UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

THE CITY OF CHICAGO,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS III,
Attorney General of the United States

Defendant.

Civil Action No. 1:17-cv-5720
Hon. Harry D. Leinenweber

REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Attorney General identifies no genuine disputes of material fact, and the Court has a complete record on which to resolve pure questions of law: Are the conditions imposed on the JAG formula grant *ultra vires*? Yes, because none is authorized by the JAG statute or any other law. Should injunctive relief be nationwide? Yes, for the reasons already articulated by this Court. Is Chicago also entitled to a declaration that it complies with 8 U.S.C. § 1373? Yes, because no City policy prohibits information sharing within the narrow meaning of that law. The immaterial discovery and resulting delay requested by the Attorney General would serve no purpose.

And the need for relief here is urgent. It has been six months since the date that the Attorney General stated he would issue awards for FY2017 JAG grants. No award is forthcoming, and meanwhile his threats to Chicago keep multiplying. The Attorney General is now withholding grant money from an additional program—the COPS grant—that helps cities like Chicago hire new police officers. And less than a month ago, the Attorney General sued the State of California, making good on a threat that he also has leveled at Chicago and other jurisdictions who stand behind their own welcoming policies rather than bend to the will of the federal Executive.

In our system of federalism, state and local governments may not be coerced by the federal Executive without a clear mandate from Congress—and indeed, even then, the federal government may not substitute its policy priorities for those of state and local governments without their consent. The Attorney General now says that "[l]aw enforcement in this country is a cooperative endeavor." It should be. But Chicago sought relief from this Court because the Attorney General *rejected* genuine cooperation between sovereigns and instead chose threats and confrontation. This approach is not just bad policy; it is unlawful because Congress never authorized the Attorney General's efforts to reverse the City's long-held policies by threatening to withhold JAG funds, and because the Attorney General has no other legal basis for his actions. Summary judgment should be granted, and a permanent injunction and a declaration of compliance with § 1373 should issue.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE ATTORNEY GENERAL'S CONDITIONS ARE *ULTRA VIRES*

A. The Decision To Impose The Conditions Is Final Agency Action

The Attorney General concedes that he has reached a final decision to impose the notice, access, and compliance conditions. *See* Opp., Dkt. 167 at 3-4; Def.'s Response to Pltf.'s SUMF ("RSUMF"), Dkt. 168, ¶¶ 17-18. Indeed, the FY2017 JAG solicitation states unequivocally that awards "will include" the three conditions, SUMF ¶ 22, which the Attorney General confirmed in a sworn declaration in this lawsuit, SUMF ¶ 27. *See also* Dkt. 32 at 21 (awards containing "the *final language* of th[e] conditions" for all grantees (emphasis added)).

Having acknowledged his final decision to impose the conditions, the Attorney General now argues that only the ultimate decision to grant or deny a JAG grant application matters for APA purposes. Opp. 3. This is perplexing, given that the Attorney General—after pledging his intention to issue annual awards in September 2017, Dkt. 28, ¶ 4—has been holding Chicago's (and many others') FY2017 JAG applications in stasis for six months, with no "final decision" in sight. But in any event, it is legally incorrect. The decision to impose the conditions is plainly final under settled law, because it "mark[s] the 'consummation' of the [Department of Justice's] decisionmaking process" on the question, and results in "'legal consequences'" for Chicago and other JAG applicants, *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997), such as the requirement to make certifications to the federal government, and the Hobson's choice of whether to change longstanding City policy to obtain federal funding. *See, e.g.*, *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662 (7th Cir. 1998) ("'The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'"); *Abbs v. Sullivan*, 963 F.2d 918, 926 (7th Cir. 1992) (decision final where plaintiff faces "a dilemma: comply with a rule that harms [it] … or violate the rule at the risk of incurring a heavy

penalty"). That the Department of Justice ("Department") may later determine whether Chicago *complies* with the new policy conditions does not make the decision to *impose* those conditions any less final. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (availability of "distinct final agency action" "'should not … support an implication of exclusion as to other[]' agency actions"); *see also, e.g.*, *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289-1290 (D.C. Cir. 2016) (policy banning repatriation of hunting trophies reviewable prior to any permit application).[1]

The Attorney General does not even attempt to distinguish the recent decision by the Eastern District of Pennsylvania holding that his imposition of these conditions is reviewable now, *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 615 (E.D. Pa. 2017) (appeal filed Jan. 18, 2018); since his last filing, an additional district court has reached the same conclusion, *see California ex rel. Becerra v. Sessions*, 2018 WL 1156774, at *11-12 (N.D. Cal. Mar. 5, 2018); *see also City of Philadelphia v. Sessions*, 2018 WL 1305789, at *6-7 (E.D. Pa. Mar. 13, 2018) (reaffirming finality holding). And the cases the Attorney General cites (at 3-4) for his theory of final agency action provide him no support. Each involved an agency investigation into whether *past* conduct violated *preexisting* legal rules—not the announcement of a new rule governing future conduct. *See Abbs*, 963 F.2d at 921 (investigation into whether scientist had misrepresented data in violation of preexisting rules); *see also Acker v. EPA*, 290 F.3d 892, 894-895 (7th Cir. 2002) (investigation into compliance with preexisting asbestos regulations); *Jerome Milton, Inc. v. FTC*, 734 F. Supp. 1416, 1421-1422 (N.D. Ill. 1990) (investigation into alleged deceptive advertising). These cases did not involve "an official agency pronouncement with the effect of law requiring plaintiffs to take any action," *id.* at 1422, *i.e.*, the type of agency action typically considered final and reviewable. And that is *precisely* what Chicago is challenging: a new legal requirement from the Department that seeks to coerce the City into

[1] The Attorney General (at 3) suggests that agency action on a grant is not final until the funds are disbursed, but cites in support only dicta from *Rattlesnake Coalition v. EPA*, 509 F.3d 1095 (9th Cir. 2007), which found no final agency action because Congress is not an "agency" for APA purposes. *See id.* at 1103.

changing its immigrant-friendly community-policing policy on pain of losing longstanding formula grant funds.[2] The decision challenged here is final.

B. The Notice and Access Conditions Are *Ultra Vires*

On the merits, summary judgment should be granted as to the notice and access conditions for the reasons already stated by this Court (which are now before the Seventh Circuit on appeal) and by the court in *Philadelphia*, 280 F. Supp. 3d 616-617. The Attorney General acknowledges that he has no authority to impose the conditions unless authorized by Congress. Opp. 4-5; *see also City of Arlington v. FCC,* 569 U.S. 290, 297 (2013). And he cannot dispute the fundamental proposition that Congress's grant of authority must be "unmistakably clear in the language of the statute" if it "upset[s] the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Those principles are fatal to the notice and access conditions. As before, the Attorney General identifies no provision of the JAG statute authorizing either condition; rather, his only asserted authority is 34 U.S.C. § 10102(a)(6), a provision outside the JAG law describing the "duties and functions" of the Assistant Attorney General ("AAG"). And this argument still suffers from the same overarching flaw: It is inconsistent with the plain text of § 10102(a)(6).

In relevant part, § 10102(a)(6) provides that the AAG may "exercise such other powers and functions as may be vested in [him] pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for

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[2] Accordingly, the Attorney General's further argument (at 3) that Chicago has not even identified "agency action" fails. "[T]he word 'action' [in 'agency action'] … is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 478 (2001). The full definition of "agency action" (omitted from the Attorney General's brief) "includes the whole or a part of an agency rule … or the equivalent … thereof." 5 U.S.C. § 551(13) (emphasis added). And a "rule" includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement … or prescribe law or policy." *Id.* § 551(4). These definitions easily cover the adoption of a nationwide policy imposing new conditions on a widely-used local law enforcement grant program.

formula grants." In other words, § 10102(a)(6) authorizes the AAG to exercise only whatever power is vested in him or the Attorney General elsewhere by statute, and does not independently grant any authority at all. That is the only possible interpretation of the text in light of the use of the word "including," because "[w]hatever follows the word 'including' is a subset of whatever comes before." *Epsilon Elecs. v. U.S. Dep't of Treasury*, 857 F.3d 913, 922 (D.C. Cir. 2017); *see also Gaffney v. Riverboat Servs. of Ind.*, 451 F.3d 424, 459 (7th Cir. 2006) (items following "including" are merely "illustrative" of the set of things described before it).

This Court has already resolved the question against the Attorney General, *see* Dkt. 78 at 17-19, and his new embellishments during this round of briefing change nothing because the plain text of § 10102(a)(6) is clear. *See, e.g.*, *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 649 (7th Cir. 2011) (if text is unambiguous, courts "will not conduct further inquiry into its meaning"). But even considering these arguments, they fail on their own terms.

First, the Attorney General (at 6-7) appeals to legislative history. He points out that the "special conditions" language on which he relies was added as part of the same legislation that created the JAG program, but that does not help his position. Congress chose to structure the JAG program as a formula grant, to provide no authority within the JAG statute to impose across-the-board substantive conditions, to limit the Attorney General's discretion to "reserv[ing] *not more* than 5 percent" of JAG funds to address "extraordinary increases in crime" or to "mitigate significant programmatic harm," 34 U.S.C. § 10157(b) (emphasis added), and to expressly tie JAG funding to specific federal policy objectives, *e.g.*, *id.* § 20927(a); *see also infra* pp. 9-10. Those carefully articulated legislative choices regarding the administration of JAG funds belie any intent to give the AAG *carte blanche* to impose substantive policy conditions on the JAG program. Nor does the Attorney

General's citation (at 7) to a passing reference to "special conditions" from a single sentence of a massive House Report change that analysis.[3]

Second, the Attorney General also argues (at 6-7) that under Chicago's (and this Court's) reading of the statute, the grant-conditioning language in § 10102(a)(6) is superfluous. But every "including" clause is superfluous in the sense that it serves to illustrate rather than perform independent substantive work. *See Gaffney*, 451 F.3d at 459. And in any event, it is the Attorney General's interpretation that risks rendering vast swaths of statutory text superfluous: On his view, there is no need for the specific, limited grants of authority in the JAG statute itself, such as the authority to condition grants on submission of certain "data, records, and information," 34 U.S.C. § 10153(a)(4), or on compliance with a mandatory "program assessment component," *id.* § 10152(e), or to *incrementally* reduce Byrne JAG funds for jurisdictions that fail to comply with certain *specific* federal statutes, *id.* § 60105(c)(2); *see also infra* p. 9.

Third, the Attorney General argues (at 7-8) that Chicago's reading of § 10102(a)(6) "does not comport" with the Department's past imposition of various conditions on JAG funds, such as "human subjects research," "conditions related to information-sharing and privacy protection," "training," or conditions prohibiting "purchas[ing] military-style equipment" with grant funds. As an initial matter, the Attorney General is wrong to suggest that those conditions were imposed "[w]ithout any tie to a specific statutory direction." *Id.* Each was at least arguably authorized by Congress. *See* 42 U.S.C. § 300v-1 (providing that agency shall engage in notice and comment rulemaking regarding human research); 34 U.S.C. § 10231(c) (providing that "[a]ll criminal intelligence systems" funded by JAG program among others shall conform to information-sharing

[3] Moreover, the conditions at issue here are not "special conditions" at all. In fact, "special conditions," according to regulations that existed at the time § 10102(a)(6) was passed, is a term of art that refers to individualized conditions imposed on high-risk grantees, as opposed to "general conditions" applicable to all. *See* 28 C.F.R. § 66.12; *accord* Federal Grant Practice, § 25.4-14; *see also* Amici Br. of States, Dkt. 166, at 8-9 (discussing term "special conditions").

and privacy standards); *id.* § 10153(b)(1) (requiring Attorney General to provide technical assistance and training for JAG recipients); *id.* § 10152(d) ("no funds … may be used … to provide … vehicles … luxury items … or any similar matters"). And even if some unauthorized conditions previously had been imposed "without objection," Opp. 7, two wrongs do not make a right. The Department "'may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.'" *See S.E.C. v. Sloan*, 436 U.S. 103, 119 (1978) (quoting *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). The notice and access conditions should be permanently enjoined.

C. The Compliance Condition Is *Ultra Vires*

This Court should also permanently enjoin the compliance condition. The Attorney General premises his authority to impose the compliance condition on a single provision of the JAG statute that requires grant applications to certify "that … the applicant will comply with all provisions of this part and all other applicable Federal laws." 34 U.S.C. § 10153(a)(5). The issue—which this Court addressed once in the likelihood-of-success context—is whether 8 U.S.C. § 1373, an immigration law having nothing to do with federal grants that prohibits restricting certain information sharing, is an "other applicable Federal law[]" within the meaning of the JAG statute.

Section 1373 is not an "other applicable Federal law[]" under established canons of statutory interpretation, as discussed below. And as with the notice and access conditions, federalism principles bear crucially on this question. "[U]nmistakably clear" congressional authorization, *Gregory*, 501 U.S. at 460, is especially important where Congress has attempted to "regulate areas traditionally supervised by the States' police power." *Gonzalez v. Oregon*, 546 U.S. 243, 274 (2006). The Attorney General wrongly contends (at 9-10) that federalism concerns are irrelevant here. But federal grant conditions necessarily implicate the federal/state balance of power. *E.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (powers accorded to federal government, including the power to "tax and spend" and "condition" funds, "must be read carefully to avoid creating a general

federal authority akin to the police power," upending the federalist design). And the conditions challenged here, *whose express purpose is conforming local and state law to federal policy priorities*, by definition disturb that balance. In light of federalism principles, the better reading is that § 10153(a)'s "other applicable Federal laws" language is narrow in scope, and does not include § 1373. Summary judgment should be granted.

1. Section 1373 is not an "other applicable Federal law[]" because it has nothing to do with federal grants

This Court has previously acknowledged that § 10153(a) is susceptible to multiple "plausible" interpretations, including Chicago's interpretation. Dkt. 78 at 21. Indeed, § 10153(a) contains a key ambiguity: the referent of the phrase "other applicable Federal laws." There are two options: As Chicago has argued, § 10153(a) might refer to laws "applicable" to grantees *as* grantees. *See* Dkt. 152 at 6-9. Or, as the Attorney General claims (at 8), it might refer to *any* Federal law, regardless of context, that "independently … appl[ies] to Byrne JAG grantees."

The Attorney General attempts (at 8-9) to brush aside Chicago's reading on the theory that courts always construe the term "applicable" to have the "broad[est]" possible "reach." That is wrong. As with any statutory term, *see Ali v. Fed'l Bureau of Prisons*, 552 U.S. 214, 227-228 (2008), courts construing the term "applicable" in other statutes have emphasized that its meaning must "be determined … by reading the term in the context of the surrounding language and of the statute as a whole." *City of New York v. Beretta USA Corp.*, 524 F.3d 384, 400 (2d Cir. 2008) (rejecting broadest conceivable reading of "applicable"); *see also Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1286 n.9 (C.D. Cal. 2006) ("[T]he Court fails to see how [other] courts' respective interpretations of completely unrelated statutes bear[] any relevance to the meaning of the word 'applicable' in [this] specific context."). Here, Congress used limiting language—"the provisions of *this part* [*i.e.*, the JAG statute] and all *other* applicable Federal laws," 34 U.S.C. § 10153(a)(5)(D)—which indicates a limited meaning of "applicable" that encompasses only laws that apply to grantees as grantees. *See, e.g.*, *Circuit City*

Stores, Inc. v. Adams, 532 U.S. 105, 114-115 (2001) (phrase "any other class of workers" should be "controlled and defined by reference to" the preceding terms, "seamen" and "railroad employees" (quotation marks omitted)); *see also* Dkt. 152 at 6-7.[4] The broader statutory context confirms that construction: Subsection 10153(a) is part of a section titled "Applications" that is focused on grant application standards and technical requirements, and more broadly the JAG statute (*i.e.*, "this part") contains rules defining and governing a grant program. *See Ali*, 552 U.S. at 227-228 (considering "whole context" of the text at issue). The surrounding language and the statute as a whole indicate that "applicable" *here* most naturally means "applicable to grants and grant programs."

Other contextual clues likewise favor Chicago's narrower reading. Congress made JAG funding contingent on compliance with three specific statutes and defined *limited* consequences for noncompliance. *E.g.*, 34 U.S.C. § 60105(c)(2) (requiring "not more than a 10-percent reduction" in JAG funds for non-compliance with Death in Custody Reporting Act); *see also id.* § 20927(a); *id.* § 30307(e)(2)(A). The Attorney General's interpretation of "other applicable Federal laws" as conditioning 100% of JAG funding on compliance with every independently applicable law would render these provisions superfluous and override Congress's nuanced treatment of JAG funds.

And Chicago's limited reading of "applicable" rings truer still when read against "the backdrop of what Congress was attempting to accomplish." *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (adopting limited meaning of term "any note" consistent with Congress's purposes); *accord Beretta*, 524 F.3d at 401-402 (considering legislative intent as well as text and stating that "the term 'applicable' must be examined in context"). Congress enacted the JAG statute to "give State and

[4] The Attorney General argues that the relevant language in § 10153(a) is disjunctive, and that the *ejusdem generis* canon applies to lists rather than disjunctive phrases. Opp. 8 (citing *Ali*, 552 U.S. at 225). But courts *do* apply the canon to residual clauses where (as here) doing so makes sense in context, *e.g.*, *Falkenberg v. Alere Home Monitoring, Inc.*, 2014 WL 5020431, at *3 (N.D. Cal. Oct. 7, 2014). By contrast, and unlike in this case, using *ejusdem generis* did not make sense in *Ali* because "no relevant common attribute immediately appear[ed] from the [preceding] phrase." 552 U.S. at 225.

local governments more flexibility to spend [federal] money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. 109-233, at 89 (2005). JAG funding was thus designed to empower local governments by *deferring* to local policy choices. And this understanding is confirmed by 34 U.S.C. § 10228(a), which prohibits "any … Act" of Congress from "be[ing] construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof."[5] A limited reading of "other applicable Federal laws" thus preserves Congress's intent.

A limited reading is also required by key federalism principles. Under Chicago's reading, § 10153(a) merely requires following the rules for federal grantees, and thus presents no major change in the ordering of federal and local power. But the Attorney General's expansive reading would make *any* legal dispute or policy disagreement between federal and local governments a potential ground for withholding formula grant funds. Turning the JAG program into a tool for top-down coercion cannot be what Congress intended, *see* H.R. Rep. 109-233, at 89, and it surely is not a result that Congress made "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. That is especially problematic here, where the federal government's target is local law enforcement. *E.g.*, *Gonzalez*, 546 U.S. at 274; *accord Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) ("[T]he clearest example of traditional state authority is the punishment of local criminal activity.").

[5] The Attorney General downplays (at 9) Congress's repeated rejection of grant-conditioning legislation, suggesting that Congress perhaps preferred to leave the issue to his discretion. But Congress could not have believed that the Attorney General already had such discretion, as one of the failed bills would have given him that exact discretion to withdraw local grant funds from cities that do not comply with § 1373. *See Preventing the Catch and Release of Criminal Aliens Act of 2015*, S. 1812, 114th Cong., sec. 3(b)(3) (2015). And contrary to the Attorney General's arguments, federal courts, including the Supreme Court, have often relied on rejected legislation as evidence of statutory meaning when addressing the scope of executive authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); *Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921, 935-936 (N.D. Miss. 2016).

Beyond these fatal federalism problems, the absurd consequences of the Attorney General's construction make it implausible. For one, it would create massive new liability traps for state and local governments by requiring every JAG applicant to certify compliance with *all* "federal laws that independently do apply to Byrne JAG grantees." Opp. 8. Broadening § 10153's certification requirement thus risks expanding potential False Claims Act liability for JAG grantees, contravening both the False Claims Act itself *and* the JAG statute. *Cf. Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002, 2004 (2016) (under False Claims Act, federal government cannot condition payment on compliance with every one of the "thousands of complex statutory and regulatory provisions" to which payee is subject). And conditioning grant funds on compliance with every independently applicable federal law would also violate the germaneness requirements of the Spending Clause, because numerous requirements that fall upon state or local governments have nothing at all to do with local law enforcement or any other purpose of the JAG program. *E.g.* 16 U.S.C. § 2601 *et seq.* (procedural requirements for municipal utilities); 26 U.S.C. § 3402 (requiring employers, including municipal employers, to withhold income taxes). These absurdities are undoubtedly why the Department has never—to this day—followed the all-laws interpretation the Attorney General now advances and why it previously applied *Chicago*'s approach, requesting certification of compliance with only laws applicable to grantees *as* grantees. *See* Dkt. 152 at 7 & n.3; Opp. 9, 20 (not disputing Department's past practice).

Perhaps to evade these cascading problems with his approach, the Attorney General appears to argue (at 7-8) in the alternative that § 10153(a)(5)(D) grants him the discretion to define which laws are "applicable" and which are not, selecting from a menu of "the corpus of federal laws that actually do apply, independently, to Byrne JAG grantees." But recasting his definition of "applicable" to refer to the same overbroad body of laws, while also granting him a discretionary on/off switch, solves none of the problems just mentioned. Indeed, it exacerbates the tension with

the JAG program's text and purpose because such discretion is inconsistent with the mandatory nature of § 10153 ("Such application *shall* include") and exceeds the limited discretion Congress envisioned for the Attorney General: to specify "the form" (but not the content) of the JAG application and the certification of compliance. 34 U.S.C. § 10153(a), (a)(5). And it creates a new problem: Using grant certification to selectively enforce independent federal laws that contain no enforcement mechanism (like § 1373) contravenes the Supreme Court's admonition against creating an enforcement mechanism where none exists in the statute. *See Alexander v. Sandoval*, 532 U.S 275, 291 (2001) ("Agencies may play the sorcerer's apprentice but not the sorcerer himself.").

This Court previously found Chicago's reading "plausible," but declined to hold that Chicago was likely to succeed on the merits as to the compliance condition for purposes of a motion for emergency relief. Dkt. 78 at 21-24; *accord Philadelphia*, 280 F. Supp. 3d at 619 (question is a "close call"). But the Court did not focus on the limiting effect of the word "other" in the statutory text, or address the federalism clear-statement rule, or consider the cases narrowly construing the word "applicable," or account for the absurd consequences of turning *every federal law* into a condition on JAG funding (at the Attorney General's option or otherwise). These arguments have now been fully aired, and they weigh in Chicago's favor. Summary judgment should be granted.

2. Section 1373 is not an "applicable Federal law[]" because it is unconstitutional

There is yet another reason to grant summary judgment to Chicago on the compliance condition: Section 1373 commandeers state and local governments.

As previously explained, § 1373 violates the Tenth Amendment by depriving Chicago of the "critical alternative" guaranteed by the Constitution and its federalist structure: the freedom to "decline to administer the federal program." *New York v. United States*, 505 U.S. 144, 177 (1992). *See* Dkt. 152 at 8-9, 22-23. The Attorney General responds (at 17) that commandeering protections do not apply to grant conditions. But his own cases undermine the point, *see Agency for Int'l Dev. v. All.*

for Open Soc'y Int'l, Inc., 570 U.S. 205, 214-215 (2013) (explaining that "a funding condition can result in an unconstitutional burden on First Amendment rights" if it "seek[s] to leverage funding to regulate speech outside the contours of the federal program itself"), and in any event, Chicago's argument has always been a direct challenge to § 1373, because only valid and constitutional laws are "applicable" under any definition of the word. *Cf. Branch v. Smith*, 538 U.S. 254, 281 (2003) (unconstitutional state law could not be applied under phrase "as state law requires").

The Attorney General also argues (at 18) that § 1373 "[m]erely protect[s] the transmission of information to federal authorities." That assertion is directly contradicted by the Attorney General's public statement that § 1373 would be used to work a "reordering of [Chicago's] law enforcement practice." SUMF ¶ 26. And in any event, it ignores that § 1373 interferes with the government-officer relationship, a critical component of state and local sovereignty, in a way that extends far beyond information sharing. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 931 (1997) ("To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance."). Suppose, for example, that a police officer seeks to assist ICE with civil immigration enforcement to the exclusion of his other duties, spending all of his time combing through city files and reporting to ICE. Under the Attorney General's theory, the City would be powerless to redirect the officer's priorities. That kind of "reordering" is precisely what the Tenth Amendment, and anti-commandeering doctrine, guard against.

D. The Court Should Issue A Nationwide Injunction

The Attorney General has offered no substantive response to Chicago's argument that it meets all four requirements for a permanent injunction, and thus concedes the point. Instead he argues (at 10-12) only that any injunction here should not be nationwide in scope. But this Court already considered the appropriate scope of relief here both in issuing its preliminary injunction and in denying the Attorney General's motion to stay the nationwide scope of the Court's injunction. In

both instances, the Court correctly concluded that a nationwide injunction is appropriate because 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." Dkt. 78 at 41; *see* Dkt. 98 at 5. The issue is now before the Seventh Circuit. In the meantime, this Court should issue a nationwide permanent injunction.

The Attorney General's primary argument against a nationwide injunction is the same as before: He argues that Article III prevents Chicago from obtaining relief that incidentally benefits individuals not before the Court. As this Court has already recognized, that position misunderstands basic principles of Article III standing. There is no question that Chicago has standing "for each claim [it] seeks to press" in this case. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351-352 (2006). Article III imposes no additional constraint on the scope of the injunctive relief that a court may order. Rather, federal courts have the inherent power to craft and issue injunctions that address the harm demonstrated—*i.e.*, "the nature of the … remedy is to be determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995). Here, the "nature and scope of the constitutional violation" is a single set of unlawful grant conditions promulgated by a single federal actor. Enjoining them is the appropriate relief in this case.

Any other conclusion would contradict decisions of the Supreme Court, *see Trump v. IRAP*, 137 S. Ct. 2080 (2017), the Seventh Circuit, *see Decker v. O'Connell*, 661 F.2d 598, 618 (7th Cir. 1980), and other circuits, *see Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). For example, in *IRAP*, the Supreme Court left in place portions of a nationwide injunction. The dissenting Justices made the same argument that the Attorney General advances here—that "a court's role is to provide relief only to [the] claimant[]." 137 S. Ct. at 2090 (Thomas, J., dissenting). But the majority upheld the injunction "with respect to parties similarly situated to [the plaintiffs]." *Id.* at 2088. The Supreme Court has thus "clearly rejected" the Attorney General's argument. Dkt. 98 at 8-9.

Rather than addressing those precedents or this Court's prior reasoning, the Attorney General relies heavily (at 11) on *McKenzie v. City of Chicago*, 118 F.3d 552 (7th Cir. 1997). *McKenzie* involved fact-specific, as-applied due process challenges to a demolition ordinance. In that context, the Seventh Circuit held that the plaintiffs "lack[ed] standing to seek … relief that benefit[ed]" parties not before the court. *Id.* at 555. That holding—that a plaintiff making an as-applied challenge cannot obtain an injunction that bars all applications of the challenged law—is off-point here. Indeed, the Attorney General sought a stay of the preliminary injunction in the Seventh Circuit based largely on *McKenzie*, and that court rejected his application. *See* Mot., No. 17-2991, Dkt. 8, at 2, 10-14 (7th Cir. Oct. 13, 2017); Order, No. 17-2991, Dkt. 33 (7th Cir. Nov. 21, 2017).

Once the Attorney General's Article III argument is cleared away, all that remains is his contention (at 12) that equitable principles counsel against imposing a nationwide injunction. But the equities here *favor* nationwide injunctive relief, as this Court has said. Failure to enjoin the conditions nationwide would "allow the Attorney General to impose what this Court has ruled are … unconstitutional conditions across a number of jurisdictions." Dkt. 98 at 11. That is especially inequitable because there is "no reason to think that the legal issues" differ from place to place. Dkt. 78 at 41. And "judicial economy counsels against" requiring a proliferation of challenges to the same conditions. Dkt. 98 at 11. This Court should hold, again, that nationwide relief is appropriate.

II. THE COURT SHOULD DECLARE THAT CHICAGO COMPLIES WITH § 1373

The Attorney General offers three arguments against issuing a declaration that Chicago complies with § 1373. None succeeds.

A. A Declaratory Judgment Is Warranted

As an initial matter, the Attorney General argues (at 20-21) it would be imprudent to issue a declaratory judgment while the Department is still considering Chicago's certification of

compliance.[6] But the Supreme Court has recently questioned the "continued vitality" of the prudential ripeness doctrine, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014), and in any event, this action, which presents a purely legal question and ongoing harms to Chicago, would satisfy any prudential concerns, *see New West v. City of Joliet*, 2012 WL 366733 (N.D. Ill. Jan. 30, 2012) (rejecting prudential ripeness argument founded on parallel administrative proceeding). Deferring adjudication of Chicago's claims to the Department's long-delayed decisionmaking process while the Attorney General withholds JAG and now COPS funds would risk multiplying the harm to Chicago—which still must certify compliance under penalty of perjury with a law (§ 1373) that the Attorney General is continuously reinterpreting—and to Chicagoans, who urgently need the City to expand ShotSpotter technology (with JAG funds) and hire additional officers (with COPS funds).

More fundamentally, the Attorney General ignores the other reason a declaratory judgment is needed: because he and the President have threatened suit against jurisdictions, like Chicago, that they believe are violating § 1373—a threat that in no way depends on the Department's administrative process. *See* Dkt. 152, at 12-13; *see also* Dkt. 157-11 at 2, 8, 22. Recent events prove just how real a threat this is. Just weeks ago, the Attorney General filed suit against the State of California, its Governor, and its Attorney General alleging that some of California's laws violate § 1373. *See* Compl., *United States v. California*, No. 2:18-at-00264 (E.D. Cal. Mar. 6, 2018). Removing this "Damoclean threat of impending litigation" is a quintessentially proper basis for a declaratory judgment. *Med. Assur. Co. v. Hellman*, 610 F.3d 371, 377 (7th Cir. 2010).

B. No Discovery Is Necessary

The Attorney General also argues (at 23-24) that a declaration should not issue now because he needs discovery, invoking Rule 56(d) of the Federal Rules. But he fails to describe in any detail

[6] The Attorney General has now abandoned his other two threshold arguments against declaratory relief. *See* Dkt. 139 at 18; Dkt. 152 at 12-13 (identifying the flaws in those arguments).

what discovery he might need, or where such discovery would end, raising the specter of unfocused, asymmetric discovery if the Court were to grant his request. Fortunately, though, Chicago's declaratory judgment claim presents a pure question of law, rendering Rule 56(d) inapplicable. *See Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 886 (7th Cir. 2005) ("Rule 56(d) is not a shield that can be raised to block … summary judgment without even the slightest showing … [that the] opposition is meritorious."). Rule 56(d) cannot forestall summary judgment where the discovery sought is immaterial. *See Grayson v. O'Neill*, 308 F.3d 808, 816 (7th Cir. 2002); *see also W. Bend Mut. Ins. Co. v. Procaccio Painting & Drywall Co.*, 928 F. Supp. 2d 976, 982 (N.D. Ill. 2013) (rejecting Rule 56(d) request where discovery "would have no bearing" on issues before the Court). And here, everything the Attorney General purports to seek is either immaterial or undisputed and already in the record.

On the one hand, with respect to the actual text and scope of City policies, there are no more facts to develop, and the legal question is ripe for decision. The text of Chicago's Welcoming City Ordinance ("WCO") is undisputed. *See* SUMF ¶¶ 5-8; RSUMF ¶¶ 7-8. And the record contains the only other City policy that provides any instruction to Chicago police officers regarding their enforcement or non-enforcement of federal immigration law, namely a single police department special order, *see* Dkt. 157-6. An unrebutted declaration confirms that the City has no other relevant policies, *see* Kaup Decl., Dkt. 156; *see also* SUMF ¶ 10, and in any event, Chicago police directives are all publicly available (http://directives.chicagopolice.org/directives/).[7] Nothing more is needed. *See, e.g.*, *Transport Leasing/Contract, Inc. v. Methvin*, 1992 WL 67846, at *2 (N.D. Ill. Mar. 24, 1992) (party need not "prove a negative," *i.e.*, the non-existence of documents).[8]

[7] In addition, the Attorney General had already requested and received before filing his response to Chicago's summary judgment motion, "[a]ll documents reflecting any orders, directives, instruction, or guidance to [Chicago] law enforcement employees … whether formal or informal" pursuant to a request the Department made outside of the litigation. *See* https://www.justice.gov/opa/press-release/file/1028311/download.

[8] Indeed, the Attorney General appears to concede this point; neither his brief nor the declaration that Rule 56(d) requires (Dkt. 169), assert a need for more discovery to confirm whether additional relevant City

Unable to contest that all relevant City policies are in the record, the Attorney General implies that discovery might be necessary to *understand* the contents of City policies. At the outset, the Attorney General has already requested and received a formal legal opinion on that very subject from the City's Corporation Counsel, and it is in the record, *see* Dkt. 152 at 14. But in any event, the meaning of legislative text, and the determination of whether two pieces of text are in conflict, are legal questions for the Court. *See*, *e.g.*, *Alvarado-Fonseca v. Holder*, 631 F.3d 385, 389 (7th Cir. 2011) (interpretation of INA is a legal question); *see also, e.g.*, *Baker v. Lindgren*, 856 F.3d 498, 502 (7th Cir. 2017) (interpretation of federal law and rules is a "question of law"). Thus, the Attorney General, in moving to dismiss, asked the Court to compare his new conditions to the JAG statute and § 10102(a)(6) and resolve whether the former are consistent with the latter, *see* Dkt. 139 at 5-9—all with no discovery into "the day-to-day reality of what is understood and practiced among the rank-and-file" at the Department (or, for that matter, ICE), *see* Opp. 24. Similarly, Chicago's declaratory judgment request asks this Court to consider whether City policy is consistent with § 1373.[9] With no more facts to develop, this Court can now resolve that question as a matter of law.

On the other hand, while there might well be outstanding factual questions regarding the on-the-ground practices and conduct of particular Chicago police officers, such questions are immaterial to the legal issue before this Court. The Attorney General argues that such discovery might be relevant because "Section 1373 speaks … to any restriction on information-sharing by any

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policies exist. *See Buquer v. City of Indianapolis*, 2012 WL 829666, at *2 (S.D. Ind. Mar. 9, 2012). And the half-hearted statement in a different filing—his Rule 56.1 response—that he "lacks sufficient information to form a belief" on this issue and "*may* request discovery on it," RSUMF ¶ 10 (emphasis added), falls far short of satisfying the requirements of Rule 56(d), let alone establishing a material fact dispute sufficient to defeat summary judgment. *E.g.*, *Dumas v. Dovenmueble Mortg. Inc.*, 2005 WL 1528262, at *1 (N.D. Ill. June 23, 2005).

[9] In no event should the Court accept the lopsided position that the lawfulness of Chicago's policies depends on discovery into "the day-to-day reality of what is understood and practiced among the rank-and-file" but the lawfulness of the Attorney General's policies does not. Indeed, absent summary judgment, Chicago's need for discovery would be substantial; for example, to determine whether the conditions are germane to the JAG program for Spending Clause purposes, Chicago would need discovery into the facts (or lack thereof) behind the Attorney General's assertion that his conditions somehow promote local safety or crimefighting.

'entity or official.'" Opp. 24 (quoting 8 U.S.C. § 1373(a)). But that gets it exactly backwards. Section 1373, in the very text quoted by the Attorney General, speaks of "officials" as *separate actors* from "local government entit[ies]." This lawsuit involves *Chicago's* JAG money, and *Chicago's* compliance with § 1373—not whether individual officers are "prohibiting" or "restricting" Chicago employees independent of, or contrary to, formal City policy. The "on-the-ground" discovery the Attorney General seeks would be relevant only if § 1373 included an expansive vicarious liability component making the City responsible for the actions of individual employees, including for mere confusion regarding the meaning of official policy.[10] That interpretation would defy the actual text of the statute, and impose massive costs on local governments with nothing like the "unmistakable clarity" required by federalism principles. Indeed, such comprehensive liability would effectively impose a bevy of affirmative obligations—to train, instruct, and monitor employees—in violation of the anti-commandeering doctrine, *see* Dkt. 78 at 31-32, and 34 U.S.C. § 10228(a), *see supra* p. 12-13.[11]

In fact, § 1373 is a narrow and carefully worded law. It only bars "prohibiting" or "restricting" other entities or officials from taking specified actions with regard to citizenship or immigration-status information. The only way Chicago *itself* can prohibit or restrict its officers from sharing covered information with the federal government is by adopting policies that apply to those officers. And because Chicago's policies are in the record, no further discovery is necessary. The delay the Attorney General seeks would only permit him to continue his improper efforts to reverse

[10] The Attorney General argues (at 24) that, regarding the collection of immigration status information, Chicago's "working practice … diverge[s] from what City policy facially contemplates." But, even if correct, that goes only to the collection of status information. It has nothing to do with the relevant question for § 1373, namely restrictions on communications *with ICE*. And in any event, the Attorney General does not describe an actual divergence between policy and practice; Lieutenant Hannigan declared that it is engrained practice not to ask for status information, and, consistent with that general statement, the policy provides that officers should not seek such information, with a few exceptions. *Compare* Dkt. 155, ¶¶ 4-5 *with* Dkt. 157-6.

[11] The Attorney General asserts that arguments concerning whether § 1373 requires the City to affirmatively instruct its employees are moot, because Chicago has already done so once. Opp. 21 n.10. That is wrong; at a minimum, if § 1373 requires Chicago to communicate its interpretation of the WCO, then Chicago might well be subject to a continuing obligation to make subsequent communications as it hires new employees.

Chicago's chosen law enforcement policies by withholding JAG and COPS funds. The Court should reject this gambit.

C. Chicago Complies With § 1373

On the merits, a declaratory judgment should issue, because Chicago's policies comport with § 1373. The Attorney General (at 21-22) trains his fire on a single provision of the WCO (§ 042), effectively conceding that § 020 and § 030 pass muster. Sections 020 and 030 should therefore be declared compliant with § 1373.

And as for § 042, the Attorney General's arguments fail. Section 042 limits Chicago police from sharing information regarding a detainee's custody status or release date. *See* Dkt. 157-4. Section 1373, however, prohibits only restrictions on sharing "information regarding citizenship or immigration status." *See* Dkt. 152 at 15-17. The Attorney General has now abandoned any argument that this language itself encompasses custody status or release date, relying instead on loose statements about the structure and purpose of the INA. But statutory interpretation begins, and in this case ends, with the text. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (interpretation "must begin with the language employed by Congress"); *Davel v. Sullivan*, 902 F.2d 559, 562 (7th Cir. 1990) ("The words of the statute, not the words of the legislative history, control statutory interpretation."); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text"). Here, the text is clear and must be given effect: It covers only two specific types of information—"immigration status" and "citizenship"—and not, as the Attorney General has argued, any "information that assists the federal government in carrying out its statutory responsibilities" under the INA, Dkt. 139 at 19-20. That ends the matter.

As with the Attorney General's *ultra vires* grant conditions, his improper leveraging of § 1373 is an affront to federalism principles, and inconsistent with the laws as Congress wrote them. This Court should declare Chicago's policies compliant with § 1373.

CONCLUSION

For these reasons, Chicago's cross-motion for summary judgment should be granted.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

On the 21st day of March, 2018, I electronically filed the foregoing brief using the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by that system.

/s/ Edward N. Siskel
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