**No. 18-1103**

# IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITY OF PHILADELPHIA,

Plaintiff-Appellee,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

## BRIEF FOR APPELLANT

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## STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction on November 15, 2017. App. 3. The government timely filed its notice of appeal on January 16, 2018. App. 1; Fed. R. App. P. 4(a)(1)(B)(iii). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

The Department of Justice administers the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, a nationwide grant program through which the Department provides funding to state and local law enforcement for a variety of purposes, including crime prevention, prosecution, detention, and victim services. Grant applicants 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). As part of the FY 2017 Byrne JAG application, Philadelphia and other applicants are required to certify that they comply with 8 U.S.C. § 1373, which prohibits states and localities from restricting the sharing of "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with federal authorities.

Before the Department had made a decision on Philadelphia's FY 2017 Byrne JAG application, the district court declared that Philadelphia is in "substantial compliance" with § 1373 and issued a preliminary injunction barring the Department from rejecting Philadelphia's FY 2017 application or withholding FY 2017 Byrne JAG

funds from Philadelphia on the basis of noncompliance with the statute. The issues presented are:

1. Whether the district court erred in preempting final agency action on Philadelphia's FY 2017 grant application and resolving disputed facts outside of the statutorily-designated administrative process. [Ruled upon at App. 122-27].

2. Whether the district court erred in applying the doctrine of substantial compliance without addressing the federal government's asserted grounds of noncompliance, and where any noncompliance with federal law would be the result of Philadelphia's deliberate choices, not inadvertence or mistake. [Ruled upon at App. 122-27].

## STATEMENT OF RELATED CASES

This case has not previously been before this Court. Four other cases pending in district courts outside this circuit involve challenges to the Attorney General's authority to require recipients of Byrne JAG funds to certify their compliance with 8 U.S.C. § 1373. *See City of Chicago v. Sessions* (N.D. Ill. No. 17-cv-5720); *California v. Sessions* (N.D. Cal. No. 17-cv-04701); *City & County of San Francisco v. Sessions* (N.D. Cal. No. 17-cv-04642); *City of West Palm Beach v. Sessions* (S.D. Fla. No. 18-cv-80131).

## STATEMENT OF THE CASE

### A. Statutory Background

The Department of Justice administers the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program. The Byrne JAG 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 "in such form as the Attorney General may require." *Id.* § 10153(A). Among other requirements, applicants must certify that they "will comply with" the Byrne JAG statute "and all other applicable Federal laws." *Id.* § 10153(A)(5)(D).

In both 2016 and 2017, the Department identified 8 U.S.C. § 1373 as an "applicable Federal law[]" under the Byrne JAG program. As relevant here, § 1373(a) provides that state and local governments and officials "may not prohibit or in any way restrict" the sharing of "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with federal immigration authorities. 8 U.S.C. § 1373(a). And § 1373(b) provides that "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from . . . requesting or receiving information regarding the immigration status . . . of any individual."

Jurisdictions that fail to meet the application requirements set by the Attorney General for the Byrne JAG program can be denied funding. Before any action is

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

taken, however, jurisdictions at risk of denial are provided with an administrative mechanism for correcting any flaws in the application. The Byrne JAG statute requires that "[t]he Attorney General shall not finally disapprove any application (or any amendment to that application) submitted under this part without first affording the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration." 34 U.S.C. § 10154. A dissatisfied applicant may then seek review of the determination under the Administrative Procedure Act (APA).

### B. Factual Background

In May 2016, the Department's Office of the Inspector General issued a report raising concerns about compliance with § 1373 by ten jurisdictions receiving Department grants, including Philadelphia. App. 216-31. As a result, in FY 2016, the Department included a condition in the Byrne JAG awards for these jurisdictions requiring them to review their compliance with § 1373 and to submit a letter from counsel explaining the jurisdiction's basis for its belief that it complied. App. 214. To comply with the FY 2016 requirement, Philadelphia provided a letter from its city solicitor in June 2017 certifying its compliance with § 1373. *Id.* at 243-58.

A few weeks later, in preparation for the FY 2017 grant year, the Department announced that grant recipients would be required to certify their compliance with § 1373 in connection with their applications for Byrne JAG funds (the "certification

condition").[2] App. 272-73, 286-87. The condition is intended to ensure that state and local law enforcement grant recipients share information about aliens who have committed or are suspected of having committed crimes—a category of persons that both local and federal law enforcement have an interest in detaining. *See, e.g.*, 8 U.S.C. § 1231(a)(1)(B)(iii) (immigration removal period "begins on . . . the date the alien is released from [state or local criminal] detention"); *id.* § 1231(a)(4) (Department of Homeland Security, except in limited circumstances, "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment").

In October 2017, the Department initiated an administrative process to determine whether Philadelphia's FY 2016 certification of compliance with § 1373 was accurate. That process began with a letter informing the City of the Department's "preliminary assessment" that Philadelphia "appears to have laws, policies, or practices that violate 8 U.S.C. § 1373." App. 357.[3] The letter raised concerns regarding two city policies embodied in city executive orders or police commissioner memoranda regarding information-sharing. The first was a

[2] The Department also announced two new special conditions on Byrne JAG funding related to cooperation between local authorities and federal immigration officials. Philadelphia's lawsuit challenges those conditions as well, but those conditions were not enjoined by the district court and are not at issue in this appeal.

[3] The Department sent similar letters to other jurisdictions identified in the Inspector General's report, and in some cases those letters informed the jurisdiction that no violations had been found, *see* App. 218, 355; Press Release, U.S. Dep't of Justice (Oct. 12, 2017), https://go.usa.gov/xQate.

Philadelphia executive order stating that the City would not provide the federal government with notice of an individual's pending release from custody unless the individual was convicted of a first- or second-degree felony involving violence and the federal government obtained a judicial warrant. *Id.*; *cf.* 8 U.S.C. § 1231 (removal period triggered by release from state custody). The second was a prohibition on sharing the immigration status of perpetrators of crime if the perpetrator is also a victim of crime. App. 357-58.

The Department's letter also raised questions as to the manner in which the City was interpreting and implementing three other policies. Two of these policies generally restrict the disclosure or transmission of information about an immigrant unless required by law or subject to certain exceptions, App. 358-59, while the third restricts a police officer's ability to "inquire about a person's immigration status," except in certain limited circumstances, App. 358. The letter invited Philadelphia to submit additional information about these policies to enable the Department to evaluate the city's compliance with § 1373 "before [the Department] reaches its final determination." App. 359. The City provided a response to the preliminary assessment in late October of 2017. App. 365-68.

### C. Prior Proceedings

On August 30, 2017, before submitting its FY 2017 Byrne JAG application and before receiving the Department's October 2017 preliminary assessment, Philadelphia instituted this suit. As relevant here, Philadelphia asserted that § 1373 is not an

"applicable Federal law[]" within the meaning of 34 U.S.C. § 10153(A)(5)(D); that the Attorney General otherwise lacked statutory authority to impose the condition; that imposition of the condition was arbitrary and capricious; and that the condition exceeded the government's powers under the Spending Clause and violated the Tenth Amendment. Philadelphia also sought a declaration from the district court that it in fact complies with § 1373. The district court conducted a hearing on the City's request for a preliminary injunction, at which it heard testimony about the City's policies toward aliens and the City's cooperation with federal immigration enforcement efforts.

The district court issued a 128-page opinion laying out its views on a wide range of issues related to federal immigration policy and the criminal justice system in Philadelphia. *See, e.g.*, App. 93-94 (comparing the prior and "current administration's" immigration enforcement priorities and opining that the "new conditions will 'widen the net' of immigration enforcement unfairly").[4] The district court opined that "immigration law does not impact the criminal justice system"; "[i]mmigration law has nothing to do with the enforcement of local criminal laws"; "it is simply not the case that local criminal justice actors in Philadelphia care about federal immigration laws"; and "the pursuit of criminal justice [does not] in any way rel[y] on the enforcement of

[4] The determination that § 1373 is an applicable federal law under the Byrne JAG program was first made by the prior administration, *see* App. 233-34, and the district court noted that a condition requiring a review of compliance with § 1373 was included in Philadelphia's FY 2016 Byrne JAG award, App. 18; *see* App. 214.

immigration law." App. 104. The district court also drew sweeping conclusions relying on "findings" based not on record evidence submitted by the parties, but on the court's own "considerable research" outside the record, including "newspaper accounts of the discussions of Congress over 'immigration reform,'" App. 50-51, and the district judge's own "personal experience" as a state and federal prosecutor, App. 53 ("[T]he undersigned notes his experience as an Assistant District Attorney in Philadelphia, and also serving as United States Attorney in this district, which has given me substantial experience in the workings of the criminal justice system, the availability of judicial warrants, the cooperation between federal and local officials, the data contained on computer-based information about criminal histories, of people arrested, likely including their immigrant status or at least data showing that they are immigrants, and whether legal immigrants, or visa overstayers.").

The district court granted the City's motion for a preliminary injunction in part, barring the Department from "rejecting Philadelphia's FY 2017 application for Byrne JAG funding or withholding any FY 2017 Byrne JAG funding from Philadelphia based on Philadelphia's certification of compliance with 8 U.S.C. § 1373." App. 3.

The district court ultimately based the injunction on its conclusion that the City is in "substantial compliance" with § 1373. App. 122. The court stated that under the doctrine of substantial compliance as developed in the area of contract law, "minor noncompliance with the terms of a contract may be excused." App. 126. The court recognized that it had found no precedent "that would allow or deny this concept in a

similar case." App. 127. Nonetheless, "[e]xercising its discretion, and noting the hesitancy to make firm decisions on some of the legal issues in this case, but finding that it is likely the City will prevail on one and possibly more of its contentions, the Court will apply the doctrine of substantial compliance and find that the City is in substantial compliance, as noted in the Findings of Fact." *Id.*

The district court did not specify which of its factual findings supported its conclusion that Philadelphia is in substantial compliance with § 1373. And none of the factual findings addressed the five policies that the Department had identified in its letter. Rather, as discussed above, the factual findings reflected a wide-ranging evaluation of a host of immigration-related policy issues. The court concluded that disclosing the immigration status of incarcerated aliens to Immigration and Customs Enforcement (ICE) "has nothing to do with law enforcement, and will not prevent crime," and that Philadelphia has "adopted policies designed to improve re-entry, to encourage non-criminal behavior by individuals who were previously convicted of a crime, whether citizens or aliens, and to preserve public health." App. 48. The district court also concluded that "[t]he City's policy of respecting judicial warrants serves a valid purpose and will enable ICE to fully perform its immigration and law enforcement functions." App. 49. The court stated its belief that ICE has "access to national databases" that provide it with enough information to make it unnecessary "for the City to designate individuals who are subject to a specific release date," *id.*, and that "[o]btaining a judicial warrant is not a burdensome procedure," App. 52.

Although the balance of the district court's opinion discussed several of Philadelphia's claims in some detail, the court did not rely on any of them as the basis for its injunction. The court declined to rule on whether the Department had the statutory authority to require a certification of compliance with § 1373. The court stated that the Department's argument that § 1373 qualified as an "applicable Federal law[]" under the Byrne JAG statute, 34 U.S.C. § 10153(A)(5)(D), was "plausible" and that the issue was a "close call," App. 64-65.

The district court also discussed Philadelphia's argument that the certification condition is arbitrary and capricious, App. 68-74, stating that although many of the Department's concerns about local cooperation with immigration enforcement efforts were "reasonable," App. 68, "certifying compliance with Section 1373 does not have a rational connection" to remedying the Department's concerns, App. 68-69. The court ended its discussion by saying that "this Court concludes that the Certification Condition is arbitrary and capricious under 5 U.S.C. § 706(2)(A)." App. at 74. As noted, however, the court's injunction ultimately did not rely on this ground, and it did not preclude the government from requiring Philadelphia to certify compliance with § 1373. Instead, the court premised its holding on its conclusion that the City was in substantial compliance with that provision.

The district court also considered Philadelphia's claims that the certification condition exceeds the federal government's authority under the Spending Clause and violates the Tenth Amendment. The court stated that it was a "close question"

whether the condition was sufficiently related to the federal interest in the Byrne JAG program to survive Spending Clause scrutiny, and declined to make a ruling on that issue. App. 107-08. Similarly, the court observed that it "need not make a ruling on the merits" of Philadelphia's argument that the condition was so ambiguous as to be impermissible under the Spending Clause, but "conclude[d] the City is likely to prevail on its argument that the Attorney General's decision to condition receipt of JAG funds on certifying compliance with 8 U.S.C. § 1373 may be inconsistent with the requirement that all conditions on funds be unambiguously imposed by Congress." App. 113. The court likewise "conclude[d]," but "[w]ithout specifically so holding," "that Philadelphia is likely to succeed on the merits of its Tenth Amendment challenge." App. 120.

## SUMMARY OF ARGUMENT

**1.** It is axiomatic that under the Administrative Procedure Act courts review only final agency action, and that they conduct that review on the basis of the administrative record that formed the basis of the agency's decision. *See* 5 U.S.C. § 704; *Christ the King Manor, Inc. v. Secretary U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 305 (3d Cir. 2013). The district court's injunction disregards both of these fundamental premises. The Department of Justice has taken no action on Philadelphia's FY 2017 Byrne JAG application. Before the Department could "finally disapprove" Philadelphia's application for funds on any basis, including failure to comply with 8 U.S.C. § 1373, it would be statutorily required to provide the City with

notice and an opportunity to correct deficiencies in the application. 34 U.S.C. § 10154. If the administrative process resulted in disapproval of Philadelphia's application, Philadelphia would then be able to appeal that final agency action. The City cannot bring suit in advance of any final agency action, short-circuiting the procedures provided by the governing statute.

By permitting the City to bypass these procedures and sue prior to final agency action, the district court displaced the agency's role in compiling the record that would form the basis for judicial review (assuming a determination adverse to the City), and disregarded its own obligation to conduct that review in the context of a concrete agency determination.

**2.** Even assuming that the district court properly allowed the City to challenge the § 1373 condition prior to the Department's review and determination, it had no basis for concluding that Philadelphia is in "substantial compliance" with the statute's requirements. The Department identified five City policies that raised concerns regarding compliance with § 1373. The district court's factual findings have no bearing on whether Philadelphia's interpretation and implementation of those policies in fact constitutes compliance, or even substantial compliance, with the statute.

The district court's substantial compliance ruling does not reflect a conclusion that the City is attempting to comply with § 1373 and has failed to do so only in minor respects. The court instead determined the extent to which, in its own view, compliance with § 1373 constituted good public policy, and it concluded that the

City's noncompliance was excused based on those policy grounds. The court had no such authority.

## STANDARD OF REVIEW

In assessing the grant of a preliminary injunction, this Court reviews legal conclusions de novo, findings of fact for clear error, and the decision to grant a preliminary injunction for abuse of discretion. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010).

## ARGUMENT

### I. The District Court Erred in Evaluating Philadelphia's Compliance with 8 U.S.C. § 1373 in Advance of Any Final Agency Action and Without the Benefit of the Record That Would Form the Basis for That Action

**A.** Under the APA, courts may only review "final agency action." 5 U.S.C. § 704; *see American Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urban Dev.*, 170 F.3d 381, 389 (3d Cir. 1999). Final agency action has two components. First, it "must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 247 (3d Cir. 2011) (quoting *TSG Inc. v. U.S. EPA*, 538 F.3d 264, 267 (3d Cir. 2008)). Second, the challenged "action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* The finality requirement ensures that judicial review will not "disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983).

The Supreme Court and this Court have repeatedly recognized the importance of the finality requirement as a gateway to judicial review of agency action. In *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), the Supreme Court held that issuance of a complaint initiating enforcement proceedings before an agency is not a final agency action, observing that any other conclusion risked "interference with the proper functioning of the agency" and "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Id.* at 242. Similarly, this Court has stated that preliminary agency decisions that initiate "a process that may or may not lead to an ultimate enforcement action" do not constitute final agency action. *University of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 69 (3d Cir. 2003). Thus, as particularly relevant here, this Court in *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998), recognized that a notice of noncompliance was not final agency action, as it merely initiated "a multi-step statutory procedure which must be followed" before agency action could occur. *Id.* at 162.

When a court undertakes review of the final agency action, it conducts that review on the basis of "'the administrative record [that was] already in existence' before the agency, not 'some new record made initially in the reviewing court,'" *Christ the King Manor, Inc. v. Secretary U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 305 (3d Cir. 2013) (quoting *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851 (3d Cir. 1999)). The basic "task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to

the reviewing court." *Horizons Int'l, Inc. v. Baldridge*, 811 F.2d 154, 162 (3d Cir. 1987) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citation omitted)).

**B.** The court's injunction here not only disregarded the finality requirement but affirmatively precluded "the 'consummation' of the agency's decisionmaking process." *Minard Run*, 670 F.3d at 247. Each applicant for Byrne JAG funds is required to certify compliance with the provisions of the Byrne JAG statute and "all other applicable Federal laws." 34 U.S.C. § 10153(A)(5)(D). Before the Attorney General can "finally disapprove" any application for Byrne JAG funds, he must "afford[] the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration." 34 U.S.C. § 10154. Thus, before disapproving an application on the basis of an insufficient or inaccurate certification of compliance with any statute—including 8 U.S.C. § 1373—the Attorney General must provide an administrative process that permits the applicant to resolve concerns with the certification. Until the Attorney General awards a grant, or until the Attorney General "finally disapproves" an application after completion of the administrative process (including any administrative appeals), no final agency action has occurred.

The district court issued its injunction before the Department had even initiated an administrative process that would be a predicate to the possible disapproval of Philadelphia's FY 2017 application. *See* 34 U.S.C. § 10154. Rather

than await the outcome of that process, the district court undertook a wholly separate inquiry, compiling its own evidentiary record through the preliminary injunction process and combining that record with newspaper articles and its own "personal experience" as a prosecutor, App. 53, to preemptively conclude that Philadelphia was in "substantial compliance" with § 1373 and thus satisfied the FY 2017 Byrne JAG certification requirement. This procedure disregards the admonition that in reviewing agency action "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

At no point did the district court reconcile its substantial compliance holding with the fact that no final agency action had been taken on Philadelphia's compliance with § 1373 or on Philadelphia's FY 2017 Byrne JAG application. The court's only discussion of final agency action concluded that imposition of the certification requirement on FY 2017 Byrne JAG applicants was final agency action. App. 55-57. Whether or not that conclusion is correct, it is ultimately irrelevant to the injunction the district court issued. The court did not hold that the Department lacked the authority to impose a requirement that Philadelphia certify compliance with § 1373. Rather, the court concluded that Philadelphia fulfilled the requirement and could not

have its application disapproved because of noncompliance. On these questions, there has been no final agency action.[5]

The district court thus contravened the limitation of APA review to consideration of final agency action, and departed from the fundamental principle that judicial review should take place on the basis of the record compiled in the administrative proceeding. In the event that Philadelphia's grant application is ultimately disapproved, Philadelphia can challenge that determination based on the administrative record, and a court can determine whether the Department's ultimate reasons for disapproving the application withstand judicial scrutiny. There is no authority for resolving a hypothetical denial in advance of final agency action and compilation of a record that can furnish the basis for judicial review.

## II. The District Court Did Not Explain How Philadelphia Is in "Substantial Compliance" and That Doctrine Does Not Excuse a Party's Deliberate Failure to Comply with a Statutory Mandate

The district court acknowledged that in administrative proceedings related to the City's FY 2016 grant, the Department had identified five different Philadelphia policies that raised concerns regarding the City's compliance with § 1373. App. 21-23. For example, as the district court noted, the Department had raised concerns regarding whether Philadelphia violates § 1373 by maintaining a policy of requiring a judicial warrant before providing information about the release date of aliens who

[5] The Department's administrative process is on hold due to the district court's injunction.

might be subject to detention by federal immigration officials. Without analyzing the relationship between any of these policies and § 1373, the district court concluded that Philadelphia "substantially complies" with the statute. This conclusion not only fundamentally misunderstands the doctrine of substantial compliance, but also rests on factual findings that bear no relationship to any understanding of that doctrine.

The district court cited cases discussing notions of substantial compliance from disputes involving state contract law, insurance law, consent decrees, tax law, and wiretap law, *see* App. 122-27, but acknowledged that it knew of no precedent for applying it in a case like this one, App. 127. And the court's application of principles of substantial compliance here bears no resemblance to the way such principles are applied in other settings. The district court acknowledged that substantial compliance is only appropriately invoked "where one party to a contract has complied with the substantive requirements imposed on it but has made mistakes or omissions with respect to the procedural aspects of the agreement," and that the doctrine permits a court to "excuse[] these minor errors." App. 126. But the district court failed to explain how, for example, Philadelphia's written policies categorically restricting information shared with federal immigration authorities could plausibly be described as reflecting "mistakes or omissions with respect to . . . procedural" requirements rather than deliberate decisions to disobey the core requirements of a statute.

The cases cited by the district court underscore the incompatibility of its reasoning with other applications of principles of substantial compliance. In *Shands v.*

*Tull*, 602 F.2d 1156 (3d Cir. 1979), for example, this Court invoked the doctrine to hold that a state was in substantial compliance with a requirement that administrative appeals be adjudicated within ninety days when the state "met the ninety-day limit in 96% of the . . . appeals," and the delays affecting the plaintiffs were "no more than four to twenty-one days" past the mandated period. *Id.* at 1160-61; *see also Fortin v. Commissioner of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 793-96 (1st Cir. 1982) (examining similar programs and determining that the state was not substantially compliant with mandated hearing timelines). Other cases cited by the district court likewise apply the doctrine of substantial compliance to excuse failure of good-faith efforts to achieve perfect compliance with a goal, not to excuse deliberate decisions not to comply with a statutory requirement. *See, e.g.*, *Jeff D. v. Otter*, 643 F.3d 278, 284 (9th Cir. 2011) ("[S]ubstantial compliance 'does imply something less than a strict and literal compliance with the contract provisions but fundamentally it means that the deviation is unintentional and so minor or trivial as not "substantially to defeat the object which the parties intend to accomplish."'" (quoting *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964))); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 564-65 (4th Cir. 1994) (substantial compliance applies to clear efforts to change beneficiary of an insurance policy).

Indeed, as the district court itself recognized, App. 126, substantial compliance is inapplicable to a party's failure to fulfill substantive statutory requirements. *See Baccei v. United States*, 632 F.3d 1140, 1145 (9th Cir. 2011) ("Full compliance is

necessary when the requirement relates to the substance of the statute." (quoting *Sawyer v. Sonoma County*, 719 F.2d 1001, 1008 (9th Cir. 1983))); *State Coll. Manor, Ltd. v. Commonwealth Dep't of Pub. Welfare*, 498 A.2d 996, 999 (Pa. Commw. Ct. 1985) ("[T]he doctrine of substantial compliance will not excuse . . . failures of omission, important or otherwise, with regard to the requirements of a substantive regulation having the force and effect of law."). The district court never explained how § 1373, which forbids actions that "in any way restrict" the sharing of information regarding immigration status and serves the essential purpose of ensuring the free flow of information necessary to federal enforcement of the immigration laws, could be described as anything other than a substantive requirement for which substantial compliance is insufficient.

Even if the doctrine could appropriately be applied in this instance, the district court's factual findings did not provide the necessary foundation for concluding that Philadelphia substantially complies with § 1373. The district court did not address whether Philadelphia's policies violate § 1373. Instead, the court engaged in a standardless weighing of the benefits and burdens of complying with the statute. For example, it expressed its view that "[t]he City's policy of respecting judicial warrants serves a valid purpose and will enable ICE to fully perform its immigration and law enforcement functions," App. 49, and that "[o]btaining a judicial warrant is not a burdensome procedure," App. 52. Even setting aside the fact that the Court's policy determinations are at odds with those of Congress, *see, e.g.*, 8 U.S.C. 1226(a)

(authorizing detention of aliens based on the issuance of an administrative warrant); *City of El Cenizo v. Texas*, __ F. 3d __, 2018 WL 1282035, at *12-15 (5th Cir. Mar. 13, 2018) (holding that detention on the basis of an administrative warrant does not per se violate the Fourth Amendment), and assuming for argument's sake that these statements were correct, they would say nothing about whether the City's policy was consistent with § 1373.

Other "findings" by the district court are likewise inappropriate policy determinations and are irrelevant to the question of whether the policies identified by the Department are consistent with § 1373. The district court stated, for example, that the term "Sanctuary Cities" is "a misnomer," App. 47; that Philadelphia "has a comprehensive criminal justice system," *id.*; that ICE has access through law enforcement databases to "important facts such as medications, continuing of medication for certain diseases, etc.," App. 48; that "ICE really has no need for the City to designate individuals who are subject to a specific release date," App. 49; that "[t]here is no evidence in the record whatsoever that non-citizens in Philadelphia commit any more crimes than the citizens," App. 50; that "federal immigration authorities have, for decades, concentrated virtually exclusively on the removal of aliens who have committed crimes," *id.*; and that "the decision of the City not to make disclosure of an immigrant's status on any publicly available reports is a sound one," App. 52.

In declaring that Philadelphia "substantially complied" with § 1373, the district court did not find that the City's policies were, in fact, consistent with § 1373 or that the City departed from the statute only in minor or technical respects. The court concluded, instead, that the City was complying to the extent the court deemed necessary to advance its view of the public interest without imposing burdens on the City. That reasoning fundamentally misunderstands the relevant inquiry, and is relevant at most to whether § 1373 is good policy. Congress has already made that determination by enacting the provision.

In sum, the record provides no support for the conclusion that the City's policies are consistent with § 1373 or that the City is in substantial compliance with the statute.

## III. No Other Justification Supports the Injunction

The district court's opinion addressed a variety of other issues, but the court premised its injunction solely on the conclusion that the City was in substantial compliance with § 1373. The district court expressed its "hesitancy to make firm decisions on some of the legal issues in this case," App. 127, and while it stated that it viewed Philadelphia as likely to prevail "on one and possibly more of its contentions," *id.*, it did not specify which contentions it was referring to. The court reiterated its unwillingness to make rulings on specific legal issues at several points, noting, for example, that it "need not make a ruling on the merits of the City's 'ambiguity' challenge," but nonetheless "conclude[d] the City is likely to prevail on its argument

that the Attorney General's decision to condition receipt of JAG funds on certifying compliance with 8 U.S.C. § 1373 may be inconsistent with the requirement that all conditions on funds be unambiguously imposed by Congress." App. 113. The court also indicated that "without specifically so holding," it "conclude[d]" that the City would likely succeed on its Tenth Amendment challenge to the certification condition, stressing that it "need not analyze the City's Tenth Amendment claim in detail, as the Court will not rely on it in considering whether to grant a preliminary injunction." App. 120.

This Court need not address any of the issues discussed by the district court's lengthy opinion that did not form the basis for the injunction. It is incumbent on the district court to state clearly the reasons for granting the extraordinary relief of a preliminary injunction. Fed. R. Civ. P. 52(a)(2), 65(d)(1)(A). But in any event, the claims discussed by the district court are meritless.

The district court first suggested that the certification condition "is arbitrary and capricious under 5 U.S.C. § 706(2)(A)." App. 74. The court did not explain how this suggestion can be reconciled with the Byrne JAG statute or principles of APA review. Congress specified that Byrne JAG recipients must certify their compliance with "applicable Federal laws" as a component of the grant application. 34 U.S.C. § 10153(A)(5)(D). Thus, the relevant inquiry would be whether § 1373 is an "applicable Federal law[]" for purposes of the Byrne JAG statute—an issue the district court pointedly declined to decide. App. 64-65; *see City of Chicago v. Sessions*,

264 F. Supp. 3d 933, 943-46 (N.D. Ill. 2017) (holding that plaintiff could not demonstrate likelihood of success on the merits of its challenge to the certification condition because "the Attorney General's position is more consistent with the plain language of the statute").

In any case, there is no basis for concluding that the Attorney General's determination is foreclosed by the statute or simply unreasonable. Nothing in the Byrne JAG statute or common sense suggests that the federal government is obliged to provide law enforcement funding to municipalities that refuse to obey federal law—i.e., to provide even the very basic level of cooperation contemplated by § 1373, allowing criminals subject to removal to return to the general population and frustrating the federal government's ability to enforce the immigration laws against criminal aliens.

The district court's analysis of this issue parallels its discussion of Philadelphia's "substantial compliance." The court simply substituted its policy judgment for that of Congress and the Attorney General, declaring that "Section 1373 is far too broad" to achieve the objective of "reducing or eliminating the flow of Byrne funds to jurisdictions that do not share information about illegal aliens who commit crimes," because "Section 1373 is not limited to illegal aliens who commit crimes." App. 69. That the district court believed that the federal government's law enforcement interests should be limited to aliens convicted of crimes provides no basis for questioning the breadth of the statute enacted by Congress or inclusion of the statute

as an applicable federal law as a condition for a law enforcement grant, particularly where all of the policies at issue involve Philadelphia's sharing of information about aliens in criminal custody. The district court similarly demonstrated a fundamental misunderstanding of the question before it when it declared that the Department failed to show "a link between localities maintaining as confidential the immigration status of non-criminal aliens or citizens and increases in crime and violence," App. 70, and that the Department "entirely failed to consider an important aspect of the problem by failing to recognize how Section 1373 interferes with local policies that promote public health and safety," App. 74. No such showing is relevant to the requirement that a municipality comply with a federal statute concerning the enforcement of the immigration laws as a condition of receiving law enforcement grants.

The district court was equally wide of the mark in suggesting that the certification condition violated constitutional limitations on the scope of grant conditions. Conditions on receipt of federal funds must be unambiguously imposed to ensure that recipients "exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The solicitation documents for the FY 2017 Byrne JAG program clearly identified § 1373 as an applicable law—as did Philadelphia's FY 2016 grant, without challenge by the City. Against this backdrop, Philadelphia can hardly claim that it is "unaware" or

"unable to ascertain" whether it is required to comply with § 1373 to receive its Byrne JAG funds. *Pennhurst*, 451 U.S. at 17. Nor do the grant conditions implicate the Tenth Amendment. The Supreme Court has made clear that "a perceived Tenth Amendment limitation on congressional regulation of state affairs d[oes] not concomitantly limit the range of conditions legitimately placed on federal grants." *Dole*, 483 U.S. at 210. It is unquestionably permissible to impose an information-sharing obligation as a grant condition, and the condition here raises no constitutional concerns. *See id.* at 207-08, 210-11 (holding that a condition withholding five percent of federal highway funds from states that did not establish a minimum drinking age of twenty-one did not violate the Tenth Amendment or exceed Congress's Spending Clause authority).

## CONCLUSION

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

Respectfully submitted,

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## COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,429 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

3. On March 26, 2018, I electronically filed the foregoing brief and appendix (two volumes) with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

4. The text of the electronic version of these documents is identical to the text of the hard copies that will be provided.

5. These documents were scanned for viruses using Symantec Endpoint Protection, and no virus was detected.

*s/ Brad Hinshelwood*
Brad Hinshelwood

# ADDENDUM

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**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.