal law enforcement grants even as they refuse to provide the most basic cooperation in immigration enforcement, which the Attorney General has identified as a federal priority. The district court seriously erred in construing the statute to preclude such conditions.

B. The district court reached its counterintuitive result by declining to give any import to 34 U.S.C. § 10102(a)(6), which authorizes the Assistant Attorney General to "plac[e] special conditions on all grants, and determin[e] priority purposes for formula grants."

The district court mistakenly held that this provision is inapplicable to the Byrne JAG program, declaring that "this grant of authority" is "located in an entirely different subchapter" than the subchapter establishing the Byrne JAG Program. Merits Op. 13-14 [SA 13-14]. The court stated that § 10102(a)(6) was codified in subchapter I, which governs OJP, whereas the Byrne JAG Program was "later-in-time" and was codified under the Bureau of Justice Assistance Grant Programs in subchapter V. *Id.* at 12-14 [SA 12-14].

Contrary to the district court's understanding, Congress enacted the provision that is now § 10102(a)(6) in the same bill that created the Byrne JAG grant program. *See* Pub. L. No. 109-162, § 1152(b), 119 Stat. at 3113. The court likewise misunderstood the codification of the Byrne JAG Program under the Bureau of Justice Assistance Grant Programs. The Director of the Bureau of Justice Assistance "report[s] to the Attorney General through the Assistant Attorney General" for the Office of Justice Programs. 34 U.S.C. § 10141(b); *see* OJP, *About Us*, https://ojp.gov/about/bureaus.htm (OJP organizational chart). The Bureau is part of the Office of Justice Programs, not an independent entity. Section 10102(a)(6)'s provision authorizing the Assistant Attorney General for OJP to "plac[e] special conditions on all grants" and "determin[e] priority purposes for formula grants" clearly applies to the Byrne JAG Program.

When the court analyzed the provision on the assumption that it might apply, it effectively rendered the grant of authority a nullity. The court declared that the statute provides no authority to impose conditions or establish priorities unless the authority is already elsewhere vested in the Attorney General. Merits Op. 17 [SA 17].

There is no basis in the text for making the provision superfluous, and the provision's history underscores the error in the district court's analysis. Prior to 2006, the statute provided, without elaboration, that the Assistant Attorney General for OJP had the power to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney

General." 42 U.S.C. § 3712(a)(6) (2000). In the DOJ Reauthorization Act, in addition to creating the Byrne JAG Program, Congress amended the statute to provide expressly that these powers "includ[e] placing special conditions on all grants, and determining priority purposes for formula grants." Pub. L. No. 109-162, § 1152(b), 119 Stat. at 3113; *see* 34 U.S.C. § 10102(a)(6). Congress did not amend the statute to add superfluous language, and the Committee Report accompanying the amendment confirmed that the new provision "allows the Assistant Attorney General to place special conditions on all grants and to determine priority purposes for formula grants." H.R. Rep. No. 109-233, at 101 (2005).

Although the amendment to § 10102(a)(6) expressly provides the Department of Justice with some discretion over grants in general and formula grants in particular, the district court interpreted the new language to authorize no conditions not already authorized by the statute. Paradoxically, the district court justified this interpretation on the ground that giving it effect would render superfluous the statutory provision that authorizes the Director of the Bureau of Justice Assistance to determine terms and conditions for discretionary grants issued under Part B of the statute. Merits Op. 14-16 [SA 14-16] (citing 34 U.S.C. § 10142). The new provision made clear that the Assistant Attorney General has power to add conditions in addition to those established by the Director, who, as noted, reports to the Assistant Attorney General.

The court likewise erred in concluding that giving effect to § 10102(a)(6) would in some way be at odds with Congress's express statement that the Attorney General can

impose "reasonable conditions" when administering the grant program designed to combat violence against women. Merits Op. 16 [SA 16] (emphasis omitted) (quoting 34 U.S.C. § 10446(e)(3)). That program is administered not by the Office of Justice Programs but by the Violence Against Women Office, which is a "separate and distinct office" within DOJ that is headed by a Director "who shall report to the Attorney General." 34 U.S.C. § 10442(b). That Congress used different language to confer authority in connection with that distinct program has no evident bearing on the issue presented here.

The district court was also mistaken to conclude that "it is suspect to ground the Attorney General's authority to impose the challenged conditions via the power Congress conferred on the *Assistant* Attorney General." Merits Op. 17 [SA 17]. OJP, which is headed by the Assistant Attorney General to whom the power is conferred, is the entity that imposes the grant award conditions. Moreover, Congress provided that the Attorney General "shall have final authority over all functions, including any grants . . . made, or entered into, for the Office of Justice Programs." 34 U.S.C. § 10110(2).

The district court exacerbated its error by investing its holding with constitutional significance, declaring without elaboration that because the inclusion of the notice and access conditions in grant applications "exceed statutory authority, . . . consequently, efforts to impose them violate the separation of powers doctrine." Merits Op. 19 [SA 19]. As discussed, the Assistant Attorney General did not abuse his discretion or

contravene any statutory limitation in including the two conditions. But even assuming that the conditions could be deemed an abuse of discretion, an error in grant administration does not implicate the structural limitations on the three branches of government.

II. The District Court Improperly Extended the Injunction to Entities Other Than Chicago.

As we have shown, the district court's assessment of the merits of Chicago's challenge rests on an error of law. Even assuming, however, that this Court were to agree with the district court's reasoning, it would be necessary to vacate the injunction insofar as it extends to entities other than the City of Chicago. Vacatur is required by principles of Article III standing and limitations on a court's equitable authority.

A. To establish standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quotation marks omitted). "[S]tanding is not dispensed in gross," and the plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted). It is fundamental that "plaintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties." *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997). *See also Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining

party, even though the court's judgment may benefit others collaterally."). As this Court has emphasized, "[t]he general rule is that a plaintiff has standing to sue only for injuries to his *own* interests that can be remedied by a court order." *Laskowski v. Spellings*, 546 F.3d 822, 825 (7th Cir. 2008) (emphasis in original).

Applying this principle in *McKenzie,* this Court reversed an injunction that precluded the City of Chicago from operating a demolition program with respect to entities other than the plaintiffs. This Court noted the district court's conclusion "that it was appropriate to enjoin the entire program, despite the lack of class certification, in order to prevent the City from violating the Constitution." *McKenzie*, 118 F.3d at 555. As this Court explained, the district court's statement "assume[d] an affirmative answer to the question at issue: whether a court may grant relief to non-parties. The right answer is no." *Id.* This Court held that "the injunction exceeded the district judge's powers under Article III of the Constitution." *Id.* at 555 n.*. This Court reasoned that the plaintiff's "interests c[ould] be protected by an injunction that prevents the City from demolishing their properties," so the district court was wrong to "enjoin the entire program, despite the lack of class certification." *Id.* at 555.

Similarly, in *Scherr v. Marriott International, Inc.*, this Court held that the plaintiff did not have standing to seek an injunction that went beyond remedying her personal injury, even though the defendant allegedly committed the same legal violation more broadly. 703 F.3d 1069, 1075 (7th Cir. 2013). This Court reasoned that although the plaintiff had established that she was suffering an imminent injury from the

defendant's use of spring-hinged door closers at one particular hotel, she had not established that she would be imminently injured by the defendant's use of the same door closers at the defendant's other hotels, and thus she did not have standing to pursue injunctive relief relating to other hotels. *Id.*

These cases make clear that where no class has been certified, no justiciable controversy exists when the injury to the actual plaintiffs has been remedied. As this Court explained in *McKenzie,* where "a class has not been certified, the only interests at stake are those of the named plaintiffs." 118 F.3d at 555 (citing *Baxter v. Palmigiano,* 425 U.S. 308, 310 n.1 (1976)). Thus, in *Alvarez v. Smith*, 558 U.S. 87, 92 (2009), the plaintiffs lacked standing to seek declaratory and injunctive relief against the State's practice of keeping property in custody without a prompt post-seizure hearing because the plaintiffs had already received the seized property or forfeited their claims to it. The Supreme Court explained that since class certification had been denied, the "only disputes relevant here are those between these six plaintiffs and the State's Attorney . . . and those disputes are now over." *Id.* at 93; *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (the plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency order] on the ground that it might cause harm to other parties").

The same principles inform the Supreme Court's repeated admonition that the standing requirements of Article III preclude a court from granting relief that is not directed to remedying the injury asserted by the plaintiff. Thus, for example, in

Summers v. Earth Island Institute, 555 U.S. 488 (2009), the Supreme Court held that the plaintiffs lacked standing to challenge Forest Service regulations after the parties had resolved the controversy regarding the application of the regulations to the project that had caused the plaintiffs' injury. Noting that the plaintiffs' "injury in fact with regard to that project ha[d] been remedied," *id.* at 494, the Court held that to allow the plaintiffs to challenge the regulations "apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the face of Article III's injury-in-fact requirement." *Id.*

Under these principles, Chicago does not have standing to seek an injunction broader than necessary to remedy its own asserted injury. Chicago properly does not claim that an injunction that extends to all grant applicants is necessary to remedy the City's claimed harm, which is based entirely on the imposition of the notice and access conditions on Chicago itself. Having granted relief to Chicago, the district court had no authority to extend its ruling to jurisdictions across the country.

In its order denying a partial stay pending appeal, the district court declared that, having found a "constitutional violation," Stay Op. 4 [App. 103], it had discretion to correct that violation with respect to cities across the country. As discussed, *see* pp. 20-21, *supra*, there is no "constitutional violation." Even if the court's interpretation of the statute were correct, an error in administering a grant program would not implicate the separation of powers; it would give rise to a run-of-the-mill statutory claim. In any event, *McKenzie* makes clear that rules of standing are not suspended

even when a court finds a constitutional violation. 118 F.3d at 555. The cases the district court relied on did not address the issue of Article III standing, and the Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). The binding cases of this Court that did address Article III standing in this context make clear that Chicago does not have standing to seek relief that benefits only non-parties.

B. Even apart from the requirements of Article III, the district court's injunction runs afoul of fundamental limitations on a court's exercise of its equitable powers. Equitable principles require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction except as to individual plaintiff).

Applying this principle, the Fourth Circuit in *Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263 F.3d 379 (4th Cir. 2001), vacated an injunction that precluded the Federal Election Commission from enforcing, against any entity, a regulation found to have violated the First Amendment. The court explained that an injunction covering the plaintiff "alone adequately protects it from the feared prosecution," and that "[p]reventing the FEC from enforcing [the regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff]." *Id.* at 393. Recognizing the same restraint on the exercise of equitable powers, in *Los*

Angeles Haven Hospice, Inc. v. Sebelius, 638 F.3d 644 (9th Cir. 2011), although the Ninth Circuit agreed with the district court that a Department of Health and Human Services regulation was facially invalid, the court vacated an injunction insofar as it barred the Department of Health and Human Services from enforcing the regulation against entities other than the plaintiff. *See id.* at 664 ("[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification.") (alteration in original) (quoting *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1501 (9th Cir. 1996)). These principles apply with even greater force to a preliminary injunction, an equitable tool designed merely to "preserve the relative positions of *the parties* until a trial on the merits can be held." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added).

The portion of the district court's injunction that applies to jurisdictions other than Chicago plainly exceeds the court's equitable authority. Chicago is the only grant applicant in this lawsuit, and Chicago does not dispute that an injunction limited to Chicago provides it with full relief.

C. The district court misperceived its role in expanding the scope of its injunction on the theory that there is "no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction." Merits Op. 41 [SA 41]; *see also* Stay Op. 4-5 [App. 103-04]. This conclusion does not by itself warrant relief for parties not before the court, as Chicago did not move for class certification on this (or any other) basis.

The district court's finding that Chicago was likely to succeed on its argument that the imposition of the conditions was facially invalid does not entitle Chicago to a nationwide injunction. The court's conclusion conflated the scope of Chicago's legal argument with the scope of relief necessary to remedy Chicago's alleged injury. *See Los Angeles Haven Hospice*, 638 F.3d at 665 (reversing nationwide injunction despite upholding district court's conclusion that regulation was facially invalid). A district court has no general authority to go beyond the relief necessary to remedy a plaintiff's injury and also purport to settle the law for the entire nation. Permitting a court to do so "would 'substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.'" *Virginia Soc'y for Human Life*, 263 F.3d at 393 (quoting *United States v. Mendoza*, 464 U.S. 154, 160 (1984)). *See also Los Angeles Haven Hospice*, 638 F.3d at 664 ("[N]ationwide injunctions 'have a detrimental effect by foreclosing adjudication by a number of different courts and judges.'") (quoting *Califano*, 442 U.S. at 702); *id.* ("[A]llowing only one final adjudication deprives the Supreme Court of the benefit it receives from permitting multiple courts of appeals to explore a difficult question before it grants certiorari.") (citing *Mendoza*, 464 U.S. at 160).

The district court's error is underscored by the asymmetry inherent in its view of its equitable powers. A denial of a nationwide injunction in this case would not foreclose any other grant applicant from bringing suit on the same legal grounds

urged here by Chicago. Nevertheless, the court deemed it equitable to foreclose the United States from enforcing the grant conditions regardless of whether it would be able to prevail in other courts. In other words, insofar as Chicago prevails, the district court issues the relief that might have been appropriate if it had certified a class of all grant applicants. But insofar as the federal government prevails, it gains none of the benefits of prevailing in a class action.

In extending its injunction beyond Chicago, the district court relied on the scope of the injunction approved in *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.), *cert. granted,* 137 S. Ct. 2080, 2086 (2017), *vacated as moot*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). The Fourth Circuit's decision cannot be squared with this Court's precedent or, indeed, the precedent of the Fourth Circuit. And the Fourth Circuit's decision is inapposite even on its own terms. The Fourth Circuit gave three reasons for the nationwide injunction and none of them apply here. First, the Fourth Circuit found it significant that the "[p]laintiffs are dispersed throughout the United States," 857 F.3d at 605, which is of course not true for the City of Chicago. Second, the Fourth Circuit believed that "nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that the immigration laws of the United States should be enforced vigorously and uniformly." *Id.* (quotation marks omitted). The challenged conduct in this case involves the administration of a federal grant program, rather than the application of immigration law to foreign nationals. Third, the Fourth Circuit believed that limiting the

injunction to the plaintiffs would not cure their asserted injury under the Establishment Clause because enforcement against others would "reinforce the message that Plaintiffs are outsiders, not full members of the political community." *Id.* (quotation marks omitted). The Establishment Clause is not implicated here; nor does Chicago assert that its own injury cannot be redressed without an injunction extending to non-parties.

The district court's reliance on the Supreme Court's grant of a partial stay of the injunction in *International Refugee Assistance Project* was equally misplaced. *See* Stay Op. 7-9 [App. 106-08] (citing *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017)). There, the dissenting Justices would have reached the issues presented here and sided with the government's position, *id.* at 2090 (Thomas, J., dissenting), but the majority declined to discuss the issues at all. There is no basis for presuming that the Supreme Court resolved the issue without discussing it, much less for reading the case to overrule *sub silentio* this Court's decision in *McKenzie*. The majority was under no obligation, in a discretionary assessment of whether a stay was appropriate, to reach every issue, and indeed emphasized its discretion in balancing the equities. *International Refugee Assistance Project*, 137 S. Ct. at 2087.

The settled Article III and equitable limits on the scope of injunctions apply with full force here and require reversal of the district court's injunction as it applies to non-plaintiffs.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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NOVEMBER 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 32(c) because it contains 7,400 words. This brief also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the appendix.

s/ Daniel Tenny
Daniel Tenny

STATUTORY ADDENDUM

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34 U.S.C. § 10102

§ 10102. Duties and functions of Assistant Attorney General.

(a) Specific, general and delegated powers

The Assistant Attorney General shall--

(1) publish and disseminate information on the conditions and progress of the criminal justice systems;

(2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice;

(3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice;

(4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice;

(5) coordinate and provide staff support to coordinate the activities of the Office and the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention; and

(6) exercise such other powers and functions as may be vested in the Assistant Attorney General 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.

(b) Annual report to President and Congress

The Assistant Attorney General shall submit an annual report to the President and to the Congress not later than March 31 of each year.

34 U.S.C. § 10152

§ 10152. Description.

(a) Grants authorized

(1) In general

From amounts made available to carry out this part, the Attorney General may, in accordance with the formula established under section 10156 of this title, make grants to States and units of local government, for use by the State or unit of local government to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of the following programs:

(A) Law enforcement programs.

(B) Prosecution and court programs.

(C) Prevention and education programs.

(D) Corrections and community corrections programs.

(E) Drug treatment and enforcement programs.

(F) Planning, evaluation, and technology improvement programs.

(G) Crime victim and witness programs (other than compensation).

(H) Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.

(2) Rule of construction

Paragraph (1) shall be construed to ensure that a grant under that paragraph may be used for any purpose for which a grant was authorized to be used under either or both of the programs specified in section 10151(b) of this title, as those programs were in effect immediately before January 5, 2006.

(b) Contracts and subawards

A State or unit of local government may, in using a grant under this part for purposes authorized by subsection (a), use all or a portion of that grant to contract with or make one or more subawards to one or more--

(1) neighborhood or community-based organizations that are private and nonprofit; or

(2) units of local government.

(3) Repealed. Pub.L. 109-271, § 8(h)(3), Aug. 12, 2006, 120 Stat. 767

(c) Program assessment component; waiver

(1) Each program funded under this part shall contain a program assessment component, developed pursuant to guidelines established by the Attorney General, in coordination with the National Institute of Justice.

(2) The Attorney General may waive the requirement of paragraph (1) with respect to a program if, in the opinion of the Attorney General, the program is not of sufficient size to justify a full program assessment.

(d) Prohibited uses

Notwithstanding any other provision of this Act, no funds provided under this part may be used, directly or indirectly, to provide any of the following matters:

(1) Any security enhancements or any equipment to any nongovernmental entity that is not engaged in criminal justice or public safety.

(2) Unless the Attorney General certifies that extraordinary and exigent circumstances exist that make the use of such funds to provide such matters essential to the maintenance of public safety and good order--

(A) vehicles (excluding police cruisers), vessels (excluding police boats), or aircraft (excluding police helicopters);

(B) luxury items;

(C) real estate;

(D) construction projects (other than penal or correctional institutions); or

(E) any similar matters.

(e) Administrative costs

Not more than 10 percent of a grant made under this part may be used for costs incurred to administer such grant.

(f) Period

The period of a grant made under this part shall be four years, except that renewals and extensions beyond that period may be granted at the discretion of the Attorney General.

(g) Rule of construction

Subparagraph (d)(1) shall not be construed to prohibit the use, directly or indirectly, of funds provided under this part to provide security at a public event, such as a political convention or major sports event, so long as such security is provided under applicable laws and procedures.

34 U.S.C. § 10153

§ 10153. Applications

(A) In general

To request a grant under this part, the chief executive officer of a State or unit of local government shall submit an application to the Attorney General within 120 days after the date on which funds to carry out this part are appropriated for a fiscal year, in such form as the Attorney General may require. Such application shall include the following:

(1) A certification that Federal funds made available under this part will not be used to supplant State or local funds, but will be used to increase the amounts of such funds that would, in the absence of Federal funds, be made available for law enforcement activities.

(2) An assurance that, not fewer than 30 days before the application (or any amendment to the application) was submitted to the Attorney General, the application (or amendment) was submitted for review to the governing body of the State or unit of local government (or to an organization designated by that governing body).

(3) An assurance that, before the application (or any amendment to the application) was submitted to the Attorney General--

(A) the application (or amendment) was made public; and

(B) an opportunity to comment on the application (or amendment) was provided to citizens and to neighborhood or community-based organizations, to the extent applicable law or established procedure makes such an opportunity available.

(4) An assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require.

(5) A certification, made in a form acceptable to the Attorney General and executed by the chief executive officer of the applicant (or by another officer of the applicant, if qualified under regulations promulgated by the Attorney General), that--

(A) the programs to be funded by the grant meet all the requirements of this part;

(B) all the information contained in the application is correct;

(C) there has been appropriate coordination with affected agencies; and

(D) the applicant will comply with all provisions of this part and all other applicable Federal laws.

(6) A comprehensive Statewide plan detailing how grants received under this section will be used to improve the administration of the criminal justice system, which shall--

(A) be designed in consultation with local governments, and representatives of all segments of the criminal justice system, including judges, prosecutors, law enforcement personnel, corrections personnel, and providers of indigent defense services, victim services, juvenile justice delinquency prevention programs, community corrections, and reentry services;

(B) include a description of how the State will allocate funding within and among each of the uses described in subparagraphs (A) through (G) of section 10152(a)(1) of this title;

(C) describe the process used by the State for gathering evidence-based data and developing and using evidence-based and evidence-gathering approaches in support of funding decisions;

(D) describe the barriers at the State and local level for accessing data and implementing evidence-based approaches to preventing and reducing crime and recidivism; and

(E) be updated every 5 years, with annual progress reports that--

(i) address changing circumstances in the State, if any;

(ii) describe how the State plans to adjust funding within and among each of the uses described in subparagraphs (A) through (G) of section 10152(a)(1) of this title;

(iii) provide an ongoing assessment of need;

(iv) discuss the accomplishment of goals identified in any plan previously prepared under this paragraph; and

(v) reflect how the plan influenced funding decisions in the previous year.

(b) Technical assistance

(1) Strategic planning

Not later than 90 days after December 16, 2016, the Attorney General shall begin to provide technical assistance to States and local governments requesting support to develop and implement the strategic plan required under subsection (a)(6). The

Attorney General may enter into agreements with 1 or more non-governmental organizations to provide technical assistance and training under this paragraph.

(2) Protection of constitutional rights

Not later than 90 days after December 16, 2016, the Attorney General shall begin to provide technical assistance to States and local governments, including any agent thereof with responsibility for administration of justice, requesting support to meet the obligations established by the Sixth Amendment to the Constitution of the United States, which shall include--

(A) public dissemination of practices, structures, or models for the administration of justice consistent with the requirements of the Sixth Amendment; and

(B) assistance with adopting and implementing a system for the administration of justice consistent with the requirements of the Sixth Amendment.

(3) Authorization of appropriations

For each of fiscal years 2017 through 2021, of the amounts appropriated to carry out this subpart, not less than $5,000,000 and not more than $10,000,000 shall be used to carry out this subsection.

SHORT APPENDIX

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

THE CITY OF CHICAGO,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States,

Defendant.

Case No. 17 C 5720

Judge Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

This case involves the intersection between federal immigration policies and local control over policing. Defendant Jefferson Beauregard Sessions III, the Attorney General of the United States, seeks to impose new conditions on an annual federal grant relied on by the City of Chicago for law enforcement initiatives. These conditions require additional cooperation with federal immigration officials and directly conflict with Chicago's local policy, codified in its Welcoming City Ordinance, which restricts local officials' participation in certain federal immigration efforts. Chicago claims its policies engender safer streets by fostering trust and cooperation between the immigrant community and local police. Chicago's policies are at odds with the immigration enforcement

priorities and view of public safety espoused by the Attorney General.

Against this backdrop, the City of Chicago claims that these new conditions are unlawful and unconstitutional, and implores this Court to grant a preliminary injunction enjoining their imposition. For the reasons described herein, the Court grants in part, and denies in part, the City of Chicago's Motion for a Preliminary Injunction.

I. FACTUAL BACKGROUND

A. The Edward Byrne Memorial Justice Assistance Grant Program

The federal grant at issue is awarded by the Edward Byrne Memorial Justice Assistance Grant Program (the "Byrne JAG grant"). *See,* 34 U.S.C. § 10151 (formerly 42 U.S.C. § 3750). Named after a fallen New York City police officer, the Byrne JAG grant supports state and local law enforcement efforts by providing additional funds for personnel, equipment, training, and other criminal justice needs. *See,* 34 U.S.C. § 10152 (formerly 42 U.S.C. § 3751). The Byrne JAG grant is known as a formula grant, which means funds are awarded based on a statutorily defined formula. *See,* 34 U.S.C. § 10156 (formerly 42 U.S.C. § 3755). Each state's allocation is keyed to its population and the amount of reported violent crimes. *Ibid.* The

City of Chicago (the "City") has received Byrne JAG funds since 2005, including $2.33 million last year on behalf of itself and neighboring political entities. (*See,* Decl. of Larry Sachs, ¶¶ 3, 11-12.) The City has used these funds to buy police vehicles and to support the efforts of non-profit organizations working in high crime communities. (*See, id.* ¶ 4.)

B. New Conditions on the Byrne JAG Grant

In late July 2017, the Attorney General announced two new conditions on every grant provided by the Byrne JAG program. (*See,* Byrne JAG Program, FY 2017 Local Solicitation, Ex. 11 to Def.'s Br.) The two new conditions require, first, that local authorities provide federal agents advance notice of the scheduled release from state or local correctional facilities of certain individuals suspected of immigration violations, and, second, that local authorities provide immigration agents with access to City detention facilities and individuals detained therein. Additionally, a condition on Byrne JAG funds was added last year that requires the City to certify compliance with a federal statute, 8 U.S.C. § 1373, which prohibits local government and law enforcement officials from restricting the sharing of information with the Immigration and Naturalization Service ("INS") regarding the citizenship status of any individual. (*See,* FY 2016 Chicago/Cook County JAG Program Grant

Award, dated Sept. 7, 2017, at 2-13, Ex. C to Decl. of Alan Hanson ("Hanson Decl.").) The condition to certify compliance is also imposed on 2017 Byrne JAG funds. (*See,* Byrne JAG Program, FY 2017 Local Solicitation, Ex. 11 to Def.'s Br.) The exact text of the three conditions is as follows:

> (1) A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that, when a State (or State-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act 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.
>
> (2) A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given to access any State (or State-contracted) correctional facility for the purpose of permitting such 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.
>
> (3) The applicant local government must submit the required 'Certification of Compliance with 8 U.S.C. 1373' (executed by the chief legal officer of the local government).

(Byrne JAG Program Grant Award for County of Greenville, Special Conditions ("Byrne Conditions"), ¶¶ 53, 55-56, Ex. A to Hanson Decl.; *see also* Hanson Decl., ¶ 6.) These conditions will be

referred to respectively as the notice condition, the access condition, and the compliance condition. The City claims all three conditions are unlawful and unconstitutional, even though it acquiesced to the compliance condition when accepting the 2016 Byrne JAG funds.

The compliance condition requires the City to certify compliance with Section 1373. (Byrne Conditions ¶ 53.) Section 1373 is titled "Communication between government agencies and the Immigration and Naturalization Service" and provides as follows, 8 U.S.C. § 1373:

> **(a) In General**
>
> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> **(b) Additional Authority of Government Entities**
>
> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> **(1)** Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> **(2)** Maintaining such information.
>
> **(3)** Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to Respond to Inquiries

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

C. The City's Welcoming Ordinance

Chicago's Welcoming City Ordinance (the "Ordinance") is a codified local policy that restricts the sharing of immigration status between residents and police officers. *See,* Chicago, Illinois, Municipal Code § 2-173-005 *et seq*. The explicit purpose of the Ordinance is to "clarify what specific conduct by City employees is prohibited because such conduct significantly harms the City's relationship with immigrant communities." *Id.* § 2-173-005. The Ordinance reflects the City's belief that the "cooperation of the City's immigrant communities is essential to prevent and solve crimes and maintain public order, safety and security in the entire City" and that the "assistance from a person, whether documented or not, who is a victim of, or a witness to, a crime is important to promoting the safety of all its residents." *Ibid.* Since the mid-1980s, the City has had in place some permutation of this policy, typically in the form of executive orders that prohibited City agents and agencies from

requesting or disseminating information about individuals' citizenship. (*See,* Executive Order 85-1, 89-6, Exs. A-B to Pl.'s Br.) First codified in Chicago's Municipal Code in 2006, the Ordinance was augmented in 2012 to refuse immigration agents access to City facilities and to deny immigration detainer requests unless certain criteria were met. *See,* Chicago, Illinois Municipal Code § 2-173-005. An immigration detainer request is a request from Immigration and Customs Enforcement ("ICE"), asking local law enforcement to detain a specific individual for up to 48 hours to permit federal assumption of custody.

The Ordinance prohibits any "agent or agency" from "request[ing] information about or otherwise investigat[ing] or assist[ing] in the investigation of the citizenship or immigration status of any person unless such inquiry or investigation is required by Illinois State Statute, federal regulation, or court decision." *Id.* § 2-173-020. It goes on to forbid any agent or agency from "disclos[ing] information regarding the citizenship or immigration status of any person." *Id.* § 2-173-030. The Ordinance specifically characterizes "[c]ivil immigration enforcement actions" as a "[f]ederal responsibility," and provides as follows:

a. Except for such reasonable time as is necessary to conduct the investigation specified in subsection (c) of this section, no agency or agent shall:

1. arrest, 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;

2. arrest, detain, or continue to detain a person based on an administrative warrant entered into the Federal Bureau of Investigation's National Crime Information Center database, or successor or similar database maintained by the United States, when the administrative warrant is based solely on a violation of a civil immigration law; or

3. detain, 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.

b.

1. Unless an agency or agent is acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no agency or agent shall:

A. permit ICE agents access to a person being detained by, or in the custody of, the agency or agent;

B. permit ICE agents use of agency facilities for investigative interviews or other investigative purpose; or

> C. while on duty, expend their time responding to ICE inquiries or communicating with ICE regarding a person's custody status or release date.
>
> 2. An agency or agent is authorized to communicate with ICE in order to determine whether any matter involves enforcement based solely on a violation of a civil immigration law.
>
> c. This section shall not apply when an investigation conducted by the agency or agent indicates that the subject of the investigation:
>
> 1. has an outstanding criminal warrant;
>
> 2. has been convicted of a felony in any court of competent jurisdiction;
>
> 3. is a defendant in a criminal case in any court of competent jurisdiction where a judgment has not been entered and a felony charge is pending; or
>
> 4. has been identified as a known gang member either in a law enforcement agency's database or by his own admission.

Id. § 2-173-042. The Ordinance is thus irreconcilable with the notice and access conditions the Attorney General has imposed on the 2017 Byrne JAG grant.

After receiving notice of the Attorney General's new conditions on the Byrne JAG grant program, the City filed suit alleging that the conditions were unconstitutional and unlawful. Throughout this litigation, the City has strenuously argued for

its prerogative to allocate scarce local police resources as it sees fit – that is, to areas other than civil immigration enforcement – and for the soundness of doing so based on the integral role undocumented immigrant communities play in reporting and solving crime. (*See,* Pl.'s Br. at 2-4.) Before the Court is the City's Motion for a Preliminary Injunction, requesting the Court enjoin the Attorney General from imposing the three above-described conditions on FY 2017 Byrne JAG funds.

The Court grants the City a preliminary injunction against the imposition of the notice and access conditions on the Byrne JAG grant. The Court declines to grant the preliminary injunction with respect to the compliance condition.

II. ANALYSIS

A. Legal Standard

To warrant the entry of a preliminary injunction, the City "must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in its favor, and that an injunction is in the public interest." *Higher Soc'y of Indiana v. Tippecanoe Cty., Indiana,* 858 F.3d 1113, 1116 (7th Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008)). Where the Government is the opposing party, the last two factors merge. *Nken v. Holder,*

556 U.S. 418, 435 (2009). Further, under Seventh Circuit precedent, the Court must also "weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlan v. Scholz,* 866 F.3d 754, 758 (7th Cir. 2017).

B. Likelihood of Success on the Merits

This case presents three questions: Did Congress authorize the Attorney General to impose substantive conditions on the Byrne JAG grant? If so, did Congress have the power to authorize those conditions under the Spending Clause? And finally, does Section 1373 violate the Tenth Amendment? We take these questions in turn.

1. Executive Authority under the Byrne JAG Statute

Whether the new conditions on the Byrne JAG grant are proper depends on whether Congress conferred authority on the Attorney General to impose them. Congress may permissibly delegate authority and discretion to the Executive Branch through statute. *See, Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001). The contours of the Executive Branch's authority are circumscribed by statute because the "power to act . . . [is] authoritatively prescribed by Congress." *City of Arlington, Tex. v. F.C.C.,* 569 U.S. 290, 297-98 (2013). Accordingly, we must look to the statute to determine the

authority of the Attorney General to impose conditions on the Byrne JAG grant. In determining the scope of a statute, we look first to its language. *See, United States v. Berkos,* 543 F.3d 392, 396 (7th Cir. 2008). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Russello v. United States,* 464 U.S. 16, 20 (1983) (internal quotations omitted). The language and design of the statute as a whole may guide the Court in determining the plain meaning of the text. *Berkos,* 543 F.3d at 396.

The Byrne JAG program was created in 2006 and is codified at 34 U.S.C. §§ 10151-10158 (formerly 42 U.S.C. §§ 3750-3757). These provisions are housed in Subchapter V of Chapter 101 entitled "Justice System Improvement." Subchapter V enumerates the various "Bureau of Justice Assistance Grant Programs" in three parts: Part A covering the Byrne JAG program, Part B covering "Discretionary Grants," and Part C discussing "Administrative Provisions." The authority explicitly granted to the Attorney General within the Byrne JAG statute is limited. The Attorney General is authorized to: determine the "form" of the application, 34 U.S.C. § 10153(a); "reasonably require" "the applicant [to] maintain and report . . . data, records, and

information (programmatic and financial)," 34 U.S.C. § 10152(a)(4); and "develop[] guidelines" for "a program assessment" "in coordination with the National Institute of Justice," 34 U.S.C. § 10152.

In light of the limited express authority the statute confers on the Attorney General, the City argues that Congress did not authorize the Attorney General to place substantive conditions on the Byrne JAG grant. The fact that Congress *did* authorize the Attorney General to place substantive conditions on *other* grants, the City contends, indicates an express reservation of that authority. *See,* 34 U.S.C. § 10142 (formerly 42 U.S.C. § 3742). By failing to direct the Court to any textual authority within the Byrne JAG statute itself, the Attorney General appears to concede the point.

However, the Attorney General argues that Congress expressly authorized imposition of the challenged conditions through a provision of Subchapter I establishing the Office of Justice Programs, which provision allows the Assistant Attorney General to "plac[e] special conditions on all grants" and to "determin[e] priority purposes for formula grants." 34 U.S.C. § 10102(a)(6) (formerly 42 U.S.C. § 3712(a)(6)). The difficulty with the Attorney General's reading of the statute is that this grant of authority to the Assistant Attorney General is located

in an entirely different subchapter governing Office of Justice Programs, whereas Congress codified the later-in-time Byrne JAG program under the aegis of Bureau of Justice Assistant Grant Programs. The statute contains no textual reference that applies this section to the rest of the chapter or specifically to the Byrne JAG program. In fact, Chapter 101 comprises 38 subchapters implicating a broad swath of federal programs and subject matter, ranging from grants for residential substance abuse treatment, *see*, 34 U.S.C. §§ 10421-10426, to criminal child support enforcement, *see*, 34 U.S.C. §§ 10361-10367.

Even assuming that § 10102(a) applies to the Byrne JAG grant, reading the statute as the Attorney General advises results in multiple incongruities within the text.

First, it renders superfluous the explicit statutory authority Congress gave to the Director to impose conditions on *other* Bureau of Justice Assistance grants housed within the same subchapter as the Byrne JAG statute. Congress explicitly provides the Director of the Bureau of Justice Assistance with authority to "determine[]" "terms and conditions" for the discretionary grants itemized in Part B of the statute:

> The Director shall have the following duties:
>
> [. . .]

> (2) *Establishing programs in accordance with part B of subchapter V of this chapter* and, following public announcement of such programs, awarding and allocating funds and technical assistance in accordance with the criteria of part B of subchapter V of this chapter, *and on terms and conditions determined by the Director to be consistent with part B of subchapter V of this chapter.*

34 U.S.C. § 10142 (emphases added). As noted earlier, the Byrne JAG grant is a formula grant located in Part A of Subchapter V. The most natural reading of the statute, then, is that Congress endowed the Director with authority to impose conditions on the discretionary grants under Part B, but specifically withheld that authorization for the formula grant, the Byrne JAG grant, in Part A. *See, ibid.* The Attorney General's reading of the statute therefore ignores the ostensibly clear decision by Congress to withhold comparable authority in the Byrne JAG provisions. *See, N.L.R.B. v. SW General, Inc.,* 137 S.Ct. 929, 940 (2017) (noting the *expressio unius* canon's application when "circumstances support a sensible inference that the term left out must have been meant to be excluded") (quotations and alterations omitted). Regardless, it would be quite odd for Congress to give the Attorney General authority to impose conditions on the discretionary grants if it had already provided the Attorney General authority to impose conditions on *all* grants through Section 10102(a)(6). *See,* 34 U.S.C. §

10102(a)(6). This reading would render superfluous the explicit statutory grant of authority to impose conditions on the discretionary grants in Part B. *See, Marquez v. Weinstein, Pinson & Riley, P.S.,* 836 F.3d 808, 811 (7th Cir. 2016) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotations and citations omitted).

This conclusion is supported by the fact that Congress specifically conferred authority to impose conditions on other grants housed in the same chapter. Where Congress did so, it did so clearly. For example, Subchapter XIX of Chapter 101 provides federal funds for efforts designed to combat violence against women. *See,* 34 U.S.C. § 10446-10453 (formerly 42 U.S.C. §§ 3796gg-0 to 3796gg-11). There, Congress expressly authorized the Attorney General to impose conditions when administering the grant:

> *In disbursing grants under this subchapter, the Attorney General may impose reasonable conditions on grant awards* to ensure that the States meet statutory, regulatory, and other program requirements.

34 U.S.C. § 10446(e)(3) (emphasis added). Further, Congress expressly limited its delegation of authority to apply only to funds awarded under that specific subchapter. *Ibid.* "Where

Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello,* 464 U.S. at 23. What is more, "[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration & Customs Enf't,* 543 U.S. 335, 341 (2005).

Second, even if there were a basis for importing § 10102(a) into the Byrne JAG statute, it is suspect to ground the Attorney General's authority to impose the challenged conditions via the power Congress conferred on the *Assistant* Attorney General. *See,* 34 U.S.C. § 10102(a)(6); *Whitman*, 531 U.S. at 468 ("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."). Furthermore, § 10102(a)(6) provides that the Assistant Attorney General shall exercise "such other powers and functions as *may* be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General." 34 U.S.C. § 10102(a)(6) (emphasis added). The language of the statute,

including its use of the term "may," implies that any authority of the Assistant Attorney General to place special conditions on grants must flow either from the statute itself or from a delegation of power independently possessed by the Attorney General. *See, Jama,* 543 U.S. at 346 ("The word 'may' customarily connotes discretion."). Yet the Attorney General in this litigation has pointed to no provision other than § 10102(a)(6) to ground its purported authority to condition Byrne JAG grants.

The Attorney General's reliance on 34 U.S.C. § 10102(a)(6) is persuasive only to the extent one scrutinizes the provision without the illumination of the rest of the statute. *See, Gonzales v. Oregon,* 546 U.S. 243, 273 (2006) (statutes "should not be read as a series of unrelated and isolated provisions"). Viewed in its context, however, § 10102(a)(6) is better understood as allowing the Attorney General to delegate powers to the Assistant Attorney General to aid in administering the Office of Justice Programs – whereas the Byrne JAG grant is a Bureau of Justice Assistance Program that is both housed in a distinctly different subchapter of Chapter 101 and isolated from other discretionary grants within its own subchapter. Reading § 10102(a)(6) to authorize the Attorney General to impose substantive conditions on all grants under the entire chapter is

discordant with the specific and clear grants of authority in other sections of the statute.

This conclusion rests on principles of statutory interpretation. It does not imply that Congress *cannot* impose the conditions at issue. *See, Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981) ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."). On the contrary, Congress may well have Spending Clause power to impose the conditions or delegate to the Executive Branch the power to impose them, including the notice and access condition, but it must exert that power through statute. The Executive Branch cannot impose the conditions without Congressional authority, and that authority has not been conferred through Section 10102.

The notice and access conditions therefore exceed statutory authority, and, consequently, the efforts to impose them violate the separation of powers doctrine and are *ultra vires*. The City has shown a likelihood of success on the merits as to these conditions. We do not reach the question whether the notice and access conditions violate the Spending Clause because, regardless, Congress did not authorize the Attorney General to impose them.

The Attorney General points to one other statutory provision, 34 U.S.C. § 10153 (formerly 42 U.S.C. § 3752), for the authority to impose the compliance condition specifically. Section 10153(a) lays out the Byrne JAG application requirements, which read in relevant part:

> (A) In general
>
> To request a grant under this part, the chief executive officer of a State or unit of local government shall submit an application to the Attorney General within 120 days after the date on which funds to carry out this part are appropriated for a fiscal year, in such form as the Attorney General may require. *Such application shall include the following:*
>
> [. . .]
>
> (5) *A certification, made in a form acceptable to the Attorney General* and executed by the chief executive officer of the applicant (or by another officer of the applicant, if qualified under regulations promulgated by the Attorney General), *that—*
>
> [. . .]
>
> (D) *the applicant will comply with* all provisions of this part and *all other applicable Federal laws*.

34 U.S.C. § 10153(a) (emphases added). Specifically, the Attorney General argues that § 10153(a)(5)(D) furnishes the authority to require a Byrne JAG applicant's compliance with federal law, including Section 1373. *See, ibid.* Undeniably, Section 1373 is a federal law that, by its terms, is applicable

to the City. The City responds that "all other applicable Federal laws" merely refers to compliance with the narrow body of law governing federal grant-making. *See, e.g.,* 42 U.S.C. § 2000d; 29 U.S.C. § 794(a); 42 U.S.C. § 6102. Both positions are plausible, but for the reasons discussed below, the Attorney General's position is more consistent with the plain language of the statute.

We, as always, begin with the plain language of the statute. *See, Jackson v. Blitt & Gaines, P.C.,* 833 F.3d 860, 863 (7th Cir. 2016). We "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Russello,* 464 U.S. at 20.

The statutory language at issue here is "all other applicable Federal laws." Black's Law Dictionary defines "applicable" as "[c]apable of being applied; fit and right to be applied" or "affecting or relating to a particular person, group, or situation; having direct relevance." *Black's Law Dictionary* (10th ed. 2014). This definition embraces both parties' interpretations. However, the prefatory term in

§ 10153(a)(5)(D), "all other," implies a broader meaning than that tolerated by the City's interpretation. Furthermore, if Congress intended to have the applicant only certify compliance with a limited body of Federal grant-making law, it could have so stated. The City seeks to read into § 10153(a)(5)(D) references to specific federal statutes that are not there.

The City argues that the word "applicable" must have a narrowing effect. (Pl.'s Brief at 19.) However, it is equally reasonable to read "applicable" as referring to the noun, in other words, to refer to the federal laws applicable to the *applicant* – in this case, Chicago. 34 U.S.C. § 10153(a)(5)(D).

The Court will not stretch the natural meaning of the text, especially here where the City offers no case law or other authority to support its straitjacketed interpretation of "all other applicable Federal laws." 34 U.S.C. § 10153; *see also, Sandifer v. U.S. Steel Corp.,* 134 S.Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (quotations omitted).

The Court found no directly analogous case, but when interpreting similar constructions, the Supreme Court has broadly interpreted the term "applicable laws." *See, e.g., Dep't of Treasury v. Fed. Labor Relations Auth.,* 494 U.S. 922,

930 (1990) (interpreting the statutory term "applicable laws" as "laws outside the Act"); *see also, Bennett Enters., Inc. v. Domino's Pizza, Inc.,* 45 F.3d 493, 497 (D.C. Cir. 1995) (noting that "all applicable laws" is "not reasonably or fairly susceptible to an interpretation that does not encompass compliance with state and federal tax laws"); *United States Dep't of Health & Human Servs. v. F.L.R.A.,* 844 F.2d 1087, 1094-95 (4th Cir. 1988) (finding statutory requirement that Executive Branch managers follow "applicable laws" to exclude Office of Management and Budget circulars but to encompass a broad panoply of statutory law); *United States v. Odneal,* 565 F.2d 598, 600 (9th Cir. 1977) (reference to "all applicable laws" relating to admiralty grants "very broad statutory authority").

With no authority to support a more narrow reading of "applicable . . . laws" in a statutory context, and some authority (albeit in a different context) to support a broad reading of the phrase, combined with the plain meaning of the language, the Court finds that "all other applicable Federal laws" encompasses Section 1373 as applicable to the Byrne JAG applicant – in this case, the City of Chicago. Here, it is the City's burden as the movant to show otherwise, and it fails to meet that burden on this record. *See, Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) ("It frequently is observed that a

preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.").

This interpretation leads to a rational reading of the statute, as Congress could expect an entity receiving federal funds to certify its compliance with federal law, as the entity is – independent of receiving federal funds – obligated to comply. At oral argument, the City argued that this interpretation is limitless, allowing the Attorney General to pick from the United States Code like a menu at a restaurant. For several reasons, the City's consternation can be assuaged. First, the default assumption is that states and localities *do* comply with all federal laws. Second, the discretion to demand certifications of compliance is not limitless. The limitations on federal grant conditions announced in *South Dakota v. Dole,* 483 U.S. 203, 207-08 (1987), require that a particular condition, such as a compliance certification, bear some relation to the purpose of the federal funds. And further, as noted at oral argument, any condition attached to federal grants that is too burdensome defeats itself because a state or local government could reject the funds and thus undermine the Attorney General's attempt to induce compliance with the condition.

The City argues that previous conditions have all been tethered to statutes that by their terms apply to federal grant recipients. This may be true, but the fact that the Attorney General has not exercised authority does not necessarily speak to whether he possesses it, especially where the statutory terms embrace such an authorization.

The City has not met its burden to show a likelihood of success on the merits regarding the lack of statutory authority for the compliance condition. The most natural reading of the statute authorizes the Attorney General to require a certification of compliance with all other applicable federal laws, which by the plainest definition includes Section 1373. The City offers no statutory or case law authority to support its narrower reading. Because the lack of authority supporting a narrower interpretation and the plain language of the statute counsel against the City's interpretation of "all other applicable Federal laws," the Court finds that the Attorney General has statutory authority to impose the compliance condition on the Byrne JAG grant.

2. Constitutionality of Section 1373

Even with Congressional authorization, the compliance condition must be proper under the Spending Clause, and Section 1373 must pass constitutional muster. As the City has

not argued that the compliance condition violates the Spending Clause, the Court now turns to the Section 1373 question.

Although Congressional power is substantial, Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Travis v. Reno,* 163 F.3d 1000, 1003 (7th Cir. 1998). It also cannot require states "to govern according to Congress' instructions" or circumvent the rule by "conscripting the State's officers directly." *Printz v. United States,* 521 U.S. 898, 935 (1997); *New York v. United States,* 505 U.S. 144, 162 (1992). These prohibitions derive from principles of federalism ingrained in our constitutional system, under which "both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012); *see also, Gregory,* 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty.").

With the existence of two sovereigns comes occasional conflict. The Supremacy Clause provides the clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. "As long as it is acting

within the powers granted it under the Constitution, Congress may impose its will on the States [and] . . . may legislate in areas traditionally regulated by the States." *Gregory,* 501 U.S. at 459-60. Further, the presumption attached to every statute is that it is a constitutional exercise of legislative power. *Reno,* 528 U.S. at 148. We start there, attaching the presumption of constitutionality to Section 1373. Section 1373, in relevant part, provides that "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service; (2) Maintaining such information; (3) Exchanging such information with any other Federal, State, or local government entity." 8 U.S.C. § 1373(b).

It is undisputed that Congress has plenary power to legislate on the subject of aliens. *See, Takahashi v. Fish and Game Commission,* 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization,

and the terms and conditions of their naturalization."). Indeed, immigration regulation and enforcement are federal functions. *See, Arizona,* 567 U.S. at 396-97. Nonetheless, the City argues that Section 1373 violates the Tenth Amendment because it "requires state and local officers to provide information that belongs to Chicago and is available to them only in their official capacity" and requires "state officials to assist in the enforcement of federal statute by regulating private individuals." (Pl.'s Brief at 20 (internal quotations omitted).) Specifically, the City contends that Section 1373 commandeers state and local governments by "controlling the actions of their employees." *Ibid.*

The constitutionality of Section 1373 has been challenged before. The Second Circuit in *City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999), addressed a facial challenge to Section 1373 in similar circumstances. By executive order, New York City prohibited its employees from voluntarily providing federal immigration authorities with information concerning the immigration status of any alien. *Id.* at 31-32. The city sued the United States, challenging the constitutionality of Section 1373 under the Tenth Amendment. *Id.* at 32.

The Second Circuit found that Section 1373 did not compel state or local governments to enact or administer any federal regulatory program or conscript local employees into its service, and therefore did not run afoul of the rules gleaned from the Supreme Court's *Printz* and *New York* decisions. *City of New York,* 179 F.3d at 35. Rather, the court held that Section 1373 prohibits local governmental entities and officials only from directly restricting the voluntary exchange of immigration information with the INS. *Ibid.* The Court found that the Tenth Amendment, normally a shield from federal power, could not be turned into "a sword allowing states and localities to engage in passive resistance that frustrates federal programs." *Ibid.* The Second Circuit concluded that Congress may forbid state and local governments from outlawing their officials' voluntary cooperation with the INS without violating the Tenth Amendment. *Ibid.* As such, the court nullified New York City's executive order mandating non-cooperation with federal immigration authorities to the extent it conflicted with Section 1373. *Id.* at 37.

The City argues that *City of New York v. United States* contravenes the Seventh Circuit's decision in *Travis v. Reno,* 163 F.3d 1000 (7th Cir. 1998), by impermissibly applying a balancing analysis to encroachments on federalism. We agree

with the City that balancing the weight of a federalism infringement is inappropriate, not only under this Circuit's precedent in *Travis,* 163 F.3d at 1003, but Supreme Court precedent as well. *See, Printz,* 521 U.S. at 932 (noting that, where "it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate . . . [N]o comparative assessment of the various interests can overcome that fundamental defect.") (emphasis omitted). However, the logic of *City of New York*'s holding is not indebted to an impermissible balancing test. Rather, *City of New York* relies on the distinction between an affirmative obligation and a proscription:

> In the case of Sections 434 and [1373], Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's service. These Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS.

City of New York, 179 F.3d at 34-35 (citation omitted). The improper balancing the City highlights occurs where the Second Circuit addressed a secondary question yet found the record insufficient to supplant its prior analysis. *Id.* at 36-37. The

prior analysis was its holding – free from any inappropriate balancing – that states do not have the power "to command passive resistance to federal programs." *Id.* at 37. Granted, *City of New York* does not fully address or answer two arguments that are presented in this case: first, that the federal government cannot demand information belonging to the state; and second, that it cannot (even indirectly) control the scope and nature of the duties of state and local employees. *Id.* at 36. The Second Circuit merely deemed the record insufficient on both scores. *Ibid.* Regardless, Supreme Court precedent does not command a different result.

The City relies on *Printz,* but there, the statute at issue required state officers to perform mandatory background checks on prospective handgun purchasers – an affirmative act foisted on local officials by Congress. *See,* 521 U.S. at 933. The Supreme Court held that the statute violated the Tenth Amendment, because the federal government cannot "command the States' officers . . . to administer or enforce a federal regulatory program." *Id.* at 935. However, Section 1373 does not require the "forced participation" of state officers to "administer or enforce a federal regulatory program." *Id.* at 917-18. It merely precludes a state or local government from "prohibit[ing], or in any way restrict[ing], any . . . official"

from sending, requesting, maintaining, or exchanging "information regarding the immigration status . . . of any individual." 8 U.S.C. § 1373. In other words, it prohibits prohibitions on local officials' voluntary participation.

For similar reasons, other cases cited by the City do not advance the ball either. *See, e.g., Reno,* 528 U.S. at 151 (finding the Driver's Privacy Protection Act constitutional because "[i]t does not require the [state] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals"); *New York,* 505 U.S. at 188 (finding a "take title" provision on nuclear waste unconstitutional because it forced a state to "enact or administer a federal regulatory program" by affirmatively requiring it to legislate a certain way or take ownership of nuclear waste); *F.E.R.C. v. Mississippi,* 456 U.S. 742, 765 (1982) (finding no Tenth Amendment violation in provisions of the Public Utilities Regulatory Policies Act permitting states to regulate public utilities on the condition that they entertain federal proposals, as the statute contained nothing "directly compelling" states to enact a legislative program).

At its core, this case boils down to whether state and local governments can restrict their officials from voluntarily

cooperating with a federal scheme. The Court has not been presented with, nor could it uncover, any case holding that the scope of state sovereignty includes the power to forbid state or local employees from voluntarily complying with a federal program. Like the statute at issue in *Reno,* Section 1373 "does not require" the City "to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno,* 528 U.S. at 151. Without a doubt, Section 1373 restricts the ability of localities to prohibit state or local officials from assisting a federal program, but it does not *require* officials to assist in the enforcement of a federal program. This distinction is meaningful. In this distinction, Section 1373 is consistent with the constitutional principles enunciated in *New York* and *Printz*. *See, Printz,* 521 U.S. at 935; *New York*, 505 U.S. at 161-63. Because no case has gone so far as to prohibit the federal government from restricting actions that directly frustrate federal law, the Court finds that Congress acts constitutionally when it determines that localities may not prevent local officers from *voluntarily* cooperating with a federal program or discipline them for doing so.

It is worth noting, however, that this case poses a unique and novel constitutional question. The characterization of

Section 1373 as a prohibition that requires no affirmative state action accurately conveys the literal text of the statute, but it does not accurately portray its practical import. Section 1373 mandates that state and city employees have the option of furnishing to the INS information on individuals' immigration status while the employee is acting in his or her capacity as a state or local official. The corollary is that local governments cannot both comply with Section 1373 and discipline an employee for choosing to spend his or her time assisting in the enforcement of federal immigration laws. If a state or local government cannot control the scope of its officials' employment by limiting the extent of their paid time spent cooperating with the INS, then Section 1373 may practically limit the ability of state and local governments to decline to administer or enforce a federal regulatory program. In this way, Section 1373 may implicate the logic underlying the *Printz* decision more than it does the *Reno* rationale. *See, Printz,* 521 U.S. at 929-30.

Read literally, Section 1373 imposes no affirmative obligation on local governments. But, by leaving it up to local officials whether to assist in enforcement of federal immigration priorities, the statute may effectively thwart policymakers' ability to extricate their state or municipality

from involvement in a federal program. Under current case law, however, only affirmative demands on states constitute a violation of the Tenth Amendment. Here, we follow binding Supreme Court precedent and the persuasive authority of the Second Circuit, neither of which elevates federalism to the degree urged by the City here. A decision to the contrary would require an expansion of the law that only a higher court could establish.

Accordingly, the City has not shown a likelihood of success on the merits on the constitutionality of Section 1373.

C. Irreparable Harm

The City has demonstrated the second factor of the preliminary injunction analysis – irreparable harm. In assessing irreparable harm, courts must analyze whether the "harm . . . cannot be prevented or fully rectified by the final judgment after trial." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is deemed irreparable. *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 680 (7th Cir. 2012). Here, the City contends that, in the absence of an injunction, it must either forego the Byrne JAG grant funds it has specifically earmarked for life-saving technology that detects when and where

gunshots are fired (P.I. Hrg. Tr. at 31:8-32:9) or accede to the new conditions the Attorney General has placed on the funds and suffer the collapse of trust between local law enforcement and immigrant communities that is essential to ferreting out crime.

Two recent cases have dealt with preliminary injunctions regarding facts similar to those before the Court. Though the legal issues presented in these cases are different than those at bar, the harms alleged are sufficiently analogous. In both cases, the district court found that the plaintiff established irreparable injury. In *City of El Cenizo v. State,* the court entered a preliminary injunction and credited the plaintiff's assertion that it would suffer two forms of irreparable harm: (1) "Trust between local law enforcement and the people they serve, which police departments have worked so hard to promote, will be substantially eroded and result in increased crime rates"; and (2) "Local jurisdictions face severe economic consequences . . . including . . . the loss of grant money." *City of El Cenizo v. State,* No. SA-17-CV-404-OLG, 2017 WL 3763098, at *39 (W.D. Tex. Aug. 30, 2017). In *County of Santa Clara v. Trump,* the court found that the plaintiff established a "constitutional injury" and irreparable harm "by being forced to comply with an unconstitutional law or else face financial injury." *County of Santa Clara v. Trump,* No. 17-CV-00485-WHO,

2017 WL 1459081, at *27 (N.D. Cal. Apr. 25, 2017), *reconsideration denied,* No. 17-CV-00485-WHO, 2017 WL 3086064 (N.D. Cal. July 20, 2017).

The harm to the City's relationship with the immigrant community if it should accede to the conditions is irreparable. Once such trust is lost, it cannot be repaired through an award of money damages, making it the type of harm that is especially hard to "rectif[y] by [a] final judgment." *Roland Mach.,* 749 F.2d at 386.

The Attorney General minimizes the impact of the relatively modest Byrne JAG funds on public safety and argues that the City could, by simply declining the funds, avoid any loss of trust between local law enforcement and the immigrant communities. However, a "Hobson's choice" can establish irreparable harm. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 381 (1992). In *Morales,* the Supreme Court held that a forced choice between acquiescing to a law that the plaintiff believed to be unconstitutional and violating the law under pain of liability was sufficient to establish irreparable injury. *Ibid.* In the same way, forcing the City either to decline the grant funds based on what it believes to be unconstitutional conditions or accept them and face an irreparable harm, is the type of "Hobson's choice" that supports irreparable harm. Further, a

constitutional violation may be sufficient to establish irreparable injury as a matter of law. *See,* 11A Charles Alan Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *see also, Ezell v. City of Chicago,* 651 F.3d 684, 698–700 (7th Cir. 2011); *Doe v. Mundy,* 514 F.2d 1179, 1183 (7th Cir. 1975).

The lack of injury afflicting the Attorney General in the absence of an injunction buttresses the City's showing of irreparable harm. The Seventh Circuit has described this factor as follows:

> In deciding whether to grant a preliminary injunction, the court must also consider any irreparable harm that the defendant might suffer from the injunction—harm that would not be either cured by the defendant's ultimately prevailing in the trial on the merits or fully compensated by the injunction bond that Rule 65(c) of the Federal Rules of Civil Procedure requires the district court to make the plaintiff post. The cases do not usually speak of the defendant's *irreparable* harm, but the qualification is implicit; if the defendant will not be irreversibly injured by the injunction because a final judgment in his favor would make him whole, the injunction will not really harm him. But since the defendant may suffer irreparable harm from the entry of a preliminary injunction, the court must not only determine that the plaintiff will suffer irreparable harm if the preliminary injunction is denied—a threshold requirement for granting a preliminary injunction—but also weigh that harm against any irreparable harm that

> the defendant can show he will suffer if the injunction is granted.

Roland Mach., 749 F.2d at 387 (emphasis in original). Although harm to federal interests should not be diminished, a delay in the imposition of new conditions that have yet to go into effect will likely not cause any harm akin to that alleged by the City. The Attorney General has put forth no comparable claim that a delay in imposition of the new Byrne JAG conditions would permanently harm community relationships or any other interest that would be difficult to remedy through money damages. *See, Kansas v. United States,* 249 F.3d 1213, 1227 (10th Cir. 2001) (noting that maintaining the status quo was unlikely to affect a substantial public interest in the short time of the injunction).

Thus, the Court finds that the City has established that it would suffer irreparable harm if a preliminary injunction is not entered.

D. Balancing of Equities and the Public Interest

The remaining two factors in the preliminary injunction analysis merge where the Government is a party. *Nken,* 556 U.S. at 435. These two factors are not outcome-determinative here. Both sides can claim that concerns of public safety justify their positions.

The City and *amici* strongly emphasize the studies and other evidence demonstrating that sanctuary cities are safer than their counterparts. Although both parties before the Court have emphatically stressed the importance of their policy choice to decrease crime and support law enforcement – with Chicago emphasizing the benefits that flow from immigrant communities freely reporting crimes and acting as witnesses, and the Attorney General emphasizing the need to enforce federal immigration law – choosing between competing public policies is outside the realm of judicial expertise and is best left to the legislative and executive branch. *See, Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 538 (2012) (noting that the courts are "vested with the authority to interpret the law; [they] possess neither the expertise nor the prerogative to make policy judgments").

Accordingly, the final two factors favor neither party. Both parties have strong public policy arguments, the wisdom of which is not for the Court to decide. Accordingly, the Court finds that balancing the equities and weighing the public interest do not tip the scale in favor of either party.

III. CONCLUSION

For the reasons stated herein, the Court grants the City a preliminary injunction against the Attorney General's imposition

of the notice and access conditions on the Byrne JAG grant. The City has established a likelihood of success on the merits as to these two conditions and irreparable harm if an injunction does not issue, and the other two preliminary injunction factors do not sway the analysis. This injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction. *See, Int'l Refugee Assistance Project v. Trump,* 857 F.3d 554, 605 (4th Cir. 2017).

The Court denies the City's Motion for a Preliminary Injunction with respect to the compliance condition, because the City has failed to establish a likelihood of success on the merits.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: September 15, 2017