UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CITY OF PROVIDENCE and CITY OF CENTRAL FALLS, *Plaintiffs,*	
v.	C.A. No.: 1:18-cv-00437-JJM-LDA
JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States, and the UNITED STATES DEPARTMENT OF JUSTICE, *Defendants.*	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (FY 2017 BYRNE JAG PROGRAM)

INTRODUCTION

Federal courts have been a critical (and constitutionally intended) firewall between the current federal Administration and immigrants—legal, temporary, and undocumented alike. Since January 2017, federal courts have struck down attempt after attempt by the executive branch to dismember the "American Dream," a dream rooted in the Declaration of Independence, which proclaims that "all men are created equal" with the right to "life, liberty and the pursuit of happiness." Court have struck down multiple iterations of executive action—from banning travel by migrants from certain nations; dismantling the Deferred Action for Childhood Arrivals program; inhumanely separating children and parents at the border; adding a citizenship question to the United States Census; and denying the legal ability of refugees to apply for asylum; to the present issue that is before this court: whether the executive branch can condition congressional funding to local governments on the deputizing of local law enforcement as agents of the federal immigration system.

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I. SUMMARY OF FACTS AND ARGUMENT

At the center of the present controversy is the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") program, which provides federal funding for states and local governments to support a broad range of criminal-justice related activities based on their own local needs and conditions. Congress has appropriated hundreds of millions of dollars in annual grant funds to that end. From its inception, this federal funding stream has been premised on the recognition that local governments are the primary source for law enforcement policies that keep communities safe and promote trust between law enforcement agencies and the residents they serve. Indeed, the Byrne JAG program was designed to "give state and local governments more flexibility to spend money for programs that work for them rather than impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005); 151 Cong. Rec. 25, 919 (2005) ("Byrne grants fund local law enforcement to combat the most urgent public safety problems in their own communities.").

Contrary to this congressional intent, however, the United States Department of Justice ("DOJ"), under President Donald Trump's Administration, has attempted to weaponize this important source of federal funding to impose current federal immigration policies on local police departments. On the fifth day of his presidency, President Trump issued Executive Order 13768 and ordered that so-called "sanctuary jurisdictions" would not be eligible for federal grants. After this executive order was declared unconstitutional and enjoined, the DOJ tried to put a sharper point on their anti-immigrant campaign: announcing a plan to coerce local governments into enforcing the federal government's civil immigration priorities by conditioning Byrne JAG funding on compliance with immigration-related conditions that have nothing to do with the program's purpose.

On July 25, 2017, DOJ issued a press release announcing that it was imposing three immigration-related conditions on Fiscal Year ("FY") 2017 Byrne JAG funds. The conditions require states and local governments to (1) provide unfettered access to their correctional facilities for federal immigration enforcement agents (the "access condition"); (2) provide advance notice to federal immigration authorities before a suspected alien's scheduled release from custody (the "notice condition"); and (3) comply with 8 U.S.C. § 1373, which prohibits states and localities from restricting their officials from communicating with federal immigration authorities "regarding the citizenship or immigration status, lawful or unlawful, of any individual" (the "Section 1373 condition"). In conjunction therewith, DOJ is requiring certification of compliance with Section 1373 and the notice and access conditions. (These three conditions and the certifications required are referred to collectively as the "FY 2017 immigration-related conditions.)

DOJ thus forced local governments into an untenable position: accept unlawful and unconstitutional conditions that diminish their ability to design their law enforcement policies and protect their communities, or forfeit Byrne JAG funding, thus undermining the vital programs that such funding supports. DOJ's decision to impose these sweeping conditions on Byrne JAG grantees represents an unlawful, *ultra vires* attempt to force states and localities to forsake their own policy judgments and aid in federal civil immigration enforcement. Nothing in the Byrne JAG statute "grant[s] the Attorney General the authority to impose conditions that require states or local governments to assist in immigration enforcement, nor to deny funds to states or local governments for their failure to comply with those conditions." *City of Chicago v. Sessions*, 888 F.3d 272, 284 (7th Cir. 2018).

Accordingly, with this action Plaintiffs, the City of Providence ("Providence") and the City of Central Falls ("Central Falls") (collectively, the "Cities" or "Plaintiffs"), challenge these unconstitutional and illegal conditions. The Cities seek declaratory relief that the notice, access, and Section 1373 conditions are unlawful, injunctive relief enjoining the DOJ from imposing these conditions on Byrne JAG grantees, and mandamus relief ordering DOJ to disburse FY 2017 Byrne JAG funding without regard to these conditions.

Now, Plaintiffs move this Court for partial summary judgment, pursuant to Federal Rule of Civil Procedure 56(a), because they are entitled to judgment as a matter of law that the immigration-related conditions that DOJ has imposed on FY 2017 Byrne JAG funds are unlawful.[1] *See, e.g., States of New York v. Dep't of Justice*, --- F. Supp. 3d ---, No. 18-cv-6471-ER, 2018 WL 6257693, at *1 (S.D.N.Y. Nov. 30, 2018) (concluding, "[c]onsistent with every other court that has considered these issues, … that [DOJ] did not have lawful authority to impose these [immigration-related] conditions").

As explained more fully *infra*, there are several reasons for the conditions' illegality. First, DOJ has no statutory authorization to impose the FY 2017 immigration-related conditions. An "agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). Here, nothing in the Byrne JAG statute's text, structure, purpose, or history suggests that Congress granted the DOJ authority to prescribe generally applicable substantive conditions like the notice, access, and Section 1373 conditions at issue here. *See City of Chicago*, 888 F.3d at 285-87; *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 321-22 (E.D. Pa. 2018). Second, the immigration-related conditions violate 34 U.S.C. § 10228(a), which is codified in the same chapter of the U.S.

[1] This Court has entered the parties' agreed-to Stipulation and Order bifurcating the dispositive briefing on Plaintiffs' FY 2017 and FY 2018 claims. (ECF No. 19.)

Code as the Byrne JAG statute and provides that "[n]othing in this title or any other Act shall be 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 political subdivision thereof." Third, because Congress did not authorize DOJ to impose conditions on the Byrne JAG program, DOJ's actions violate the separation of powers between Congress and the Executive. Fourth, the Section 1373 condition is invalid because Section 1373 is unconstitutional. *See South Dakota v. Dole*, 483 U.S. 203, 210-211 (1987) (federal government cannot impose unconstitutional conditions); *Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1478 (2018) (Congress runs afoul of the anti-commandeering principles of the Tenth Amendment when it "unequivocally dictates what a state legislature may and may not do"). Fifth, because the challenged conditions are ambiguous and unrelated to the purposes of the Byrne JAG program, they run afoul of the Spending Clause. *See Dole*, 483 U.S. at 207-08. Finally, the conditions are arbitrary and capricious because the DOJ imposed them without any explanation, reasoning, or opportunity for exchange with state or local governments regarding the likely impact of the conditions on state and local efforts to promote public safety. *See City of Philadelphia*, 309 F. Supp. 3d at 323-325 (holding that the FY 2017 immigration-related conditions are arbitrary and capricious); *City of Philadelphia*, 280 F. Supp. 3d 579, 620-25 (E.D. Pa. 2017) (same).

II. FACTUAL BACKGROUND

A. The Byrne JAG Program

The Byrne JAG program has its origins in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title I, 82 Stat. 197 (1968) (the "1968 Act"), which created the first block grants for states and localities to use for law enforcement and criminal justice programs.[2] Recognizing that "crime is essentially a local problem that must be dealt with by state and local governments," 82 Stat. at 197, Congress designed the grant to provide a reliable funding stream that states and localities could use in accordance with state and local law enforcement policies.[3] (Statement of Undisputed Facts ("SUF") ¶ 1.)

To ensure federal deference to local priorities, the 1968 Act prohibited federal agencies and executive branch officials from using law enforcement grants to "exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof." *Id.* § 518(a), 82 Stat. at 208. Although Congress repeatedly has modified the structure and terms of the law enforcement grants authorized under Title I of the 1968 Act, the prohibition originally set forth in § 518 of the 1968 Act remains in effect, with virtually no modification, and is now codified in the same chapter of the U.S. Code as the Byrne

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[2] *See* Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, 1179 (1979) (amending Title I of the 1968 Act and reauthorizing law enforcement block grants to states and local governments); Justice Assistance Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2077-85 (1984) (same); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, pt. E, 102 Stat. 4181, 4329 (1988) (amending Title I of the 1968 Act and creating a formula law-enforcement grant); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006) (amending Title I of the 1968 Act and creating the modern Byrne JAG program).

[3] *See, e.g.*, S. Rep. No. 90-1097, at 2 (1968) (stating that Congress sought to encourage States and localities to adopt programs "based upon their evaluation of State and local problems of law enforcement"); *see also Ely v. Velde*, 451 F.2d 1130, 1136 (4th Cir. 1971) (reviewing the legislative history of the 1968 Act and concluding that "[t]he dominant concern of Congress apparently was to guard against any tendency towards federalization of local police and law enforcement agencies").

JAG program. *See* 34 U.S.C. § 10228(a). (SUF ¶ 6.) The full text of Section 10228(a) provides: "Nothing in this chapter or any other Act shall be 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." *Id.*

Congress codified the modern Byrne JAG program in 2006.[4] 34 U.S.C. §§ 10151-58. (SUF ¶ 1.) Like its predecessors, Byrne JAG aims to "give state and local governments more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005). (SUF ¶ 1.) To that end, the Byrne JAG statute gives recipients substantial discretion to use funds for eight "broad purposes," *id.*—namely: (1) law enforcement, (2) prosecution and courts, (3) crime prevention and education, (4) corrections and community corrections, (5) drug treatment, (6) planning, evaluation, and technology improvement, (7) crime victim and witness programs, and (8) mental health programs, including behavioral programs and crisis intervention. 34 U.S.C. § 10152(a)(1). (SUF ¶ 2.)

DOJ is required by law to issue grants in "accordance with the formula" set forth in the Byrne JAG statute. *Id.* (SUF ¶ 3.) That formula determines the distribution of Byrne JAG funds to state and local governments based on their population and relative levels of violent crime and

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[4] The program is named after a former New York City police officer who was killed in the line of duty while protecting a Guyanese immigrant who was acting as a cooperating witness. *See About Officer Byrne*, https://goo.gl/pLm8JM (last visited August 8, 2018), *see also Arjune Enters Plea of Guilty in Arrest Case,* NEW YORK TIMES (1989), *available at* https://www.nytimes.com/1989/12/16/nyregion/arjune-enters-plea-of-guilty-in-arrest-case.html (last visited August 8, 2018). Congress appropriated for the program—which consolidated the existing Byrne JAG formula program with another law enforcement block grant program—in an appropriations act passed on December 8, 2004. *See* P.L. 108-447, 118 Stat. 2809, 2863 (Dec. 8, 2004). Thus, although the program was not codified until 2006, some states began receiving awards under the program in FY 2005.

is explicitly enumerated in 34 U.S.C. § 10156. (SUF ¶ 3.) Of the money allocated to each state, sixty percent of the funding "shall be for direct grants to States," *id.* § 10156(b)(1), and forty percent "shall be for grants" directly to localities, *id.* § 10156(b)(2), (d). Each state is required to allocate a portion of its award to localities within the state. *See id.* § 10156(c)(2). Thus, some localities are both direct grant recipients and subgrantees of the states. The Cities are direct grant recipients only.[5] (SUF ¶¶ 27, 48.)

Unlike *discretionary* grant programs, which agencies award on a competitive basis, "formula grants … are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula." *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989). Thus, if a grantee satisfies the statutory requirements, it is entitled to receive what the formula dictates. (SUF ¶¶ 3-4.) Under the Byrne JAG statute, state and local governments are entitled to their share of the formula allocation as long as they use the funds to further one or more of the eight broadly defined goals, *see* 34 U.S.C. § 10152(a)(1)(A)-(H), and their applications contain a series of statutorily prescribed certifications and attestations, *see id.* § 10153(a). (SUF ¶ 4.)

States and localities are required to submit an application to receive Byrne JAG funds each fiscal year. *See id*. § 10153(a). (SUF ¶ 4.) The application must include the following items, among others: a certification that program funds will not be used to supplant state or local funds, *id*. § 10153(a)(1); an assurance that the application was made available for comment by the public, and by neighborhood or community-based organizations, *id*. § 10153(a)(3); an assurance that the applicant will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require," *id*. § 10153(a)(4); and a

[5] In the past, Central Falls has been a direct grant recipient and subgrantee of Byrne JAG funds. Since 2014, however, it has been only a direct recipient.

certification that programs to be funded meet the requirements of the Byrne JAG statute, that all the information in the application is correct, that there has been appropriate coordination with affected agencies, and that "the applicant will comply with all provisions of this part and all other applicable Federal laws," *id*. § 10153(a)(5). Importantly, the Byrne JAG statute does not include any provision expressly authorizing DOJ to impose conditions on Byrne JAG funding. (SUF ¶ 5.)

B. The Cities' Use of Byrne JAG Funding

For nearly fifty years, the states and local governments have used grant funds received under Byrne JAG and its predecessor grant programs to support a broad array of critical law enforcement programs tailored to local needs. Providence and Central Falls are no exception.

1. City of Providence

Providence is the state capital of Rhode Island and the third largest city in New England, with a population of approximately 180,393, as estimated by the U.S. Census Bureau as of July 1, 2017.[6] According to the 2017 American Community Survey data, Providence is home to a diverse community, with a population that is approximately 42% Hispanic or Latino, 34% White, 13% Black, 6% Asian, and 3% Multi-Racial.[7] Over 48% of Providence residents speak a language other than English, *see id.*,[8] compared to just 22% of residents statewide. *See id.*[9] Providence is one of the poorest cities in the Northeast, with approximately 27% of its residents

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[6] *See* https://www.census.gov/quickfacts/providencecityrhodeisland (last visited Dec. 5, 2018).

[7] *See* https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2017/ (select state: Rhode Island and place: Providence) (follow link for "Demographic Characteristics") (last visited December 14, 2018).

[8] *See id.* (follow link for "Social Characteristics").

[9] *See* https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2017/ (selected state: Rhode Island) (follow link for "Social Characteristics") visited December 14, 2018).

receiving income below the federal poverty level. *See id.*[10] Despite these financial challenges, the City's community-oriented police policies have helped reduce the rate of crime by 32% between 2011 and 2017. (*See* Affidavit of Commissioner of Public Safety Steven Paré, ¶ 18, at P7—hereinafter "Paré Affidavit;" SUF ¶¶ 32, 43.)

As a diverse city with a significant immigrant population, Providence has used Byrne JAG funding for a variety of purposes, including overtime compensation for targeted patrols in areas known for criminal activity, training of police department personnel, and the development of a gang intervention unit and database (now known as an Intelligence Assessment Database) in order to monitor and curb the criminal activity of highly organized gangs operating in Providence. (*See* Paré Affidavit, ¶ 21, at P7.) Providence has received Byrne JAG awards every year since at least FY 2005 and has never had any conflicts with the federal government in obtaining Byrne JAG funds. (*See* Paré Affidavit, ¶¶ 19-20, at P7; SUF ¶¶ 24-25.)

On June 26, 2018, DOJ awarded Providence with Byrne JAG funding for FY 2017 in the amount of $212,112. (*See* FY 2017 Providence Award Letter, at P74; SUF ¶ 26.) For the FY 2017 grant cycle, Providence plans to use its Byrne JAG funding to support a number of criminal justice priorities. In particular, Providence plans to use FY 2017 Byrne JAG funding to: (1) cover overtime expenses incurred by the investigative and patrol divisions of the Providence Police Department in order to conduct targeted patrols in known "hotspot" areas; (2) contract with a part-time bilingual police liaison in order to assist with providing crisis intervention, serve as an interpreter, and interview potential clients and recommend appropriate program assignments; and (3) cover the cost of placing a "public notice ad" in the locality's prominent news publication. (*See* Paré Affidavit, ¶ 23, at P7-8; SUF ¶ 28.) Providence's deadline to accept the FY 2017

10 *See supra n.7* (select link for "Economic Characteristics").

Byrne JAG award was August 10, 2018, but that time has been extended pursuant to a Stipulation and Order filed by the parties in this matter (ECF No. 8) and entered as a text order by this Court on August 10, 2018. (SUF ¶ 29.)

2. City of Central Falls

Central Falls has the most low-income people, immigrants, and people of color, per capita, in the state. Encompassing only 1.27 square miles, Central Falls has approximately 19,359 residents, of whom 38% are foreign-born, according to the U.S. Census Bureau's July 1, 2017 estimates.[11] A super-majority of the population is people of color, with an estimated two-thirds of the population of Hispanic or Latino origin. (*See* Declaration of Dr. Michael Fine, ¶ 8, at P43—hereinafter "Dr. Fine Declaration.") As of 2016, 42% of Central Falls' children lived in poverty and 17% in extreme poverty, twice the state rates.[12] (*See* Dr. Fine Declaration, ¶ 8, at P43.) Despite these financial challenges, Central Falls has witnessed a reduction in crime of over 17% in the last five years as a result of community-oriented policing policies. (*See* Declaration of Colonel James J. Mendonca, ¶ 18, at P41—hereinafter "Mendonca Declaration;"; SUF ¶ 58)

Like Providence, Central Falls has used Byrne JAG funding for a variety of purposes, including obtaining internet access and tablets for detectives; upgrading police department servers, video cameras, security doors, radio system, and computer technology systems; and purchasing weapons and digital recording systems. Central Falls has received Byrne JAG awards every year since at least FY 2005 and has never had any conflicts with the federal government in obtaining Byrne JAG funds. (*See* Mendonca Declaration, ¶ 10, at P39; SUF ¶¶ 44-45.) Byrne JAG funds have been especially important to Central Falls as funding for its police department

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[11] *See* https://www.census.gov/quickfacts/fact/table/centralfallscityrhodeisland/PST045217 (last visited August 8, 2018).

[12] See 2016 Rhode Island Kids Count Facebook, *available at* https://tinyurl.com/yc2bauqx, at 37 (last visited December 5, 2018).

was cut dramatically following the city's declaration of bankruptcy in August 2011 and emergence from bankruptcy in late 2012. (*See* Mendonca Declaration, ¶¶ 8-9, at P39; SUF ¶ 46.)

On June 26, 2018 DOJ awarded Central Falls with Byrne JAG funding for FY 2017 in the amount of $28,677. (*See* FY 2017 Central Falls Award Letter, at P46 (referred to collectively with the FY 2017 Providence Award Letter as "the FY 2017 Award Letters"); SUF ¶ 47.) For the FY 2017 grant cycle, Central Falls plans to use its Byrne JAG funding to purchase hardware and software that will (1) allow police personnel to log onto the existing police network with heightened security and (2) increase the viability of the police department's remote access location, the Emergency Operations Center. (*See* Mendonca Declaration, ¶ 11, at P39; SUF ¶ 49.) Together this technology will enhance security by utilizing fingerprint readers and dual authentication, assist in the maintenance and backup of data in real time, and store information in an alternate offsite location for access in the event of equipment failure or an emergency event. (*See id.*; SUF ¶ 49) Central Falls' deadline to accept the FY 2017 Byrne JAG award was August 10, 2018, but that time has been extended pursuant to a Stipulation and Order filed by the parties in this matter (ECF No. 8) and entered as a text order by this Court on August 10, 2018. (SUF ¶ 50.)

C. The Cities' Local Laws and Policies

Immigrants are an integral part of the Cities' workforces, business sectors, schools and college populations, and civic associations. The success of local immigrants is vital to the Cities' success. To ensure that immigrant communities continue to thrive, the Cities' have adopted policies that seek to foster trust between the immigrant population and city officials and agents—especially the police department—and to encourage people of all backgrounds to take full advantage of the Cities' resources and opportunities. (SUF ¶¶ 32, 51, 53-56.) The rationale

behind these policies is that if immigrants, including undocumented immigrants, do not fear adverse consequences to themselves or to their families from interacting with city officials, they are more likely to report crimes, enroll their children in public schools, request health services like vaccines, and contribute more fully to the Cities' health and prosperity. (*See* Paré Affidavit, ¶ 11, 14, 15, 25, at P6, P8; Affidavit of Director of Healthy Communities Ellen Cynar, ¶¶ 6-9, at P2-3—hereinafter "Cynar Affidavit"; Mendonca Declaration, ¶¶ 12-17, at P40-41; Dr. Fine Declaration, ¶¶ 10-12, at P44; SUF ¶¶ 33, 52, 60-62.)

The Cities' have determined that public safety is best promoted without their involvement in the enforcement of federal immigration law. (*See* Paré Affidavit, ¶¶ 11, 12, 15-17, at P6-7; Mendonca Declaration, ¶¶ 12-18, at P40-41; SUF ¶¶ 30, 55.) To the contrary, the Cities' have long recognized that a resident's immigration status has no bearing on his or her contributions to the community or on his or her likelihood to commit crimes, and that when people with foreign backgrounds are afraid to cooperate with the police, public safety is compromised. (*See* Paré Affidavit, ¶¶ 11, 12, 15, 16, at P6-7; Mendonca Declaration, ¶¶ 12-18, at P40-41; SUF ¶¶ 31, 52.)

Providence, in order to further solidify the strong relationship between the community and the police, has, among other things, enacted the Providence Community Police Relations Act, which prohibits police from inquiring about an individual's immigration status or complying with requests by other agencies to support or assist in operations conducted solely for the purpose of enforcing federal civil immigration law.[13] (SUF ¶¶ 32, 37.) The Providence Police Department, by general order, created a community relations unit, whose mission is to "develop, recommend, and strengthen policies and programs that enhance police/community relationships,

[13] *See* Providence Code of Ordinances § 18½.4 (eff. Jan. 1, 2018), at P104.

increase understanding and cooperation, build and maintain trust and respect between the Department and the community, and reduce the fear of crime."[14] (SUF ¶ 34.) By executive order of the Mayor, Providence issues identification cards to all City residents, regardless of immigration status.[15] (SUF ¶ 39.) Providence has established a Muslim-American Advisory Board to better serve the Muslim-American community in Providence and to provide advice on policy decisions that affect that community.[16] (SUF ¶ 40.) The City Council has, by resolution, expressed concern with the federal Secure Communities program, an initiative that asks local law enforcement agencies to share information with United States Immigration and Customs Enforcement about arrestees.[17] (SUF ¶ 38.) Additionally, in 2017 Providence and its school district began a newcomer program that provides specialized support and resources to students who recently arrived to the United States.[18] (SUF ¶ 41.) In Providence's experience, these policies have promoted the city's safety by facilitating greater cooperation with the immigrant community at large.[19] (*See* Paré Affidavit, ¶ 18, at P7; SUF ¶¶ 33, 35, 42.)

Central Falls, similarly to Providence, has implemented a community policing department in recent years. (*See* Mendonca Declaration, ¶¶ 12-17, at P40-41; SUF ¶ 51.) In addition, in collaboration with law enforcement experts and community leaders, Central Falls' police department implemented a general order on immigration detainers stating that "when an individual is arrested … on a criminal offense, and is determined during standard prisoner

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14 *See* Providence Police Department, General Order 510.02 (April 4, 2017), at P118.

15 *See* Providence Executive Order 2017-3 (Nov. 2, 2017), at P116.

16 *See* Providence Executive Order 2017-1 (Nov. 22, 2016), at P115.

17 *See* Providence City Council Resolution No. 170 (Mar. 11, 2011), at P102.

18 *See* Providence Public School District, Newcomer Program, *available at* https://www.providenceschools.org/Page/3499 (last visited December 12, 2018).

19 The success of these community-policing policies has been recognized, in fact, by DOJ, which selected the Providence Police Department to create a national protocol for police community partnerships and to testify before a Congressional sub-committee on community police relations. (Paré Affidavit, ¶ 9, at P5; SUF ¶¶ 35-36.)

processing to have an ICE detainer request, he or she is not to be held beyond the time when they are eligible for release from custody, to include, yet not limited to, transportation to an outside jail or detention facility."[20] (SUF ¶ 53.) The police department issued another general order on immigration matters prohibiting the detention of any individual at the request of ICE without evidence of a court-issued warrant.[21] (SUF ¶ 54.) Central Falls police officers do not stop or question individuals on account of their immigration status, do not in any way act as immigration enforcement agents, and maintain the confidentiality of information about victims and witnesses to crimes. (*See* Mendonca Declaration, ¶ 13, at P40; SUF ¶ 55.) The Central Falls City Council has expressed an official position opposing immigration policies which are not sensitive to the needs of local governments and communities.[22] (SUF ¶ 56.) In Central Falls' experience, these policies have promoted the city's safety by facilitating greater cooperation with the immigrant community at large. (*See* Mendonca Declaration, ¶ 14, 17-18, at P40-41; SUF ¶ 57.)

D. DOJ's FY 2017 Immigration-Related Byrne JAG Conditions

On January 25, 2017, President Trump issued Executive Order 13768. Section 9(a) of the order threatened to deny federal grant funding to all so-called "sanctuary jurisdictions." That section was permanently enjoined by a federal district court because it violated numerous provisions of the United States Constitution.[23] DOJ subsequently sought to achieve a similar goal by imposing three immigration-related conditions on FY 2017 Byrne JAG funds. On July 25, 2017, DOJ announced that it would impose these conditions and provided a one-page "Backgrounder" and a press release, neither of which explained how or why DOJ decided to

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20 *See* Central Falls Police Department, General Order 14-08 (July 24, 2018), at P16.
21 *See* Central Falls Police Department, General Order 100.01 (May 23, 2016), at P17.
22 *See* Central Falls City Council Resolution 17-08 (Feb. 13, 2017), at P13.
23 *Cty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017) (permanent injunction).

impose these immigration-related conditions, how the conditions would advance the interests of the Byrne JAG program, or what alternatives DOJ had considered.[24] (SUF ¶¶ 7, 14-18.)

Subsequently, DOJ published a sample final award document containing the FY 2017 immigration-related conditions.[25] (SUF ¶ 9.) Those conditions are identically reflected in the FY 2017 Award Letters received by the Cities and are as follows:

- The access condition requires all state and local grantees and state subgrantees to permit federal agents to access any correctional facility in order to question suspected aliens in state or local custody about their right to be, or remain, in the United States. (SUF ¶ 9.) The FY 2017 Award Letters impose the access condition by requiring the enactment of a state or local statute, rule, regulation, policy, or practice designed to ensure federal agents' access to state or local (or government-contracted) correctional facilities. (*See* FY 2017 Award Letters, at P67-68 and P95-96; SUF ¶ 10.)
- The notice condition requires all state and local grantees and state subgrantees to provide the United States Department of Homeland Security ("DHS"), upon written request and as early as "practicable," advance notice of a particular alien's scheduled release date and time from state or local custody. (SUF ¶ 9.) The FY

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[24] *See* Press Release No. 17-826, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Programs (July 25, 2017), *available at* https://goo.gl/VH5wGU (last visited August 8, 2018) (AR-992); Backgrounder on Grant Requirements (July 25, 2017), *available at* https://goo.gl/ZLgXMC (last visited August 8, 2018) (AR-993); Byrne JAG FY 2017 State Solicitation, *available at* https://www.bja.gov/funding/JAGstate17.pdf (last visited December 5, 2018) (AR-994); Byrne JAG FY 2017 Local Solicitation, *available at* https://www.bja.gov/Funding/JAGLocal17.pdf (last visited December 5, 2018) (oddly excluded from Administrative Record, ECF No. 18).

[25] *See* FY 2017 Local Sample Award Document, *available at* https://www.bja.gov/Jag/pdfs/SampleAwardDocument-FY2017JAG-Local.pdf (last visited December 5, 2018).

2017 Award Letters impose the notice condition by requiring the enactment of a state or local statute, rule, regulation, policy, or practice designed to ensure such notice is provided. (*See* FY 2017 Award Letters, at P67-68 and P95-96; SUF ¶ 10.)

- The Section 1373 condition requires all state and local grantees and state subgrantees to comply with federal statute prohibiting restrictions on their officials' communication with federal immigration authorities "regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a).[26] (SUF ¶ 9.) The FY 2017 Award Letters impose the Section 1373 condition by requiring compliance with 8 U.S.C. 1373. (*See* FY 2017 Award Letters, at P64-66 and P92-94; SUF ¶ 10).

In conjunction with these conditions, DOJ also requires three certifications in order to accept FY 2017 Byrne JAG awards. (SUF ¶ 11.) The first, which must be signed by the state or local government's chief legal officer—in this case, the Cities' solicitors—certifies compliance with Section 1373 (and, for states, that the chief legal officer understands that subgrantees must also comply with Section 1373). The second, which must be signed by the state or local government's chief executive—in this case, the Cities' mayors—attests to compliance with Section 1373 and the other grant conditions. The third requires the state or local government agent who signs the grant award to certify compliance with all other grant conditions. Each

[26] *See also* 8 U.S.C. § 1373(b) ("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 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.").

certification carries the risk of personal criminal prosecution, civil penalties, and administrative remedies.[27] (*See* FY 2017 Award Letters, at P51, P64-65, P69, P79, P92-93, and P97; SUF ¶¶ 11-12.)

The FY 2017 immigration-related conditions elicited a wave of legal challenges from numerous jurisdictions across the country, and several courts already have struck them down. Indeed, to date all federal courts that have considered these requirements have found them unlawful. *See States of New York*, 2018 WL 6257693 (striking down all FY 2017 immigration-related conditions); *City and Cty. of San Francisco v. Sessions*, --- F. Supp. 3d ---, No. 17-cv-04642-WHO, 2018 WL 4859528 (N.D.Cal. Oct. 5, 2018) (same); *City of Chicago*, 888 F.3d at 276 (invalidating FY 2017 notice and access requirements); *see also City of Philadelphia v. Sessions*, 309 F. Supp. 3d at 321 (striking down all FY 2017 immigration-related conditions); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 874 (N.D. Ill. 2018) (striking down all FY 2017 immigration-related conditions).

E. The Cities Are Harmed by DOJ's Imposition of the FY 2017 Immigration-Related Conditions on Byrne JAG Funding

DOJ's imposition of the FY 2017 immigration-related conditions on Byrne JAG funding threatens the Cities with serious, immediate, and irreparable harm. (SUF ¶¶ 59-62.) In our federal system, states and localities have primary responsibility for the design of law-enforcement policies to keep their residents safe. *See, e.g., United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power…reposed in the States[] than the suppression of violent crime and vindication of its victims."). As explained

[27] Since the FY 2017 Award Letters were issued, DOJ has changed the certification forms from time to time. The most up-to-date forms are available on DOJ's website, *available at:* https://ojp.gov/funding/Explore/SampleCertifications-8USC1373.htm (last visited December 20, 2018).

supra, in acknowledgement that states and local governments possess the primary authority for maintaining public safety, Congress designed the Byrne JAG program to maximize the discretion of the states and their localities to decide how to best use these funds to advance their law enforcement priorities and make their communities safer. (SUF ¶ 1.) The FY 2017 immigration-related conditions constrain the very choices that Congress sought to safeguard.

DOJ's actions place the Cities in an untenable position. If the Cities do not acquiesce to the conditions, they collectively will forfeit hundreds of thousands of dollars in law enforcement funding, potentially compromising the critical law enforcement and criminal justice programs those funds support. If they accept these conditions, the Cities will be forced to relinquish sovereign control over law enforcement officials and law enforcement policies, including policy choices to allow localities to adopt criminal justice priorities based on local needs.

Localities that lawfully limited cooperation with federal immigration officials—such as Providence's Community Police Relations Act and Central Fall's police department's general orders[28]—will now be compelled to adopt policies that undermine relationships of trust with immigrant communities, to the detriment of effective crime reporting and overall public safety. (*See generally* Paré Affidavit, at P4; Mendonca Declaration, at P38; SUF ¶¶ 59-60.) The trust between immigrants and state and local officials, "once destroyed by the mandated cooperation and communication with the federal immigration authorities, [cannot] easily be restored." *City of Chicago*, 888 F.3d at 291. By forcing local officials to forgo carefully thought-out community policing policies, DOJ's conditions will create a climate of fear that prevents immigrants and their family members from coming forward as victims or witnesses of crimes and cooperating

[28] *See supra* n.13, 20, and 21.

with police. (SUF ¶¶ 33, 52, 60.) Accordingly, these conditions will make local law enforcement more difficult and less effective, causing public safety to suffer as a result.[29] (SUF ¶¶ 33, 52, 60.)

Certifying compliance with Section 1373 is particularly perilous for the Cities given DOJ's expansive and ever-changing interpretations of that statute's meaning and application. DOJ has advanced increasingly broad interpretations of what it means to comply with Section 1373. For example, DOJ has suggested that Section 1373 prevents jurisdictions from enacting policies that define the time and manner in which their employees exchange immigration-status information with federal officials.[30] (SUF ¶ 20.) DOJ not only has suggested that Section 1373 requires jurisdictions to provide advance notification of an alien's scheduled release from state or local custody, but also that it requires them to facilitate transfers from state and local jails to federal immigration authorities.[31] (SUF ¶¶ 21-22.) DOJ has further suggested that Section 1373 requires jurisdictions to not only share the immigration and citizenship status of individuals, but that it also requires jurisdictions to share an alien's home and work address and his scheduled

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[29] Along these lines, DOJ's FY 2017 immigration-related conditions may also impair and undermine public health efforts by deterring immigrants from seeking primary care and preventative health services or from cooperating with authorities who investigate and work to prevent outbreaks of communicable and chronic disease. The idea is that individuals who fear disclosure of the personal information they must provide in order to obtain or promote health care may refrain from seeking out or cooperating in those services, including treatment and prevention of contagious diseases, routine immunizations, substance abuse treatment, and trauma support. This, of course, may put the health of the entire community at risk. (*See* Cynar Affidavit, ¶¶ 6-11, at P2-3; Dr. Fine Declaration, ¶¶ 10-12, at P44; SUF ¶¶ 61-62).

[30] *See, e.g.*, Letter from Alan Hanson, Acting Assistant Attorney General, to Elizabeth Glazer, Director, New York City Mayor's Office of Criminal Justice (Oct. 11, 2017), *available at* https://www.justice.gov/opa/press-release/file/1003041/download (last visited August 8, 2018); Letter from Alan Hanson, Acting Assistant Attorney General, to the Hon. Jim Kenney, Mayor, City of Philadelphia (Oct. 11, 2017), *available at* https://www.justice.gov/opa/press-release/file/1003046/download (last visited August 8, 2018).

[31] *See* Def.'s Proposed Findings of Fact 8-11, *City of Philadelphia v. Sessions*, No. 17-cv-3894 (E.D. Pa. May 17, 2018), ECF No. 200; Pl.'s Mot. For Prelim. Inj. and Mem. of Law in Support 24-26, *United States v. California*, No. 18-cv-00490 (E.D. Cal. Mar. 6, 2018), ECF No. 2-1 (suggesting California law violates § 1373 by restricting the transfer of aliens in state custody to federal custody).

release date from incarceration.[32] (SUF ¶ 22.) On top of all of this, DOJ has taken the position that jurisdictions have an affirmative obligation to communicate DOJ's interpretation of Section 1373 to their employees.[33] (SUF ¶ 23.) In sum, DOJ's ever-shifting interpretation of the scope of Section 1373 renders it difficult for the Cities to understand what compliance requires and, therefore, legitimately be able to certify compliance.

III. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 18 (1st Cir. 1999). A genuine issue of material fact exists if "the evidence is such that a reasonable

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[32] *See, e.g.*, Pl's Mot. for Prelim. Inj. and Mem. of Law in Support 27-28, *United States v. California*, 18-cv-00490 (E.D. Cal. Mar. 6, 2018), ECF No. 2-1 (asserting that the phrase "information regarding the citizenship or immigration statute … of any individual" in § 1373 "does not merely denote the alien's technical immigration status"); Letter from Alan Hanson, Acting Assistant Attorney General, to Elizabeth Glazer, New York City's Mayor's Office of Criminal Justice, at 2 (Oct. 11, 2017), *available at* http://www.justice.gov/opa/press-release/file/1003041/download (last visited August 8, 2018) ("In order to comply with 8 U.S.C. § 1373, the Department has determined that New York would need to certify that it interprets and applies Section 9-131(b) and (d) to not restrict New York officers from sharing information regarding the date and time of an alien's release from custody."). But at least one federal court has ruled that Section 1373 does not govern release dates or home or work addresses. *United States v. California*, 314 F. Supp. 3d 1077, 1102 (E.D. Cal. 2018).

[33] *See, e.g.*, Letter from Alan Hanson, Acting Assistant Attorney General, to Elizabeth Glazer, New York City's Mayor's Office of Criminal Justice, at 2 (Oct. 11, 2017), *available at* http://www.justice.gov/opa/press-release/file/1003041/download (last visited August 8, 2018) ("In order to comply with 8 U.S.C. § 1373, the Department has determined that … New York would need to certify that it has communicated this interpretation to its officers and employees."); Letter from Alan Hanson, Acting Assistant Attorney General, to the Hon. Jim Kenney, Mayor, City of Philadelphia, at 2 (Oct. 11, 2017), *available at* http://www.justice.gov/opa/press-release/file/1003046/download (last visited August 8, 2018) ("In order to comply with 8 U.S.C. § 1373, the Department has determined that Philadelphia would need to certify that it interprets and applies this Executive Order to not restrict Philadelphia's officers from sharing information regarding immigration status with federal immigration officers. The Department has also determined that Philadelphia would need to certify that it has communicated this interpretation to its officers and employees.").

jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (a dispute is "genuine" only if a reasonable fact-finder could find for the nonmoving party; a fact is "material" only if it is capable of affecting the outcome of the litigation).

The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party, "who then must show the trier of fact could rule in his favor with respect to each issue." *Ferro v. Rhode Island Dep't of Transp. ex rel. Lewis*, 2 F. Supp. 3d 150, 156 (D.R.I. 2014) (citing *Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 5 (1st Cir. 2010)). While courts must view facts in the light most favorable to the nonmoving party, a motion for summary judgment "cannot be defeated by relying upon conclusory allegations, improbable inferences, acrimonious invective, or rank speculation." *Ahern v. Shinseki*, 629 F.3d 49, 54 (1st Cir. 2010). Rather, "the nonmoving party must establish a trial-worthy issue by presenting enough competent evidence to enable a finding favorable to the nonmoving party." *Sellers v. U.S. Dep't of Defense*, 654 F. Supp. 2d 61, 84 (D.R.I. 2009) (*quoting ATC Realty, LLC v. Town of Kingstown*, 303 F.3d 91, 94 (1st Cir. 2002)).

In challenges to agency action under the APA, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 32 (D.D.C. 2010) (internal quotations omitted), *aff'd*, 663 F. 3d 476 (D.C. Cir. 2011). Challenges to agency action "not accordance with law" present only a question of law concerning "the legal conclusion to be drawn about the agency action." *Rempfer v. Shaftstein*, 583 F.3d 860, 865 (D.C. Cir. 2009).

Thus, a motion for summary judgment arguing that agency action was *ultra vires* requires no fact-finding, but simply asks whether the agency action was permissible under existing law. Allegations that agency action was arbitrary or capricious require the court to consult the administrative record and determine whether the "agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

IV. ARGUMENT

As with many of its sister cases, "this case is fundamentally about the separation of powers among the branches of our government and the interplay of dual sovereign authorities in our federalist system." *States of New York*, 2018 WL 6257693, at *6. "It is incumbent on the judiciary 'to act as a check on [the] usurpation of power,' whether among the branches of government or the federal and state governments." *Id.* (citing *City of Chicago*, 888 F.3d at 277).; *see Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Concentration of power in the hands of a single branch is a threat to liberty," which "is always at stake when one or more of the branches seek to transgress the separation of powers."); *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) ("a health balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"). With these principles in mind, Plaintiffs turn to the legal issues presented by this case.

Plaintiffs are entitled to judgment as a matter of law that the FY 2017 immigration-related conditions are unlawful and unconstitutional. DOJ lacks the statutory authority to impose

the three conditions and, thus, the conditions are *ultra vires* under the Administrative Procedures Act ("APA") and must be set aside. In addition, DOJ has not acted in accordance with 34 U.S.C. § 10228(a), which prohibits DOJ from exercising any discretion, supervision, or control over any state or local law enforcement agency. For these reasons, imposition of the FY 2017 immigration-related conditions violates the constitution's separation of powers doctrine and principles of federalism. Further, DOJ cannot impose the Section 1373 condition because 8 U.S.C. § 1373 is unconstitutional under Tenth Amendment anti-commandeering principles. Additionally, the challenged conditions infringe upon the limitations on Congress's spending power. Finally, the FY 2017 immigration-related conditions must be invalidated because DOJ's process for imposing them was arbitrary and capricious.

A. DOJ Does Not Have Authority to Condition the Receipt of Byrne JAG Funds on the FY 2017 Immigration-Related Conditions

DOJ lacks statutory authority to restrict the receipt of Byrne JAG funds on compliance with the FY 2017 immigration-related conditions. Pursuant to the APA, a court must "hold unlawful and set aside agency action … found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). An agency may act only within the authority granted to it by statute. *See, e.g., N.R.D.C. v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (discussing the "well-established principle" that the boundaries of an agency's authority are exclusively drawn by Congress). In considering the scope of an agency's authority, "the question … is always whether the agency has gone beyond what Congress has permitted it to do." *City of Arlington v. F.C.C.*, 569 U.S. 290, 297-98 (2013). Here, DOJ lacks

the statutory authority to impose any of the FY 2017 immigration-related conditions on Byrne JAG funds under the program's authorizing statute or any other law.[34]

1. The Byrne JAG Statute Does Not Authorize DOJ to Impose the FY 2017 Immigration-Related Conditions

The Byrne JAG statute does not permit DOJ to impose substantive policy conditions of their own design on program grantees such as Plaintiffs. As recognized by the Seventh Circuit, nothing in the Byrne JAG statute "grant[s] the Attorney General the authority to impose conditions that require states or local governments to assist in immigration enforcement, nor to deny funds to states or local governments for their failure to comply with these conditions." *City of Chicago*, 888 F.3d at 283. Contrarily, the statute mandates that "the Attorney General *shall* … allocate" grant money based on the statutory formula, 34 U.S.C. § 10156(a)(1) (emphasis added), and it provides "explicit authority" to DOJ to carry out only a limited set of "specific actions," none of which include imposing generally applicable substantive conditions. By structuring the Byrne JAG program as a formula grant, Congress made clear that DOJ has no authority to deviate from the statutory formula. *See, e.g., City of Los Angeles*, 865 F.2d at 1088 (unlike discretionary grants, "formula grants … are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula") (internal quotations omitted).

Other provisions of the Byrne JAG statute confirm Congress's intent to minimize DOJ's ability to diverge from the program's statutory formula. For example, 34 U.S.C. § 10157(b)

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[34] Plaintiff's claims under the APA are ripe for adjudication because DOJ has taken final action with respect to its FY 2017 Byrne JAG awards. There can be no dispute that DOJ's June 26, 2018 Award Letters to the Plaintiffs are a "final agency action" for FY 2017. Regardless, at least one court has held that "the Attorney General's decision to impose the conditions represents the agency's definitive position on the question, such that it is now final and ripe for … review." *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 615 (E.D. Pa. 2017), *appeal dismissed sub nom. City of Philadelphia v. Attorney Gen. United States*, No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018) (internal quotations omitted).

allows DOJ to reserve up to five percent of appropriated funds and reallocate them to a state or local government if the Attorney General determines that reallocation is necessary to combat "extraordinary increases in crime" or to "mitigate significant programmatic harm resulting from" the formula. By expressly restricting DOJ's power to redirect Byrne JAG funds to a few prescribed circumstances, Congress intended that DOJ must otherwise abide by the statutory formula. *See, e.g., D.H.S. v. MacLean*, 135 S. Ct. 913, 919 (2015) (provision of express authority in one section of statute implies intent to exclude elsewhere).[35]

The legislative history of the Byrne JAG statute leads to the same conclusion. Since Congress first created a law enforcement block grant program in 1968, it always has sought to ensure that such grants do not become a means for federal agencies to control, direct, or supervise state or local law enforcement. *See supra*, Section II(A). In enacting Byrne JAG—the latest version of the 1968 grant program—Congress reaffirmed this intent, stating that the grant was designed to "give State and local governments more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005); 151 Cong. Rec. 25, 919 (2005) ("Byrne grants fund local law enforcement to combat the most urgent public safety problems in their own communities."). DOJ's imposition of conditions requiring states and local governments to enforce executive policy as a condition of receiving grants is inconsistent not only with the statutory language of the Byrne JAG statute but with clear congressional intent underlying the program, as well as constitutional principles of federalism.

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[35] The structure of title 34, chapter 101 of the U.S. Code also confirms DOJ's limited authority. The Byrne JAG program is located in part A of chapter 101, which is entitled "Edward Byrne Memorial Justice Assistance Grant Program." *See* 34 U.S.C. §§ 10151-58. Part B, entitled "Discretionary Grants," authorizes DOJ to issue grants to support projects similar to those supported by Byrne JAG but at DOJ's discretion. *See id.* §§ 10171-91.

Moreover, since the 1990s, Congress repeatedly has considered and rejected legislation that would withhold grant funding as a penalty for noncooperation with federal immigration law.[36] The same legislation that enacted Section 1373 in September 1996 also funded a predecessor to the Byrne JAG program.[37] And although Congress imposed a number of conditions on the use of Byrne JAG funds at that time, none of those conditions was immigration related. When Congress enacted the modern Byrne JAG program in 2006, it repealed the only immigration-related condition imposed on funds under Byrne JAG's predecessor program.[38] Congress also repeatedly has considered and rejected legislation that would impose immigration-related information-sharing requirements on grantees as a condition of federal funding.[39] More recently, Congress considered and rejected proposed legislation imposing funding conditions on so-called "sanctuary cities," including through the Byrne JAG program.[40] Congress's repeated

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[36] The Senate version of the 1994 Crime Bill, for example, included a provision that conditioned grant funding on immigration cooperation, but it was eliminated in conference. *See* H.R. 3355, § 5119, 103d Cong. (version dated Nov. 19, 1993); H.R. Rep. No. 103-694, at 424 (1994) (Conf. Report).

[37] See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, Title I, 110 Stat. 3009, 3009-13 to -15 (1996) (appropriations for the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs); *id.* Title VI (amendments to the Immigration and Nationality Act).

[38] *See* 42 U.S.C. § 3753(a)(11) (2000) (requiring grantees to inform federal immigration authorities of an alien's criminal conviction); Pub. L. No. 109-162, § 1111(a)(1), 119 Stat. at 3094 (repealed).

[39] *See, e.g.,* Criminal Alien Control Act of 1995, S. 179, 104 Cong. § 201 (proposing no crime-bill grant funding if participant refuses to cooperate with the Immigration and Naturalization Service (INS) in the "identification, location, arrest, prosecution, detention, and deportation of aliens"); Illegal Immigration Control Act of 1995, S. 999, 104th Cong. § 405 (proposing twenty percent funding cut for refusing to cooperate with INS officers or employees with respect to arrest and removal of aliens); Illegal Immigration Control Act of 1995, H.R. 1018, 104th Cong. § 405 (same).

[40] *See, e.g.,* Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. § 4 (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 4 (2016); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3 (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. § 2 (2015); Stop Sanctuary Policies and Protect Americans Act, S.

rejection of efforts to enact legislation imposing similar immigration-related conditions on federal grants demonstrates that DOJ lacks authority unilaterally to impose such conditions; if DOJ could unilaterally do so, there would be no need for Congress to do so legislatively. *See, e.g., F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (in concluding that the Food and Drug Administration did not have authority to ban cigarettes and tobacco products entirely, noting that Congress "repeatedly acted to preclude any agency from exercising significant policymaking authority in [that] area").

When Congress has intended to authorize deviations from the Byrne JAG formula, it has done so explicitly and authorized only modest withholdings. For example, if a state fails to "substantially implement" relevant provisions of the Sex Offender Registration and Notification Act, it "shall not receive 10 percent of the funds" it otherwise would receive under the Byrne JAG program. *See* 34 U.S.C. § 20927(a).[41] Never has Congress imposed a condition on Byrne JAG grants that would withhold *all* funding, as DOJ now seeks to do.

In short, DOJ's attempt to assert authority to impose generally applicable substantive conditions is unreasonable and "would bring about an enormous and transformative expansion" of DOJ's power "without clear congressional authorization." *Util. Air Reg. Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014).

2. The FY 2017 Immigration-Related Conditions Are Not Authorized by 34 U.S.C. § 10102

In earlier litigation brought by other jurisdictions, DOJ has argued that the immigration-related conditions are authorized by 34 U.S.C. § 10102, which is located in an entirely "different

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2146, 114th Cong. § 3(a) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2 (2015). The full text of the bills and their legislative histories are available at https://www.congress.gov.

[41] *See also* 34 U.S.C. § 30307(e)(2) (providing a five-percent penalty for non-compliance with the Prison Rape Elimination Act); 42 U.S.C. § 3756(f) (providing a ten-percent penalty for not testing sex offenders for HIV at the victim's request).

subchapter" from the Byrne JAG statute. *States of New York*, 2018 WL 6257693, at *7; *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 941 (N.D. Ill. 2017); *see City of Philadelphia*, 309 F. Supp. 3d at 321 (referencing *City of Philadelphia*, 280 F. Supp. 3d at 616). Section 10102(a)(6) outlines the powers of the Assistant Attorney General for the Office of Justice Programs, which administers the Byrne JAG program, and authorizes the Assistant Attorney General to "exercise such powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." As every court to have considered the question has concluded, Section 10102(a)(6) does not authorize the immigration-related conditions. *See, e.g., States of New York*, 2018 WL 6257693, at *7 (Section "10102(a)(6) does not provide authority for imposing any of the challenged conditions").

First, "[t]he Attorney General's interpretation [of Section 10102(a)] is contrary to the plain meaning of the statutory language." *City of Chicago*, 888 F.3d at 284. The "plain meaning" of Section 10102(a) "is to set forth a subcategory of the types of powers and functions that the Assistant Attorney General may exercise when vested in the Assistant Attorney General either by the terms of this chapter or by the delegation of the Attorney General." *Id.* at 285. However, the authority to impose generally applicable substantive conditions is not authorized anywhere in the chapter. Further, as set forth above, because "the Byrne JAG provisions … do not provide any open-ended authority to impose additional conditions," *City of Chicago*, 888 F.3d at 285, the Attorney General cannot delegate to the Assistant Attorney General authority that he does not possess it in the first place. *Id.*

Second, interpreting Section 10102(a)(6) as a broad grant of authority to impose generally applicable substantive conditions is inconsistent with the structure of Section 10102 generally. As the Seventh Circuit explained:

> *[Section] 10102(a)(6) would be an unlikely place for Congress to place a power as broad as the one the Attorney General asserts*. The preceding "powers" in the list, §§ 10102(a)(1)–(5), address the communication and coordination duties of the Assistant Attorney General. The sixth provision, § 10102(a)(6), is a catch-all provision, simply recognizing that the Assistant Attorney General can also exercise such other powers and functions as may be vested through other sources—either in that Chapter or by delegation from the Attorney General. The "including" phrase is tacked on to that. A clause in a catch-all provision at the end of a list of explicit powers would be an odd place indeed to put a sweeping power to impose *any* conditions on *any* grants—a power much more significant than all of the duties and powers that precede it in the listing, and a power granted to the Assistant Attorney General that was not granted to the Attorney General.

City of Chicago, 888 F.3d at 285 (emphasis added). Further, especially considering that Section 10102 was passed in the same Omnibus Act as the Byrne JAG statute but there are no cross-references between these statutes, an interpretation of Section 10102 that would allow the Assistant Attorney General to impose any conditions on the grants at will is inconsistent with the nature of the Byrne JAG grant program, which is mandatory rather than discretionary, as well as with its stated goal of providing flexibility to localities. *See id.* at 285-86 ("it is inconceivable that Congress would have anticipated that the Assistant Attorney General would abrogate the entire distribution scheme and deny all funds to states and localities that could qualify under the Byrne JAG statutory provisions, based on the Assistant Attorney General's decision to impose his or her own conditions—the putative authority for which is provided in a different statute").

Third, Section 10102(a)(6) only authorizes the Assistant Attorney General to impose "special conditions," and "the term 'special conditions' … is a term of art for conditions intended

for 'high-risk grantees' with difficulty adhering to existing grant requirements." *City of Philadelphia*, 309 F. Supp. 3d at 321 (referencing *City of Philadelphia*, 280 F. Supp. 3d at 617).[42] When Congress amended Section 10102(a)(6) in 2006 to add a reference to "special conditions," a DOJ regulation defined that term to mean a condition that is imposed for a limited time to address financial or performance concerns specific to a particular applicant—for example, a requirement that a financially unstable grantee provide a more detailed financial report. 28 C.F.R. § 66.12 (2006).[43] Under well-established canons of statutory construction, this history and context offers strong support for reading Section 10102(a)(6) to incorporate that regulatory definition. *See McDermott Int'l v. Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its established meaning."). The FY 2017 immigration-related conditions are not "special conditions" because they do not relate to any existing grant requirements and do not concern grant-related performance issues of any particular grantee. Rather, DOJ is attempting to use the FY 2017 immigration-related conditions to force states and local governments to participate in federal immigration enforcement efforts that are entirely unrelated to the Byrne JAG program.

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[42] *See also City of Chicago v. Sessions*, 888 F.3d 272, 285 n.2 (7th Cir. 2018) (suggesting without deciding that DOJ's interpretation of Section 10102(a)(6) also would fail because "the term 'special conditions' is a term of art, and cannot be read as an unbounded authority to impose 'any' conditions generally"); Paul G. Dembling & Malcolm S. Mason, *Essentials of Grant Law Practice* § 11.01, at 107 (1991) (nothing that "special conditions" is a term of art describing conditions that are "tailored to problems perceived in a particular grant project" rather than "generally applicable to all grants under a particular grant program").

[43] In 2014, DOJ repealed Section 66.12 but adopted a virtually identical substitute promulgated by the federal Office of Management and Budget. *See* Federal Awarding Agency Regulatory Implementation, 79 Fed. Reg. 75870, 76081 (Dec. 19, 2014). That regulation uses the phrase "specific condition" instead of "special condition," but the regulations are otherwise parallel. *See* 2 C.F.R. § 200.207.

3. The FY 2017 Immigration-Related Conditions Are Not Authorized by 34 U.S.C. § 10153(a)(5)(D)

In previous litigation, DOJ has asserted that 34 U.S.C. § 10153(a)(5)(D) provides an independent basis for authority to impose the Section 1373 condition. *See, e.g., States of New York*, 2018 WL 6257693, at *7-8; *City of Philadelphia*, 309 F. Supp. 3d at 280-81. Section 10153(a)(5)(D) requires grant applicants to provide "[a] certification, made in a form acceptable to the Attorney General," that assures "the applicant will comply with all provisions of this part and all other applicable Federal laws." In contrast to DOJ's past arguments, Congress did not make the Byrne JAG statute a compliance vehicle for *all* federal laws, only *applicable* federal laws. The text, history, and structure of Section 10153—which appears in a section of the Byrne JAG statute enumerating the responsibilities of grant recipients—establishes that "applicable Federal laws" refers only to the body of laws that by their express text apply to federal grants.[44]

First, Section 1373 is not an "applicable" law within the meaning of Section 10153. Section 1373 concerns only information-sharing with federal authorities, contains no limits on the use of federal funds, and is textually unconnected to the Byrne JAG program. *Compare* 42 U.S.C. § 2000d (providing that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in … any program or activity receiving Federal financial assistance"). As the Supreme Court has observed, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Had Congress intended Section 10153(a)(5)(D) to be a broad grant of power to

[44] The Court need not reach this argument if it determines that Section 1373 is unconstitutional. *See, e.g., City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 875 (N.D. Ill. 2018) ("As an unconstitutional law, Section 1373 automatically drops out of the possible pool of 'applicable Federal laws' described in the Byrne JAG statute.").

DOJ, it would have done so explicitly, as it has done in other statutes. *See, e.g.,* 26 U.S.C. § 432(e)(9)(E)(iv)(II) (special rule for benefit increases does not apply if taxpayer is "required to comply with other applicable law, *as determined by the Secretary of Treasury*") (emphasis added); 28 U.S.C. § 1085(e)(9)(E)(iv)(II) (same). This common sense interpretation is bolstered by the structure of Section 10153. That provision appears in a part of Title 34 entitled "Applications," which sets forth technical and ministerial application requirements for grant applicants, such as the certifications and assurances that applicants must provide. It would be nonsensical for Congress to bury a broad grant of authority in such a location. *See States of New York*, 2018 WL 6257693, at *9 ("given the structure of § 10153, which concerns the requirements of the application and the grant, as well as the parties' long history of treating 'applicable Federal laws' as encompassing laws applicable to federal grants, grant recipients, and the grant-making process, … 'applicable Federal laws' for purposes of 34 U.S.C. § 10153(a)(5)(D) means federal laws applicable to the grant").

Second, the legislative history of Section 10153 reinforces that Congress understood the "applicable Federal Law" language to refer to statutes that expressly govern the provision of federal financial assistance—and not to collateral statutes like Section 1373. Congress first enacted the "applicable Federal law" language in the Justice System Improvement Act of 1979, which reauthorized a predecessor to the Byrne JAG statute. *See* Pub. L. No. 96-157, § 2, secs. 401-05, 93 Stat. 1167, 1179-92 (1979) (amending the 1968 Omnibus Crime Control and Safe Streets Act). At the time the 1979 Act was drafted, DOJ's Law Enforcement Assistance Administration ("LEAA")—the agency then-responsible for administering law enforcement grants—issued manuals providing guidance to grantees on their responsibilities under *applicable*

federal laws and regulations.[45] A 1978 manual listed the laws that DOJ understood to apply to federal law enforcement grants, and the list contained only statutes governing federal grant-making. Other contemporaneous DOJ documents take the same approach.[46]

Accordingly, the phrase "applicable Federal law" must be construed to have this meaning. Absent some contrary indication, when Congress incorporates a term of art into a statute, courts "assume" that "Congress intended" the language "to have its established meaning." *McDermott Int'l, Inc.*, 498 U.S. at 342. The inference is particularly strong in this case because Congress was aware of DOJ's understanding of what constituted an "applicable Federal law" when it adopted the relevant language. In 1977, DOJ issued a report identifying the laws that DOJ deemed applicable to LEAA grants: approximately twenty federal laws that, by their terms, governed federal grant making.[47] That report was distributed to every member of Congress, among others, and was subject to public comment and hearings.[48]

Finally, DOJ's interpretation of Section 10153(a)(5)(D) also conflicts with one of the main goals of the 1979 Act that adopted the relevant language: to reduce administrative burdens

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45 *See Amendments to Title I (LEAA) of the Omnibus Crime Control and Safe Streets Act: Hearing Before the Subcomm. on Criminal Laws and Procedures of the S. Judiciary Comm.*, 94th Cong. 404 (1976) (statement of Richard Velde, LEAA Administrator).

46 *See, e.g.,* LEAA: Guideline Manual: Guide for Discretionary Grant Programs (Sept. 30, 1978); LEAA, General Briefing 6 (1977) (identifying twenty-three laws "applicable" to DOJ grants and providing the National Environmental Protection Act and civil rights statutes as examples). *See also* John K. Hudzik *et al.*, *Federal Aid to Criminal Justice: Rhetoric, Results, Lessons* 45, 66-68 (1984) (listing the "19 different 'cross-cutting' laws which governed the expenditure of federal grants").

47 *See* DOJ, *Restructuring the Justice Department's Program of Assistance to State and Local Governments for Crime Control and Criminal Justice System Improvement* 8-9 (June 23, 1977), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/64996NCJRS.pdf (last visited Nov. 28, 2018).

48 *See Restructuring the Law Enforcement Assistance Administration: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 95th Cong. 3, 9 (1977).

associated with DOJ grants.[49] A principal concern highlighted in DOJ's 1977 report was that the then-body of federal laws applicable to LEAA grants—the twenty statutes scattered across the U.S. Code that applied to federal grant-making—imposed excessive burdens on grantees.[50] It is unlikely that the "applicable Federal law" language would have been supported by DOJ or enacted by Congress if either believed it could be used to drastically increase the compliance burdens on states and local governments.

4. The FY 2017 Immigration-Related Conditions Are in Direct Conflict with 34 U.S.C. § 10228(a)

Further, the immigration-related conditions DOJ's seeks to impose in FY 2017 are "not in accordance with law," 5 U.S.C. § 706(2)(A)—more specifically, they contravene 34 U.S.C. § 10228(a). The language now comprising Section 10228(a) was first enacted in 1968, at the same time as the first law enforcement block grant program, and has consistently prohibited executive branch officials from using law enforcement grants to exert "any direction, supervision, or control" over any state or local police force or criminal justice agency. Pub. L. No. 90-351, § 518(a), 82 Stat. at 208. As presently codified, Section 10228(a) is located in the same chapter of the U.S. Code as the Byrne JAG statute and provides that "*[n]othing in this chapter* or *any* other Act shall be 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."

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[49] *See, e.g., Federal Assistance to State and Local Criminal Justice Agencies: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 95th Cong. 383 (1978) (transmittal letter from U.S. Attorney General Griffin Bell) (stating that the bill was "designed" to "simplify[] the grant process"); Office of Representative Peter W. Rodino, Press Release, *Committee Approves Law Enforcement Assistance Administration (LEAA) Reorganization* (May 10, 1979) (noting the 1979 Act was "designed to drastically reduce the red tape which has plagued the process of getting federal assistance to states and local governments") (quotations omitted).

[50] *See Restructuring the Justice Department's Program*, *supra* n.47.

(Emphasis added.) (SUF ¶ 6.) The statute's repeated use of "any" signals Congress's intent to speak broadly, *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008), and in the present context, to prohibit all agency action that could interfere with state and local authority over law enforcement.

The legislative history of Section 10228(a) reinforces this meaning. Opponents of the Omnibus Crime Control and Safe Streets Act of 1968 expressed concern that the Attorney General would use law enforcement grants to coerce States and local governments into adopting federal law enforcement priorities.[51] Supporters countered that Section 10228, which was pending before Congress as part of the 1968 Act, would prohibit such control. Then-Attorney General Ramsey Clark testified that it would violate both "the mandate and spirit" of Section 10228(a) to withhold funds because police departments were not run "the way the Attorney General says they must," and that Section 10228(a) prevented DOJ from imposing extra-statutory conditions on law enforcement grants.[52] In light of this history, the Fourth Circuit has observed that Section 10228(a)'s purpose is "to shield the routine operations of local police forces from ongoing control by [DOJ]—a control which conceivably could turn the local police into an arm of the federal government." *Ely v. Verde*, 451 F.2d 1130, 1136 (4th Cir. 1971) (describing identical language in 42 U.S.C. § 3766(a)—the predecessor to the modern Byrne JAG program). DOJ's imposition of the FY 2017 immigration-related conditions seeks to do just

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[51] *See, e.g.*, S. Rep. No. 90-1097, at 230 (1968) (views of Senators Dirksen, Hruska, Scott, and Thurmond) (expressing concern that the Act would enable the Attorney General to "become the director of state and local law enforcement"). *See generally* Hudzik*, supra* n.13 at 15, 23-26 (discussing opposition to the grant program).

[52] *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedure of the S. Comm. on the Judiciary*, 90th Cong. 100, 384, 497 (1967) (discussing Section 408 of the bill, which became Section 10228(a)).

that—turn local police forces into federal immigration enforcement officers—and accordingly must be held unlawful and set aside.

The FY 2017 immigration-related conditions violate Section 10228(a)'s prohibition on "direction, supervision, or control" in a number of ways. First, the Section 1373 condition requires states and localities to monitor their subgrantees for compliance with 8 U.S.C. § 1373 and to report any violations to DOJ—effectively turning states and localities into an enforcement arm of the Department of Homeland Security (DHS). The notice and access conditions likewise require all grantees to monitor their subgrantees for compliance.[53]

Second, the Section 1373 condition "directs" law enforcement agencies not to limit communications regarding immigration status between individual states and local governments and federal immigration enforcement officials, and thus interferes with state and local control over their own law enforcement policies and procedures. *See City of Philadelphia*, 309 F. Supp. 3d at 327 ("Literal compliance with Section 1373 would inherently prevent Philadelphia from, among other things, disciplining an employee for choosing to spend her free time or work time assisting in the enforcement of federal immigration laws.").

Third, the notice and access conditions "direct" states and localities to *create* and *enact* a statute, rule, regulation, policy, or practice. Mandating the passage of a particular form of legislation or policy is clearly "direction, supervision, or control" of a state or local government. Additionally, in practice, the notice condition requires state and municipal officials to administer federal immigration policy by mandating that those officials respond to DHS requests for

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[53] Plaintiffs are direct grant recipients in FY 2017, and thus are not subject to state monitoring nor required to monitor subgrantees. Nonetheless, Plaintiffs include these issues here so as to apprise the Court of the generally applicable issues attendant to the FY 2017 immigration-related conditions to the extent pertinent to the Cities' request for a nationwide injunction. *See infra* Section IV(D)(3).

information, while the access condition requires state and municipal offices to devote staff, resources, and real property to facilitate federal agents' access to aliens in correctional facilities.

The illegality of the notice and access conditions is bolstered by reference to the Tenth Amendment's anti-commandeering doctrine, discussed *infra* at Section IV(B)(2). In that context, requiring state and municipal officers to "accept" a mere form was held to be impermissible direction by the federal government. *See Printz v. United States*, 521 U.S. 898, 904 (1997) (the Brady Act violated anti-commandeering principles by requiring state officers "to accept" forms from gun dealers). Accordingly, requiring state officers to accept and assist federal officials at state and local facilities surely must be impermissible direction as well. *See City of Philadelphia*, 280 F. Supp. 3d at 651 (suggesting that the conditions are at odds with anti-commandeering principles).

For the foregoing reasons, DOJ has no statutory authority to impose the FY 2017 immigration-related conditions on Byrne JAG grantees.

B. DOJ's Imposition of the FY 2017 Immigration-Related Conditions Violates the United States Constitution

1. DOJ's Imposition of the FY 2017 Immigration-Related Conditions Violates the Constitution's Separation of Powers Doctrine

Without statutory authority to impose the FY 2017 immigration-related conditions, DOJ's imposition of them constitutes a violation of well-established constitutional checks and balances. The Constitution vests Congress, not the Executive, with the spending power. *See* U.S. Const. art. I, § 8, cl. 1. "Congress may, of course, delegate such authority to the Executive Branch." *City of Chicago*, 888 F.3d at 283. As explained above, Congress has not delegated any authority to the Executive that would permit DOJ to impose the FY 2017 immigration-related

conditions in its administration of the Byrne JAG program. Thus, any attempt by DOJ to impose the conditions violates the Constitution's separation of powers doctrine.

In the absence of such delegated authority, the executive branch does not "have the inherent authority" under the Byrne JAG program or any other statute "to condition the payment of such federal funds on adherence to its political priorities." *Id.* Nor may they amend or cancel an appropriation that Congress has duly enacted, *see Clinton*, 524 U.S. at 438, or choose to spend less than the full amount of funding that Congress has authorized by statute. *See Train v. City of New York*, 420 U.S. 35, 42-45 (1975) (holding that Environmental Protection Agency administrator lacked authority to withhold the fully authorized amount under the statute where there was no source of authority that would permit the executive branch official to negate "a firm commitment" of funds by Congress "to achieve" its objective); *see also In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (the President cannot "spend less than the full amount appropriated by Congress" for a "particular project or program"); *Dabney v. Reagan*, 542 F. Supp. 756, 764-68 (S.D.N.Y. 1982) (officials at the Department of Housing and Urban Development could not decide unilaterally not to "mak[e] available" statutorily "appropriated funds"). Rather, the Executive's constitutional duty, and that of his appointees, is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 5.

As numerous courts have held, DOJ's imposition of the FY 2017 immigration-related conditions—and the use of these conditions as a basis to withhold congressionally appropriated Byrne JAG funds—exceeds its authority and violates the separation of powers between the legislative and executive branches. *City of Chicago*, 321 F. Supp. 3d at 873-74 (holding that imposition of notice and access conditions violates the constitutional principle of separation of powers); *City of Philadelphia*, 309 F. Supp. 3d at 321 (holding all FY 2017 immigration-related

conditions violate separation of powers); *States of New York*, 2018 WL 6257693, at *15 ("these conditions violate the separation of powers"). As the Seventh Circuit aptly concluded:

> The Attorney General in this case [is] us[ing] the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement. But the power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds."

City of Chicago, 888 F.3d at 277. It is also telling that, elsewhere in the Byrne JAG statute, as explained above, Congress foreclosed the ability of the Executive to use such grants as a means for federal agencies to control, direct, or supervise state and local law enforcement, which is precisely the type of authority DOJ now claims.

In short, DOJ's imposition of the FY 2017 immigration-related conditions is contrary to the Byrne JAG statute, and therefore contrary to the Constitution's vesting of power to create and fund grant programs such as Byrne JAG in Congress.

2. The Tenth Amendment Prohibits DOJ from Requiring Compliance with Section 1373

DOJ may not impose compliance with Section 1373 as a condition of Byrne JAG funds because that statute violates the Tenth Amendment's anti-commandeering doctrine—which doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."[54] *Murphy*, 138 S.Ct. at 1475. The Supreme Court has explained, "[t]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992); *see*

[54] The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Printz, 521 U.S. at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). A federal law violates those principles where "the whole *object* of the law is to direct the functioning of the state executive," *Printz*, 521 U.S. at 932, or to "unequivocally dictate what a state legislature may and may not do." *Murphy*, 138 S. Ct. at 1478.

In its most recent application of the anti-commandeering rule, the Supreme Court clarified that it applies both to federal laws that affirmatively compel a state or locality to enact legislation, and to those that preclude or proscribe state action. *Id.* at 1478. "The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.* The Supreme Court's recent ruling in *Murphy* guided the district courts in the *City of Chicago* and *City of Philadelphia* cases to hold Section 1373 unconstitutional. *See City of Chicago*, 321 F.Supp.3d at 867 (explaining that *Murphy* "pulls the lynchpin from this Court's earlier Section 1373 constitutionality analysis"); *see also States of New York*, 2018 WL 6257693, at *12 (Section "1373 is unconstitutional under the anticommandeering principles of the Tenth Amendment); *City of Philadelphia*, 309 F.Supp.3d at 329 (holding Section 1373 unconstitutional).

Although "[n]ot all laws prohibiting state action are constitutionally problematic," *City of Chicago*, 321 F. Supp. 3d at 868, it is clear under *Murphy* that the anti-commandeering doctrine applies to Section 1373 because it seeks to "regulat[e] activities undertaken by government entities *only*." *Id.* (emphasis added). *See Murphy*, 138 S. Ct. at 1478 ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."); *see also City of Philadelphia*, 309 F. Supp. 3d at 329 ("Given their

plain language, neither Section 1373(a) nor Section 1373(b) can be best read as regulating private actors."); *City of Chicago*, 321 F. Supp. 3d at 869 ("Section 1373 does not evenhandedly regulate activities in which both private and government actors engage."). In this way, Congress is problematically "conscripting state action in the implementation of a federal scheme." *City of Chicago*, 321 F. Supp. 3d at 868.

Section 1373 impermissibly directs the functioning of local government in contravention of Tenth Amendment principles in a number of ways. First, Section 1373 "indirectly constrains local rule-making by precluding city lawmakers from passing laws … that institute locally-preferred policies which run counter to Section 1373." *Id*. at 869. Because Section 1373 imposes a "blanket, if indirect, prohibition on certain local lawmaking," this directly contravenes the concern "squarely addressed in *Murphy*, where the Court observed that a 'more direct affront to state sovereignty is not easy to imagine' than in federal law that 'dictates what a state legislature may and may not do.'" *Id.* (citing *Murphy*, 138 S.Ct. at 1478); *see States of New York*, 2018 WL 6257693, at *12 (Section "1373 impinges on Plaintiffs' sovereign authority … [by] requir[ing] Plaintiffs to … forego passing laws contrary to Section 1373").

Second, because Section 1373 "mandates that local government employees have the option of furnishing immigration information to INS [Immigration and Naturalization Service] while acting in their official, state-employed capacities," Section 1373 "redistributes local decision-making power by stripping it from local policymakers and installing it instead in line-level employees who may decide whether or not to communicate with INS." *City of Chicago*, 321 F. Supp. 3d at 869-70. In other words, "Section 1373 supplants local control of local officers." *Id.* at 869 ("A state's ability to control its officers and employees lies at the heart of state sovereignty.") This is, essentially, a "federally-imposed restructuring of power within state

government." *Id.* It also "shifts a portion of immigration enforcement costs onto" states and local governments, forcing them "to allow their employees to participate in the federal scheme, shifting employee time—and thus corresponding costs—to the federal initiatives and away from state priorities." *States of New York*, 2018 WL 6257693, at *13 (quoting *City of Chicago*, 321 F. Supp. 3d at 870). Lending further credibility to this federalism objection "is the fact that the information at issue is state-owned and only accessible to city employees in their official capacities." *City of Chicago*, 321 F. Supp. 3d at 869 (citing *Printz*, 521 U.S. at 931 n.17 (noting that a constitutionally-impermissible statute required state employees "to provide information that belongs to the State and is available to them only in their official capacity")).

This restructuring of power *within* state government is a direct affront to the anti-commandeering principle as espoused by the Supreme Court in *Printz*. In that case, the background check law at issue required local officials to make "reasonable efforts" to determine whether a gun sale was lawful. *See Printz*, 521 U.S. 898. The Supreme Court determined that requiring local officials to engage in "reasonable efforts" necessarily compelled policymaking in deciding what that requirement entailed. *Id.* at 927-28. In this case, because Section 1373 prohibits restrictions on state and local government employees' communication with federal immigration authorities, "employees may decide for themselves whether to communicate with federal authorities *at all*." *City of Chicago*, 321 F. Supp. 3d at 870. Affording state and local government employees with such a broad degree of discretion "is certainly a matter of policy, and yet it is a matter that, under Section 1373, state policymakers are not allowed to touch." *Id.* It is that level of control—directing a locality's policy—that the anti-commandeering rule expressly prohibits. *Id.*

Third, because Section 1373 removes the ability of a locality to control its employees' communications with INS, the statute prevents any locality "from extricating itself from federal immigration enforcement." *Id.* Thus, Section 1373 forecloses the option of non-participation in a federal program—which itself is a violation of the anti-commandeering doctrine. *Id.* (citing *New York*, 505 U.S. at 176).

Consequently, Section 1373 "makes it difficult for citizens to distinguish between state and federal policy in the immigration context." *City of Chicago*, 321 F. Supp. 3d at 870. When officials from the Cities "cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation" then "the accountability of *both* state and federal officials is diminished." *New York*, 505 U.S. at 168, 169 (emphasis added). Such a loss of accountability cannot be tolerated in our federalist system. *See id.* at 188 (invalidating a federal law that reduced state and federal accountability); *see also City of Chicago*, 321 F. Supp. 3d at 870 (explaining that *Murphy* articulated three policy rationales "undergirding" the anti-commandeering doctrine: "protect[ing] individual liberty by dividing authority between federal and state governments;" "promot[ing] political accountability by clarifying whether laws and policies are promulgated by federal or state actors;" and "prevent[ing] Congress from shifting the costs of regulation to the states"). Section 1373 intrudes upon the Cities' "direct relationship … [with] the people who sustain it and are governed by it" by imposing the federal government between the Cities and their citizens. *See Printz*, 521 U.S. at 920 (citation omitted). Such interpolation destroys the trust that the Cities have cultivated through their respective community policing laws and policies.

Finally, because *Murphy* overrules the notion that the Tenth Amendment prohibits only affirmative commands to state and local government, this Court need not be persuaded by a

Second Circuit decision, *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), that rejected a facial Tenth Amendment challenge to Section 1373 upon that precise view. *See Austin v. United States*, 280 F. Supp. 3d 567, 572 (S.D.N.Y. 2017) (a district court should follow Supreme Court precedent over Second Circuit precedent when "a subsequent decision of the Supreme Court so undermines Second Circuit precedent that it will almost inevitably be overruled") (quotations and brackets omitted); *see also City of Chicago*, 321 F. Supp. 3d at 872 ("respectfully disagree[ing] with *City of New York*" and holding Section 1373 unconstitutional).

Regardless, it appears that the Second Circuit would have reached a different conclusion on the facts of this case. In *City of New York*, the Second Circuit rejected a Tenth Amendment challenge to Section 1373 because the City of New York was unable to "demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees." 179 F.3d at 36. The court made clear that it remained an open question whether Section 1373 "would survive a constitutional challenge" in the face of evidence that Section 1373 interferes with state or local policies "necessary to the performance of legitimate municipal functions." *Id.* at 37. Here, DOJ's expansive interpretation of Section 1373 interferes with the Cities' governmental functions—in particular, their thoughtfully-crafted policies and law enforcement procedures that were designed to encourage trust between local government and the community and, flowing therefrom, public safety through the increased reporting of crimes and cooperation with police. It is that interference that the Second Circuit likely would have found to be a violation of the anti-commandeering doctrine.

Nonetheless, to the extent the Second Circuit's holding in *City of New York* was premised on a view that Section 1373 "has not compelled state and local governments to enact or

administer any federal regulatory program," 179 F.3d at 35, that reasoning does not survive an analysis in light of the Supreme Courts' recent decision in *Murphy*. Recall that, as mentioned above, in *Murphy*, the Supreme Court rejected the distinction between *compelling* a state or state actors to act and *prohibiting* a state from taking specific regulatory action. *See* 138 S.Ct. at 1478. Accordingly, the Second Circuit's reasoning in *City of New York* is not persuasive in this matter either as applied or in light of more recent Supreme Court precedent and should not be followed.

For the foregoing reasons, Section 1373 violates the anti-commandeering rule by "impermissibly direct[ing] the functioning of local government," *City of Chicago*, 321 F. Supp. 3d at 872, and is therefore unconstitutional. Thus, DOJ may not impose compliance with Section 1373 as a condition of Byrne JAG funding. *See Dole*, 483 U.S. at 210-211 (federal government cannot impose unconstitutional conditions).

3. Imposition of the FY 2017 Immigration-Related Conditions Violates the Spending Clause

Even if Congress had delegated DOJ with the authority to impose the FY 2017 immigration-related conditions on Byrne JAG funds, the conditions are unconstitutional because they exceed constitutional limits on the spending power. Congress's spending power is not unlimited. *Dole*, 483 U.S. at 207 (1987). Rather, it "is subject to several general restrictions" derived, in part, from the language of the Constitution itself. *Id.* Among other limitations, federal funding conditions must be unambiguous and relate to Congress's purpose in authorizing the funds.[55] *Id.* The challenged conditions violate these two limitations. *See City & Cty. of San Francisco*, 2018 WL 4859528, at *23 ("the challenged conditions are ambiguous and

[55] Additionally, conditions on states' receipt of federal funds must be in pursuit of "the general welfare" and must not induce the states to commit an unconstitutional action. *See South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987); *State of Nevada v. Skinner*, 884 F.2d 445, 447 (9th Cir. 1989).

insufficiently related to the grant or the local criminal justice program purposes of the federal spending").

a. *The FY 2017 Immigration-Related Conditions Are Ambiguous*

First, the FY 2017 immigration-related conditions are unconstitutional because they violate the Spending Clause's prohibition on ambiguous funding conditions. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Dole*, 483 U.S. at 207. This is because "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst*, 451 U.S. at 17. Congress's exercise of the spending power in that "contract" is invalid unless the "State voluntarily and knowingly accepts [its] terms." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012). Grant recipients "cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Ctr. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (courts "must view [the governing statute] from the perspective of a state official who is engaged in the process of deciding whether … [to] accept [the] funds and the obligations that go with those funds"). All of the FY 2017 immigration-related conditions fail this test.

Despite invoking an existing statute, the Section 1373 condition provides anything but "clear notice" about what DOJ intends to require of Byrne JAG grantees. *Arlington Cent.*, 548 U.S. at 296. Decisions analyzing Section 1373 have addressed, for the most part, what Section 1373 does *not* require of states and cities. *See, e.g., Steinle v. City & Cty. of San Francisco*, 230 F.Supp.3d 994, 1015 (N.D. Cal. 2017) ("Nothing in [Section 1373] addresses information concerning an inmate's release date."); *Doe v. City of New York*, 860 N.Y.S.2d 841, 844 (N.Y. 2008) (holding that Section 1373 "does not impose an affirmative duty" to report immigration

status). Neither Section 1373 nor case law addressing Section 1373 explains what type of policy, rule, regulation, or ordinance (or absence of the same) would be found to run afoul of the Section 1373 condition.

Mixed messages transmitted by DOJ only increase the ambiguity. On one occasion, DOJ has stated that Section 1373 requires no affirmative action by states and local governments.[56] On other occasions, however, DOJ has indicated that, in order to be compliant with Section 1373, states and local governments must take steps to communicate to their employees the "provisions of Section 1373, including [the fact that] employees cannot be prohibited or restricted from sending citizenship or immigration status information to ICE [Immigration and Custom Enforcement],"[57] and that Section 1373 imposes an obligation on states and local governments to facilitate the transfer of aliens from state to federal custody.[58] (SUF ¶¶ 20-21, 23.) Further, DOJ has interpreted "information regarding the citizenship or immigration status … of any individual" to include that individual's work and home address and scheduled release date from incarceration, despite there being no language in Section 1373 to support such a broad interpretation.[59] (SUF ¶ 22.) These contradicting directions reveals the existence of confusion in the requirements of the Section 1373 condition, as well as in DOJ's own attempted administration of the condition.

In short, the Cities have no way of "voluntarily and knowingly accept[ing] the terms of the contract" with regard to the Section 1373 condition because it is unclear what DOJ will

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56 DOJ, *Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373,* at 1 (2016), *available at* https://goo.gl/ht5eQP (last visited December 5, 2018) (AR-393-AR394).

57 *See* Memorandum from Michael E. Horowitz, Inspector General, to Karol V. Mason, Assistant Attorney General for the Office of Justice Programs, at 9-10 (May 31, 2016), *available at* https://goo.gl/VhHrqA (last visited December 5, 2018) (AR-366).

58 *See supra* n.31.

59 *See supra* n.32.

require. *Sebelius*, 567 U.S. at 577 (internal quotation marks omitted). *See also City & Cty. of San Francisco*, 2018 WL 4859528, at *21 ("DOJ's evolving interpretations of the [Section 1373] condition further demonstrate ambiguities that prevent [Byrne JAG] applicants from deciding whether to accept the funds 'cognizant of the consequences of their participation.'") (quoting *Dole*, 483 U.S. at 207).

The notice and access conditions are likewise impermissibly ambiguous. There are no statutes or DOJ guidance documents explaining what these conditions require, and the FY 2017 Award Letters do not elucidate the requirement that a state or local statute, rule, regulation, policy, or practice must be "designed to ensure" federal agents have access to and advance notice concerning the release of suspected aliens in state and local custody. Based on DOJ's own briefing in *City of Philadelphia*, the access condition is unclear on its face as to whether jurisdictions are required to provide access to inmates in custody only when those inmates consent, or instead whether jurisdictions are required to compel unwilling inmates to meet with ICE. *Compare City of Philadelphia*, No. 2:17-cv-03894, ECF No. 28, at 32 (E.D. Pa. Oct. 12, 2017) (arguing that the access condition requires access "even if the inmate refuses to answer questions") *with California ex rel. Becerra v. Sessions*, No. 3:17-cv-4701, ECF No. 83, at 6 (N.D. Cal. Nov. 22, 2017) (arguing that the access condition does not "forbid a jurisdiction from informing detainees … that they may choose not to meet with immigration authorities"). It is impossible for Byrne JAG grantees to reconcile these statements. The notice condition is ambiguous in its demand that jurisdictions provide as much advance notice of an individual's release as is "practicable." (*See* FY Award Letters, at P67-68 and P95-96.) DOJ gives no guidance as to what "practicable" means. Further, the notice condition refers to an inmate's "scheduled release date and time" but fails to acknowledge that inmates may at times be released

with little or no notice, leaving Plaintiffs without opportunity to provide DOJ with any advance notice. It is unclear if Plaintiffs would violate the condition in those circumstances.

Furthermore, other courts have equated the ambiguity of the notice and access conditions with the Executive's lack of authority to impose them. In other words, because Congress must use its spending power clearly, and did not plainly confer DOJ with the authority to impose these conditions, they are inescapably ambiguous. *See City & Cty. of San Francisco*, 2018 WL 4859528, at *20 ("the notice and access conditions 'cannot have been unambiguously authorized by Congress if they were never statutorily authorized'") (citing *City of Philadelphia*, 280 F. Supp. 3d at 646).

b. *The FY 2017 Immigration-Related Conditions Are Unrelated to the Purpose of the Byrne JAG Program*

The FY 2017 immigration-related conditions also violate the basic rule that conditions imposed on federal grants must be "reasonably related to the purpose of the expenditure." *New York*, 505 U.S. at 172. Congress's purpose in creating the Byrne JAG program was to give state and local governments the ability "to use the grants constructively" to combat crime and to further criminal justice policies related to one of the statutorily defined purpose areas. H.R. Rep. 109-233, at 89. Congress made clear that Byrne JAG funds were not part of a "one size fits all" approach to reducing crime. *Id.* Rather, Congress left local jurisdictions free to use Byrne JAG funds as they saw fit as long as their programming related to one of eight purpose areas related to criminal justice. 34 U.S.C. § 10152 (a)(1)(A)–(H). None of these purpose areas are related to federal civil immigration enforcement. As other courts already have found, "the federal interest in enforcing immigration laws falls outside the scope of the Byrne JAG program." *City of Philadelphia*, 280 F. Supp. 3d at 642; *see Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. 2017), *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal*

dismissed as moot sub nom., *City & Cty. of San Francisco v. Trump*, No. 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018) (this Administration "targets for defunding grants with no nexus to immigration enforcement at all"); *City & Cty. of San Francisco*, 2018 WL 4859528, at *23 (concluding that the access, notice, and Section 1373 conditions are insufficiently related to the criminal justice programs that the Byrne JAG statute supports). Accordingly, the challenged conditions violate the ambiguity and relatedness limitations on Congress's spending power.

C. DOJ's Decision to Impose the FY 2017 Immigration-Related Conditions Was Arbitrary and Capricious

Furthermore, DOJ's arbitrarily and capriciously added the FY 2017 immigration-related conditions to the Byrne JAG program more than a decade after its inception and without any justification rooted in fact. Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). At a minimum, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. Inc.*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). DOJ's imposition of the FY 2017 immigration-related conditions violates the prohibition on arbitrary and capricious conduct in a number of ways. *See City of Philadelphia*, 280 F. Supp. 3d at 620-25 (holding that the conditions are arbitrary and capricious); *City of Philadelphia*, 309 F. Supp. 3d at 323-34 (same).

As an initial matter, DOJ's imposition of the challenged conditions was arbitrary and capricious because it departed from over a decade of past practice with essentially no explanation. DOJ has never before sought to impose the access or notice conditions on grantees, and, as explained above, Congress removed the only immigration-related condition that was

contained in the predecessor grant program when it enacted the current Byrne JAG statute. *See supra* Section IV(A)(1).[60] Moreover, since Section 1373 was enacted in 1996, "the United States government has never sought to enforce [Section 1373] against a state or local government, or to invalidate a sub-federal sanctuary law or practice based on [this] provision[]")."[61] Indeed, Congress consistently has rejected efforts to make cooperation with federal immigration law a condition for federal grant funding. *See supra* Section IV(A)(1).

When an agency deviates so dramatically from past practice, it "must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quotations omitted); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (an "unexplained inconsistency" in an agency's policy is "a reason for holding an interpretation to be an arbitrary and capricious change"). Despite its departure from past practice, DOJ provided virtually no explanation for this shift in policy. It released no reports, studies, or analyses alongside its July 25, 2017 press release of the FY 2017 immigration-related conditions. (SUF ¶¶ 8, 15-17.) Instead, DOJ issued a one-page "Backgrounder," which stated only that the conditions would "improve the flow of information between federal, state, and local law enforcement, and help keep our communities safe."[62] (ECF No. 18; SUF ¶ 7.) But DOJ offered no evidence that communication between the federal government and state and local governments was deficient, that the conditions would actively promote public safety, or that requiring grantees to certify compliance with Section 1373 would improve upon criminal justice priorities. *See City of*

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60 *See supra* n.37.

61 Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 Lewis & Clark L. Rev. 165, 170 (2016).

62 *See supra*, n.24.

Philadelphia, 309 F. Supp. 3d at 323 (referencing *City of Philadelphia*, 280 F. Supp. 3d at 625 (concluding that DOJ failed to adequately explain its decision to impose the conditions)). (SUF ¶¶ 15-17.)

Nothing in the Administrative Record provides a "satisfactory explanation" for DOJ's departure from past practice. The Administrative Record is devoid of findings or analyses that explain why DOJ imposed the immigration-related conditions. (ECF No. 18; SUF ¶¶ 8, 14-17.) Rather, the record reveals that DOJ understood that it had no discretion to impose the challenged conditions on Byrne JAG funds. For example, in 2015, Senator Richard Shelby requested that DOJ "use its administrative authorities to limit the availability of [Byrne] JAG … grants to only those states and local agencies that comply with [Immigration and Customs Enforcement] requests." (AR-111; SUF ¶ 19.) In response, DOJ explained that it lacked the power to do so:

> Withholding the funding would have a significant, and unintended, impact on the underserved local populations who benefit from these programs, most of whom have no connection to immigration policy. Additionally, many Department grant funds are formula-based, with the eligibility criteria (and related penalties, if any) set firmly by statute. In many cases, therefore, the Department does not have the discretion to suspend funding at all. (AR-113; SUF ¶ 19.)

Furthermore, despite the fact that, from this response, DOJ clearly was aware of the detrimental effects withholding these funds would have, "[c]onspicuously absent from [the Administrative Record] is any discussion of the negative impacts that may result from imposing the conditions." *States of New York*, 2018 WL 6257693, at *17. Rather, "the record is devoid of any analysis that the perceived benefits outweigh those drawbacks." *Id.*; *see El Rio Santa Cruz Neighborhood Health Ctr. Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (holding that agency action was arbitrary and capricious where the agency "failed adequately to address relevant evidence before it"); *El Paso Elec. Co. v. F.E.R.C.*, 201

F.3d 667, 672 (5th Cir. 2000) (holding that the agency could not "rely on the potential advantages of [the action] … while ignoring the potential disadvantages"). (SUF ¶ 18.)

Additionally, nowhere in the Administrative Record are there records reflecting that DOJ considered whether adherence to the challenged conditions would undermine trust and cooperation between communities and local government, or the extent to which a loss of that trust might frustrate local law enforcement—which is the very thing that the Byrne JAG program was intended to assist. *See States of New York*, 2018 WL 6257693, at *17; *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency overlooked 'an important aspect of the problem' … turns on what a relevant substantive statute makes 'important.'"). (SUF ¶ 18.)

Accordingly, not only does the Administrative Record not provide support for DOJ's decision to impose the new conditions, but it reinforces the conclusion that their imposition was arbitrary and capricious.

D. This Court Should Permanently Enjoin DOJ from Imposing the FY 2017 Immigration-Related Conditions

Because the FY 2017 immigration-related conditions are unlawful and unconstitutional, this Court should enter a permanent injunction prohibiting DOJ from requiring or enforcing compliance with them by Plaintiffs, or any FY 2017 Byrne JAG grantee. In order to obtain a permanent injunction, a plaintiff "must satisfy a four-factor test": "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between [the parties], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *see*

Animal Welfare Inst. v. Martin, 623 F.3d 19, 26 (1st Cir. 2010) (same). These elements are all present here.

1. Absent an Injunction, Plaintiffs Will Suffer Irreparable Harm for Which There is No Adequate Remedy at Law

Without an injunction, Plaintiffs stand to suffer an irreparable harm for which there is no adequate remedy at law. The irreparability of harm and the inadequacy of legal, i.e., monetary, remedies are often interconnected considerations. As the First Circuit has explained, "[t]he first two of the four factors are satisfied on a showing of 'substantial injury that is not accurately measureable or adequately compensable by money damages.'" *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 112 (1st Cir. 2008) (*quoting Ross Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 11 (1st Cir. 2000); *see also Scelsa v. C.U.N.Y.*, 806 F. Supp. 1126, 1135 (S.D.N.Y 1992) (to establish irreparable harm, the injury must be one for which "monetary remedies cannot provide adequate compensation").

There exists a significant risk of irreparable harm to the Cities if this Court does not permanently enjoin the FY 2017 immigration-related conditions. If Plaintiffs do not comply with those conditions, they risk losing tens of thousands of dollars for Central Falls and hundreds of thousands of dollars for Providence, both of which are fiscally-strapped cities, and for both of which the Byrne JAG awards fund important public safety initiatives that they might have to forego.[63] Furthermore, the loss of FY 2017 Byrne JAG funds would come too late in the Cities' budget process for them to replace the missing federal dollars (both Cities' FY 2017 ended on June 30, 2018). Courts routinely find irreparable harm when an impending withdrawal of funding threatens to cause cuts to services or employees. *See, e.g.*, *Planned Parenthood of Ind.,*

[63] Indeed, the Byrne JAG statute indicates that those monies are not merely forgone, but divvied up and parceled out to other jurisdictions around the country, impossible for the Cities to later reclaim. *See* 34 U.S.C. § 10156.

Inc. v. Comm'r of Ind. State Dep't of Health, 699 F.3d 962, 980 (7th Cir. 2012).[64] If, on the other hand, the Cities capitulate to DOJ's ultimatum, they will be forced to relinquish local control over law enforcement policies and criminal justice priorities. Instead, they will be compelled to adopt policies that mandate cooperation with civil federal immigration officials—policies that jeopardize the trust and cooperation between law enforcement and immigrant communities that the Cities have strived to build over the years. (*See* Paré Affidavit, ¶ 25, at P8; Mendonca Declaration, ¶¶ 14-15, at P40; SUF ¶¶ 59-60.) That trust and cooperation between the Cities' and its residents, including immigrants, creates a culture in which victims and witnesses are willing to report crimes and cooperate with law enforcement, helping to ensure the public health and safety of the entire community. (*See* Paré Affidavit, ¶ 14, at P6; Mendonca Declaration, ¶¶ 14-15, at P40; SUF ¶¶ 33, 52, 59-60.) Such trust, once lost, cannot be resurrected by a money judgment down the line. *See City of Chicago*, 321 F. Supp. 3d at 877-78 ("Trust once lost is not easily restored, and as such, this is an irreparable harm for which there is no adequate remedy at law.").

Indeed, the Cities suffer an irreparable harm simply by being put to this choice. As political subdivisions of the State of Rhode Island, the Tenth Amendment's sovereignty guarantees are violated by the federal government's coercive policies. *See, e.g.*, *New York*, 505 U.S. at 177; *Sebelius*, 567 U.S. at 578, 580. Because money cannot compensate for being denied the right of sovereignty, "where sovereign interests and public policies [are] at stake … the harm the State stands to suffer [is] irreparable." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *see also Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (explaining that,

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64 *See also Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 649-650 (M.D. La. 2015), *aff'd*, 862 F.3d 445 (5th Cir. 2017); *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 886 (D. Ariz. 2012); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 499 (M.D.N.C. 2011).

in certain cases of "constitutional violations," "irreparable harm is presumed"); 11A Wright & Miller, Federal Practice & Procedure § 2948.1 (3d ed. 2018) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Accordingly, violations of local sovereignty are uniformly remedied by striking the offending law, not by ordering a cash payment. *See, e.g.*, *Sebelius*, 567 U.S. at 587.

Because the injury arises from being put to the choice, rather than from the consequences of any particular decision, the choice itself must be enjoined to prevent constitutional injury. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) (irreparable harm where entity "faced with a Hobson's choice": "violate the . . . law and expose themselves to potentially huge liability" or "suffer the injury of obeying the law"); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-1059 (9th Cir. 2009) (irreparable harm exists when entity put to "a stark choice—either violation of their constitutional rights or loss of their" income source). *See also City of Chicago*, 321 F. Supp. 3d at 878 ("the Hobson's choice that now confronts the City—whether to suffer this injury or else decline much-needed grant funds—is not a choice at all and is itself sufficient to establish irreparable harm"); *City of Philadelphia*, 280 F. Supp. 3d at 656-57 (the Hobson's choice between complying with an unconstitutional law and foregoing funds constitutes irreparable harm); *Cty. of Santa Clara*, 250 F. Supp. 3d at 537-38 (plaintiffs suffer irreparable harm when forced to choose between complying with an allegedly unconstitutional executive order or defying the order and forfeiting federal grant funding). Accordingly, Plaintiffs' have a constitutional injury sufficient to establish a likelihood of irreparable harm that may not be remedied with money damages.

2. The Balance of the Equities and the Public Interest Favor a Permanent Injunction

The balance of the equities and the public interest favor permanently enjoining DOJ from imposing the FY 2017 immigration-related conditions. "When the federal government is a party, these factors merge." *Cty. of Santa Clara*, 250 F. Supp. 3d at 539 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The Cities "have a strong interest in avoiding unconstitutional federal enforcement and [] significant budget uncertainty." *Id.*; *see also City of Chicago*, 888 F.3d at 291 (given the significance of the federal funds at issue, "noncompliance is a particularly poor option"). Moreover, the harms are not limited to Plaintiffs. States and local governments across the country use Byrne JAG funds to support a diverse array of important law enforcement priorities and criminal justice programs. Many of these jurisdictions, like the Cities here, face the same Hobson's choice: accept conditions that are they reasonable believe to be unlawful, or forego the vital programs that those funds support.[65]

Meanwhile, DOJ experiences little hardship from a permanent injunction. First, DOJ has never before placed these conditions on the Byrne JAG program and cannot point to any change in circumstances that would justify them. Indeed, the Administrative Record is devoid of evidence that state and local communication with the federal government is deficient or that the new conditions will promote public safety. Second, even without these conditions, nothing about the Cities' local policies "interfere[s] in any way with the federal government's *lawful* pursuit of its civil immigration activities, and the presence of such localities will not immunize anyone

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[65] For example, fifteen states and the District of Columbia—including eight states that have not brought their own lawsuits challenging the conditions—joined an amicus brief in the District Court for the Eastern District of Pennsylvania arguing that the conditions were unlawful and providing examples of the types of programs that were jeopardized by DOJ's immigration-related conditions. *See* Br. for Amicus Curiae States of New York et al., *City of Philadelphia*, No. 2:17-cv-3894 (E.D. Pa. Feb. 16, 2018), ECF No. 121-2.

from the reach of the federal government[,] … which can and does freely operate in 'sanctuary' localities." *City of Chicago*, 321 F. Supp. 3d at 878 (emphasis added).

Finally, a permanent injunction serves the public interest. By enjoining the unlawful FY 2017 immigration-related conditions, this Court will act as a much-needed check on the executive's unlawful usurpation of congressional power, thereby safeguarding the constitution's well-crafted separation of powers. *See States of New York*, 2018 WL 6257693, at *6 ("It is incumbent on the judiciary 'to act as a check on such usurpation of power'"); *City of Chicago*, 321 F. Supp. 3d at 879 ("[t]he role of the judiciary to enjoin conduct by the executive that crosses its constitutionally-imposed limits is … essential to our form of government" and serves as a check against the concentration of power that could threaten individual liberties and result in tyranny); *cf. Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("enforcement of an unconstitutional law is always contrary to the public interest"); *Amarin Pharma, Inc. v. F.D.A.*, 119 F. Supp. 3d 196, 237 (S.D.N.Y. 2015) ("the Government does not have an interest in the unconstitutional enforcement of a law") (internal citations and quotations omitted).

3. The Injunction Should Preclude DOJ From Imposing the FY 2017 Immigration-Related Conditions on Any FY 2017 Byrne JAG Grantee

Plaintiffs respectfully suggest that this Court should permanently enjoin the FY 2017 immigration-related conditions from being imposed upon any Byrne JAG grantee.[66] Where

[66] Before commencing this action, the Cities had been the beneficiaries of two nationwide preliminary injunctions prohibiting DOJ from imposing the FY 2017 immigration-related conditions on any Byrne JAG applicant, as ordered by federal courts in the Northern District of Illinois and the Northern District of California. *See City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017); *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017), *aff'd in part, vacated in part, remanded sub nom. City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018). The Seventh and Ninth Circuit Courts of Appeals, in reviewing the district courts' decisions, upheld their conclusions that the FY 2017 immigration-related conditions were unlawful; however, both circuit courts vacated the nationwide injunction, limiting the injunction to the jurisdictions at issue in those cases. *See City of Chicago v. Sessions*,

agency action is invalidated, the ordinary result "is that rules are vacated—not that their application to the individual petitioners is proscribed. *Nat'l Mining Ass'n v. U.S. Army Corps. of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quotations omitted). Likewise, when a party brings a successful facial challenge to a statute, the general rule is that the "statute is wholly invalid and cannot be applied to *anyone*. *Ezell*, 651 F.3d at 698; *see also Decker v. O'Donnell*, 661 F.2d 598, 617-18 (7th Cir. 1980) (upholding a nationwide injunction where the statute was held to be facially unconstitutional).

Under these well-established principles, DOJ should be barred from imposing the challenged conditions on all FY 2017 Byrne JAG grantees. The FY 2017 immigration-related conditions apply uniformly throughout the country and do not vary by jurisdiction.[67] (SUF ¶ 13.) DOJ has no more authority to impose them on non-plaintiffs as it does on Plaintiffs. As such, the issues before this Court are not fact-dependent, *see City of Chicago*, 888 F.3d at 290-91, but instead concern pure issues of law and are appropriately suited to an injunction barring DOJ from imposing the conditions on any grant recipient.

Moreover, DOJ's unlawful imposition of the FY 2017 immigration-related conditions on Byrne JAG grantees has generated numerous lawsuits throughout the country. To date, every court to address the issue has held that DOJ lacks or likely lacks the authority to impose these conditions. Yet, despite the courts' unanimity, Defendants have continued to impose the conditions. Issuing an injunction on a nationwide basis serves the public's interest in judicial economy by ameliorating the need for repetitive and piecemeal litigation in multiple jurisdictions

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17-2991 (7th Cir. June 26, 2018), Order, Doc. No. 134 (granting partial stay of injunction as to geographic areas beyond the City of Chicago); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. Aug. 1, 2018) (affirming grant of summary judgment in favor of plaintiffs and injunction as to state of California, but vacating nationwide injunction).

[67] *See supra*, n.25.

across the country. "As between federal district courts … the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The public interest is ill served by requiring repetitive, disjointed litigation related to the same federal grant program in numerous jurisdictions across the country, *see City of Chicago*, 888 F.3d at 291-92, particularly when the litigation concerns a single yearly appropriation by Congress.[68]

E. In Addition to Injunctive Relief, Plaintiffs are Entitled to Declaratory and Mandamus Relief

For the reasons set forth above, in addition to injunctive relief, this Court should (1) issue a declaratory judgment holding that the FY 2017 immigration-related conditions are unlawful and unconstitutional; and (2) issue a writ of mandamus compelling DOJ to re-issue the award letters without the immigration-related conditions and disburse the Cities' FY 2017 Byrne JAG funding without regard to those conditions.

The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, empowers this Court with authority to grant declaratory relief in a case of actual controversy, such as this one, and "is designed to enable the clarification of legal rights and obligations." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995) ("federal courts retain substantial discretion

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[68] Plaintiffs respectfully disagree with the Seventh and Ninth Circuit's decisions to lift the nationwide injunctions entered in the district courts below them. While the Seventh Circuit offered no reasoning for its decision, but that the nationwide injunction would be stayed pending disposition by an *en banc* court, *see City of Chicago v. Sessions*, 17-2991 (7th Cir. June 26, 2018), Order, Doc. Nos. 128 and 134, the Ninth Circuit decided that the record was insufficiently developed as to the question of the national scope of the injunction. *See City & Cty. of San Francisco*, 897 F.3d at 1245. Plaintiffs understand the courts of appeals' hesitation and caution. Nonetheless, considering that the Ninth Circuit also contemporaneously opined that the Administration's arguments in favor of a blanket restriction on a nationwide injunction was unpersuasive, *San Francisco*, 897 F.3d at 1245, Plaintiffs assert that the need for an injunction is not jurisdiction-specific and that uniformity and clarity would better serve the public interest and may even be less burdensome on DOJ, which would not need to treat myriad jurisdictions differently in its implementation of the Byrne JAG program.

in deciding whether to grant declaratory relief"). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is sufficient controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Here, declaratory relief is imperative in order to determine the legal rights of the Cities vis-à-vis the policy priorities of the executive branch in the context of the Byrne JAG program and, without it, the parties will remain at a real and immediate stalemate.

Additionally, the Mandamus Act, 28 U.S.C. § 1361, bestows this Court with jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to" Plaintiffs. Mandamus relief is appropriate where a plaintiff has a right to have the act performed, the defendant owes the plaintiff a clear non-discretionary duty, and the plaintiff has exhausted all other avenues of relief. *City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984). These conditions are met here. DOJ's duty to disburse formula grant funds is nondiscretionary, when, as here, the Cities meet the lawfully imposed requirements of the grant, and there are no other means available for Plaintiffs to obtain previously budgeted-for funding from the DOJ. *See Udall v. Wisconsin*, 306 F.2d 790, 793 (D.C. Cir. 1962) (recognizing that district court had jurisdiction to issue writ of mandamus where the Secretary of the Interior was given no discretion in apportioning a wildlife restoration fund).

Plaintiffs also are entitled to mandamus relief under the APA, 5 U.S.C. § 706(1), which authorizes the Court to "compel agency action unlawfully withheld or unreasonably delayed." *See City of Philadelphia*, 309 F. Supp. 3d at 343-44 (granting relief under the APA). The relevant factors for the Court to consider are: (1) "[t]he length of time that has elapsed since the agency came under a duty to act," (2) "[t]he reasonableness of the delay … in the context of the

statute authorizing the agency's action," (3) "[t]he consequences of the agency's delay;" and (4) "[a]ny plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." *Id.*

These factors support mandamus relief here. As to the first factor, Providence and Central Falls both received their FY 2017 Award Letters on June 26, 2018 and have yet to receive their respective awards of $212,112 and $28,677. Further, "it bears emphasis that Congress specifically set the [Byrne] JAG program as an annual award, and the DOJ's delay has precluded the [Cities] from receiving the intended award[s] at such time as the [Cities] can make timely use of [them]." *City of Philadelphia*, 309 F. Supp. 3d at 343; *see id.* at 343 n.16 ("Because this case arises in the context of an annual grant program, a one-year delay represents a far greater delay than might be the case in a different context."). As to the second factor, the delay is unreasonable because the Byrne JAG statute is a formula, rather than a discretionary, grant, and because the Byrne JAG statute is couched in mandatory language. *See* 34 U.S.C. § 10156(a)(1) ("[o]f the total amount appropriated for [the Byrne JAG program], the Attorney General *shall ... allocate*" money according to the statutory formula) (emphasis added).[69] As for the third factor, "the consequences of the agency's delay," Plaintiffs point this court to the concerns espoused in the discussion of irreparable harm, *supra*, Section IV(D)(1). As for the fourth factor, Plaintiffs are

[69] Although Section 10152(a)(1) of the Byrne JAG statute provides that, "[f]rom amounts made available to carry out this part, the Attorney General may, in accordance with the formula established [ ], make grants to States and units of local government," 34 U.S.C. § 10152(a)(1), "read in the context of the Byrne JAG Program as a non-discretionary formula grant, it is clear that this subsection does not enable the DOJ to withhold funds to which state and local governments are otherwise entitled under the statutory formula, but rather reflects that some eligible grantees may choose not to apply for funding." *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 344 n.18 (E.D. Pa. 2018).

not aware that DOJ has any mitigating evidence or argument on this element. Accordingly, Plaintiffs respectfully request mandamus relief in their favor.[70]

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully suggest that this Court grant summary judgment in their favor on Counts I through V of the Amended Complaint. The Court should also issue a declaratory judgment that the FY 2017 immigration-related conditions are unlawful and unconstitutional, as well as issue a permanent injunction enjoining DOJ from imposing the notice, access, and Section 1373 conditions on the Cities, or on any Byrne JAG grantee. Further, the Court should issue a writ of mandamus directing DOJ to immediately disburse the Cities' FY 2017 award funding and re-issue FY 2017 award letters without the FY 2017 immigration-related conditions to all grantees that previously received such documentation. The Court may award other relief as it deems just and proper.

[70] Should the Court require, the parameters of such relief can be determined after an opportunity for the parties to confer and suggest the appropriate specific relief.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that I have filed the within with the United States District Court on this 21st day of December 2018, that a copy is available for viewing and downloading via the ECF system, and that I have caused a copy to be sent to:

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