19-267(L); 19-275 (con.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, et al.,
Plaintiffs-Appellees,
v.

UNITED STATES DEPARTMENT OF JUSTICE,
WILLIAM P. BARR,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF CHICAGO; 30 ADDITIONAL CITIES, COUNTIES, AND MUNICIPAL AGENCIES; THE U.S. CONFERENCE OF MAYORS; THE NATIONAL LEAGUE OF CITIES; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici include a diverse array of cities, counties, municipal agencies, and local-government associations.[1] Local governments are responsible for the health, safety, and welfare of their residents. This appeal involves two areas of vital interest: trust between local governments and immigrant residents and federal funding for local law enforcement. *Amici* agree that trust between all community members and law enforcement promotes safety and reduces crime and that Congress created JAG to support such local determinations. *Amici* submit this brief to urge the court to grant rehearing *en banc* and affirm the injunction against the JAG conditions.

BACKGROUND

The Importance of Trust between Immigrants and Local Government. Immigrants are hugely important in America's cities. *See* Americas Society/Council of the Americas, *Immigrants &*

[1] No counsel for any party authored this brief, in whole or in part, and no person other than *amici* contributed monetarily to its preparation or submission.

Competitive Cities, available at https://www.as-coa.org/sites/default/files/ImmigrantsandCompetitiveCities.pdf. Of the 15.1 million residents of New York City, Los Angeles, and Chicago, more than 5.1 million are immigrants. U.S. Census Bureau, 2014-2018 American Community Survey 5-Year Estimates. The New York City and Los Angeles metropolitan areas each have approximately 1,000,000 undocumented residents, and Chicago's has approximately 425,000. Pew Research Center, *Estimates of unauthorized immigrant population* (Feb. 3, 2017), *available at* https://goo.gl/ZwBgda.

To ensure immigrants' willingness to interact with local officials, more than 600 counties and cities have limited their involvement in federal immigration enforcement. *See* Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, ¶ 12 (2017) ("*Effects of Sanctuary Policies*"), *available at* https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/. Without cooperation of immigrant communities, local governments cannot prevent or investigate crime effectively because "[t]he moment [immigrant] victims and witnesses begin to fear that their local police will deport them, cooperation with

their police then ceases." *Border Insecurity*, Hearing before the S. Comm. on Homeland Sec. and Govt. Affairs, 115th Cong. 4 (2017) (statement of J. Thomas Manger, Chief of Police, Montgomery County, Maryland); *accord* National Immigration Law Center, *Austin Police Chief: Congress Should Consider Good Policy, Not Politics* (2013), *available at* https://perma.cc/TJ9R-HTNS ("Senators who propose that we should engage in immigration enforcement do not realize how this would undermine everything we do to build trust and prevent crime ...."). In one study, 50% of immigrants and 67% of undocumented individuals reported they are less likely to offer information about crimes to police for fear that officers will inquire about their or others' immigration status. Nik Theodore, *Insecure Communities*, 5-6 (2013), *available at* https://perma.cc/SMV7-FZGA. Police associations agree. International Association of Chiefs of Police, *Enforcing Immigration Law*, at 5, *available at* https://perma.cc/M2J2-LDSL (recognizing local police cooperation with federal immigration enforcement "could have a chilling effect in immigrant communities and could limit cooperation with police by members of those communities"); *Major Cities Chiefs Association Immigration Position* (Oct. 2011), *available at*

https://bit.ly/2IoRh91 (recognizing police support of immigration enforcement "undermines the trust and cooperation with immigrant communities which are essential elements of community oriented policing"). "[T]he failure to obtain . . . victim and witness cooperation could both hinder law enforcement efforts and allow criminals to freely target communities with a large undocumented population, knowing that their crimes will be less likely to be reported." *City of Chicago v. Sessions*, 888 F.3d 272, 280 (7th Cir. 2018).

Trust between immigrants and local government is also essential to maintaining public health, particularly during a pandemic. "The first rule of public health is to gain people's trust to come forward: People who don't seek care cannot be tested or treated, and their contacts won't be traced …." Miriam Jordan, "*We're Petrified*," N.Y. Times, Mar. 18, 2020; *see also City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 341 (E.D. Pa. 2018) (recognizing "potential risks to public health if immigrants did not feel safe seeking care").

Chicago, for example, has for decades refined a "Welcoming City" policy to build trust with immigrant residents. Municipal Code of Chicago, Ill. § 2-173-005, et seq. Chicago prioritizes local crimefighting

and safety over federal civil immigration infractions. "The Welcoming City Ordinance reflects the City's determination that, as a City in which one out of five of its residents is an immigrant, 'the cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City's goals of protecting life and property, preventing crime and resolving problems.'" *Chicago*, 888 F.3d at 279. Other local governments have adopted similar policies. *E.g.*, Phila. Exec. Order No. 5-16; N.Y.C. Exec. Order 41 (2003); N.Y.C. Admin. Code § 9-131(h)(1); Cook Cty., Ill. Res. 07-R-240; Cook Cty. Ill., Mun. Code § 46-37(b); Madison Res. 17-00125; Oakland Res. No. 86498 (2016) and No. 63950 (1986); Minneapolis Code Title 2 Ch. 19.

Importantly, these policies provide no so-called "sanctuary" from federal immigration laws. They do "not interfere in any way with the federal government's lawful pursuit of its civil immigration activities, and presence in such localities will not immunize anyone to the reach of the federal government"; "[t]he federal government can and does freely operate in 'sanctuary' localities." *Chicago*, 888 F.3d at 281. Moreover, "crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties ... controlling for population

characteristics." *Effects of Sanctuary Policies*, ¶¶ 15-16.

JAG Funding. JAG "is the primary provider of federal criminal justice funding to states and units of local government." JAG FY 2018 Local Solicitation at 5, *available at* https://www.bja.gov/Funding/JAGLocal18.pdf. It provides grantees "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). Local governments spend JAG funds on diverse projects:

- Chicago earmarked 2017 JAG funds for expansion of ShotSpotter technology, which identifies the location of shooting incidents, so officers can respond more precisely.
- Philadelphia earmarked 2017 JAG funds to equip officers with Narcan to counteract opioid overdoses.
- Portland, Oregon used JAG funds to aid women exploited in the commercial sex industry.
- Sacramento used JAG funds to support its police helicopter program.

JAG is a formula grant, requiring that the Attorney General "shall allocate" funds according to population and crime statistics. 34 U.S.C. §§ 10152(a)(1), 10156(d)(2)(A). The statute affords the Attorney General only narrow discretion over non-substantive aspects of the

program and authorizes him to "reserve not more than 5 percent" of the total funds for specific purposes after finding the reserve is "necessary" to address "extraordinary increases in crime" or "mitigate significant programmatic harm." 34 U.S.C. § 10157(b). Nonetheless, in 2017, the Attorney General announced two new conditions on JAG funds. First, a "notice" condition requires recipients, upon request, to provide DHS notice when an alien in custody will be released. Second, an "access" condition requires recipients to permit federal agents to access correctional facilities to meet with aliens or suspected aliens to inquire about their right to remain in the country. The Attorney General also re-imposed a condition requiring certification of compliance with 8 U.S.C. § 1373.

These conditions conflicted with local policies, and local governments could not follow them without undermining their policing strategies. Grantees across the country filed suit. *City of Chicago v. Sessions*, No. 17-cv-05720 (N.D. Ill.); *City of Philadelphia v. Sessions*, No. 17-cv-03894 (E.D. Pa.); *City of Los Angeles v. Sessions*, No. 17-cv-07215 (C.D. Cal.); *California v. Sessions*, No. 17-cv-04701 (N.D. Cal.); *City & County of San Francisco v. Sessions*, No. 18-cv-05146 (N.D. Cal.);

City of Evanston v. Sessions, No. 18-cv-4853 (N.D. Ill.) (joined by U.S. Conference of Mayors); *Illinois v. Sessions*, No. 18-cv-04791 (N.D. Ill.); *City of Providence v. Sessions*, No. 18-cv-00437 (D.R.I.); *Oregon v. Trump*, 18-cv-01959 (D. Or.); *Colorado v. DOJ*, No. 19-cv-00736 (D. Colo.).

The district court below, and every court but the panel, concluded that the conditions are invalid and enjoined them. *City of Chicago v. Barr*, No. 18-2885, 2020 WL 2078395 (7th Cir. Apr. 30, 2020); *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F. 3d 931 (9th Cir. 2019); *City of Philadelphia v. Attorney General*, 916 F.3d 276, 293 (3d Cir. 2019); *Chicago*, 888 F.3d at 276-87; *Colorado v. DOJ*, No. 19-cv-00736, 2020 WL 1955474 (D. Colo. Apr. 23, 2020); *Oregon v. Trump*, 406 F. Supp. 3d 940 (D. Or. 2019); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018); *City of Los Angeles v. Sessions*, No. 17-cv-07215, 2018 WL 6071072 (C.D. Cal. Sept. 13, 2018); *City of Evanston v. Sessions*, No. 18-cv-4853, 2018 WL 10228461 (N.D. Ill. Aug. 9, 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. July 27, 2018); *Philadelphia*, 309 F. Supp. 3d at 296-97.

ARGUMENT

The Attorney General lacks authority to impose conditions on JAG funds, especially to coerce local governments into assisting with federal civil immigration enforcement. Protecting residents is central to the police power vested in state and local governments in our federal system. *See United States v. Morrison*, 529 U.S. 598, 618 (2000). The Framers left to local governments matters that "concern the lives, liberties, and properties of the people" to ensure these are determined "by governments more local and more accountable than a distant federal bureaucracy." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536 (2012). Congress likewise recognized that crimefighting is best conducted by local officials most familiar with local needs and established JAG as a formula grant to allow flexibility in expenditures, rather than imposing "one size fits all" mandates. H.R. Rep. 109-233, at 89.

The Framers also diffused power among the branches of federal government as another "bulwark against ... tyranny." *Chicago*, 888 F.3d at 277. Accordingly, "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." *Id.*

Every other decision on the JAG conditions has invalidated them as unauthorized. The panel's contrary decision is erroneous and creates inequities and anomalies in every plaintiff-state in this case. The court should grant en banc rehearing to align the result here to the rest of the country.

I. THE NOTICE AND ACCESS CONDITIONS ARE ULTRA VIRES.

The Attorney General claims no inherent authority. Without that, an agency "literally has no power to act ... unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). When federal agencies act without congressional authority, "what they do is *ultra vires*." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). Further limits arise because, when a policy would "upset the usual constitutional balance of federal and state powers," Congress must make its intention to authorize the policy "'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Clear authority is most essential

where federal policy threatens "the States' police power." *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006). These principles govern here because, while the federal government exercises power over immigration, state and local governments exercise police power over crime in their borders.

The panel ignored these principles, stretching the statute's language to invent authority. It perceived authority for the notice and access conditions in two provisions of 34 U.S.C. § 10153(a) requiring that a JAG application include "[a]n assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require" and that an applicant certify that "there has been appropriate coordination with affected agencies." Slip op. 63-73 (2d Cir. Feb. 26, 2020). Neither provision provides any conditioning authority, and the First Circuit properly rejected the panel's "capacious" reading. *Providence*, 954 F.3d at 35.

Rather, the text, structure, and purpose of the statute preclude discretionary policy conditions. The statute prescribes a mandatory funding formula – that the Attorney General "shall allocate" funds "in

accordance with" a formula based on population and crime. 34 U.S.C. §§ 10152(a)(1), 10156(d)(2)(A). Congress confers broad discretionary conditioning authority by discretionary grants, not formula grants. *See* Kenneth J. Allen, *Federal Grant Practice* § 16:7 (2017); *see also City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) ("In the formula grant program the authorizing Act of Congress determines who the recipients are and how much money each shall receive.").

The statute likewise broadly authorizes local governments to propose programs in "any one" of eight expansive areas. 34 U.S.C. § 10152(a)(1). And it enforces that authority by requiring a rule of construction that allows state and local governments to use funds as flexibly as they could under predecessor programs. 34 U.S.C. § 10152(a)(2).

The statute also contains a limited "reserved funds" exception, allowing the Attorney General to exercise a modicum of discretion by "reserv[ing] not more than 5 percent" of the program's total funds to combat "extraordinary increases in crime" or "mitigate significant programmatic harm," if he affirmatively "determin[es]" that doing so is "necessary" to address one of those objectives. 34 U.S.C. § 10157(b).

The Attorney General has made neither determination here, and he imposed the conditions not on 5% of JAG funds, but on all.

Congress has also shown that it knows how to tie JAG funds to federal policies. There are numerous provisions limiting funding for failure to meet specific goals. 34 U.S.C. §§ 20927(a), 30307(e)(2)(A), 60105(c)(2). Failure to abide by these policies results in at most a 10% funding reduction. Congress has never authorized the Attorney General to declare jurisdictions wholesale ineligible on policy grounds.

Finally, unbounded conditioning authority transforms JAG into a policy cudgel inconsistent with the program's overarching purpose of giving local governments "flexibility" "rather than … impos[ing] a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89. Congress intended JAG to empower local governments by deferring to local policy choices, not to allow the Attorney General to coerce local governments into submission to federal priorities.

II. THE ATTORNEY GENERAL LACKS AUTHORITY TO IMPOSE THE SECTION 1373 CONDITION.

The panel also erred in holding that 34 U.S.C. § 10153(a)(5)(D) authorizes the Attorney General to condition JAG funds on compliance

with section 1373. Slip op. 36-37. The panel relied on section 10153(a)(5)(D)'s requirement that an applicant "include in its application '[a] certification, made in a form acceptable to the Attorney General' stating that 'the applicant will comply with all provisions of this part *and all other applicable Federal laws*,'" *id.* at 36, and concluded the Attorney General may choose any federal law he deems "applicable" as a condition, *id.* at 37-38.

The First Circuit rejected the panel's "extravagant" interpretation of section 10153(a)(5)(D), correctly concluding that the provision does not authorize the compliance condition because it pertains only to "laws that apply to states and localities *in their capacities as Byrne JAG grant recipients*." *Providence*, 954 F.3d at 37. The Seventh Circuit has since agreed. *Chicago*, 2020 WL 2078395 at *11-14.

The panel also wrongly declined to address section 1373's facial violation of the Tenth Amendment, believing that the statute is constitutional "as applied" as a grant condition. Slip op. 50, 56. But Congress neither imposed the terms of section 1373 as a grant condition nor authorized the Attorney General to impose them. Rather, Congress authorized him to require certification of compliance with "applicable

federal laws." As the district court explained, "[a]s an unconstitutional law, Section 1373 automatically drops out of the possible pool of 'applicable Federal laws' described in the Byrne JAG statute." *New York v. DOJ*, 343 F. Supp. 3d 213, 237 (S.D.N.Y. 2018).

CONCLUSION

The court should grant en banc rehearing and affirm the injunction.

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I hereby certify that on May 14, 2020, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because they use a proportionally spaced typeface (New Century Schoolbook) in 14-point using Microsoft Word. The brief complies with the type-volume limits of Fed. R. App. P. 29(b)(4) because it contains 2,598 words beginning with the words "Statement of Interest" and ending with the words "Respectfully submitted."

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