No. 17A-_____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL, APPLICANT

v.

CITY OF CHICAGO

APPLICATION FOR PARTIAL STAY PENDING REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of Attorney General Jefferson B. Sessions III, respectfully applies for a partial stay of the preliminary injunction issued by the United States District Court for the Northern District of Illinois, pending rehearing en banc before the United States Court of Appeals for the Seventh Circuit of a panel decision affirming the injunction, and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

At the request of a single plaintiff, the City of Chicago, the district court entered, and a panel of the court appeals affirmed, a "nationwide" preliminary injunction barring the federal government from imposing two conditions in federal grants to local law

enforcement. Addendum (Add.) 2. The two enjoined conditions require local law-enforcement entities that receive federal grants to provide a basic level of cooperation with federal agencies charged with enforcing the Nation's immigration laws. One condition requires that, upon a request from the Department of Homeland Security (DHS) concerning a particular alien in custody, state and local law enforcement notify DHS in advance of the individual's scheduled release. The other requires that state and local law enforcement allow DHS agents access to aliens (or persons believed to be aliens) in custody in order to conduct interviews. The district court concluded that Chicago is likely to succeed on its claim that the two conditions exceed the statutory authority of the Department of Justice (DOJ) and that imposition of them on Chicago will cause the City irreparable harm. Yet instead of enjoining the conditions solely with respect to Chicago -- the only plaintiff -- the court enjoined them as to all grant applicants. A divided court of appeals panel affirmed and declined to stay the injunction's application beyond Chicago. The full court has granted partial rehearing en banc limited to the scope of the injunction, but it has deferred ruling on a renewed request for a stay.

The government respectfully disagrees with the lower courts' narrow reading of the relevant statutes. But in this application, it does not ask the Court to stay the preliminary injunction in its entirety. Instead, the government respectfully requests a

stay only as to the nationwide scope of the injunction -- which bars application of the two conditions not only to Chicago, but also to all other grant applicants that are not parties to this case. Even if the lower courts' statutory interpretation were correct, that sweeping remedy is unjustifiable and threatens irreparable harm to the government and the public.

Enjoining the application of grant conditions to hundreds of grant applicants that are not parties to the litigation contravenes fundamental principles of Article III and equity, and it strays far beyond the traditional, proper role of federal courts. That overbroad remedy is not even arguably necessary to redress any cognizable, irreparable harm to Chicago itself. The City has never shown, and the courts below did not conclude, that imposition of the conditions on other applicants would injure Chicago. An injunction limited to Chicago thus would fully redress the only plaintiff's claimed injuries. In contrast, the categorical injunction the courts imposed is already causing harm to the United States and other local governments that depend on federal funding.

The injunction issued in this case reflects the increasingly prevalent trend of entering categorical, absent-party injunctions that bar any enforcement of federal laws or policies against any person. Such injunctions frustrate development of the law, effectively freezing in place the first ruling adverse to the government unless and until appellate courts intervene. Indeed,

the panel majority defended the practice of issuing "nationwide injunctions" in part on the basis that, "because of the[ir] widespread impact," they are "more likely to get the attention of [this] Court." Add. 30. Moreover, it justified the injunction's scope based in part on its misreading of this Court's precedent -- a recurring error only this Court can correct.

This Court has previously stayed a categorical injunction against a federal policy to the extent it swept beyond the parties to the case. See United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993). It should follow the same course here and stay the preliminary injunction to the extent it bars imposition of the two conditions on grant applicants other than Chicago.

STATEMENT

1. a. Congress created the Byrne JAG Program in 2006 to provide additional funding to state and local law-enforcement agencies. See Violence Against Women and Department of Justice Reauthorization Act of 2005 (2006 Act), Pub. L. No. 109-162, 119 Stat. 2960 (2006). The 2006 Act provides that, "[f]rom amounts made available to carry out" the program, "the Attorney General may," in accordance with a statutory formula, "make grants to States and units of local government" for certain criminal-justice purposes. 34 U.S.C. 10152(a)(1).[1] Grant funds are divided among

[1] As of September 1, 2017, the provisions at issue here, previously codified in Title 42 of the United States Code, were recodified in Title 34.

grantees based on a statutory formula, largely premised on population and crime statistics. 34 U.S.C. 10156. States and localities that seek funding must submit an application to the Attorney General "in such form as the Attorney General may require." 34 U.S.C. 10153(a). Applicants must certify (inter alia) that they "will comply with all provisions of this part and all other applicable Federal laws," that they will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require," and that "there has been appropriate coordination with affected agencies." 34 U.S.C. 10153(a)(4), (5)(C) and (D).

Congress created the Byrne JAG Program in the Bureau of Justice Assistance in DOJ, which reports to the Assistant Attorney General for the Office of Justice Programs (OJP). 34 U.S.C. 10101, 10102, 10141, 10151-10158. The same 2006 Act that created the Program also amended the statutory provision that enumerates the powers of the Assistant Attorney General for OJP. That provision had previously authorized the Assistant Attorney General to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General." 42 U.S.C. 3712(a)(6) (2000). The 2006 Act added that those powers "includ[e] placing special conditions on all grants, and determining priority purposes for formula grants." § 1152(b), 119 Stat. at 3113; 34 U.S.C. 10102(a)(6).

When OJP approves a Byrne JAG grant application, it sends a grant award document to the applicant. The award document enumerates (inter alia) the "special conditions" applicable to the award; the applicant then typically has 45 calendar days to review the special conditions and decide whether to accept the award.[2]

b. When OJP solicited applications for the Fiscal Year 2017 grant program, it announced new conditions that were included in OJP's 2017 award documents. C.A. App. 30, 62-63, 83-84. Two of those conditions, which relate to aliens who have been arrested by state or local authorities for criminal offenses, are at issue here. The first condition -- referred to below as the notice condition -- requires that, with respect to any "program or activity" funded by the grant, the grantee must have a policy designed to ensure that, when DHS provides a formal written request for advance notice of the scheduled release date and time for a particular alien at a particular facility, the facility will provide such notice to DHS "as early as practicable." Id. at 63 (¶ 56.1.B); see id. at 60 (¶ 53.5.A(3)) (term "program or activity" has the same meaning as that phrase in 42 U.S.C. 2000d-4a). This condition is designed to facilitate cooperation when DHS issues an "immigration detainer," which includes a request to a local law-enforcement agency that it notify DHS "as early as practicable (at

[2] C.A. App. 46-99 (capitalization and emphasis omitted); OJP, DOJ, Grant Process Overview, https://ojp.gov/funding/Apply/GrantProcess.htm (all Internet sites last visited June 18, 2018).

least 48 hours, if possible) before the alien is released from [the agency's] custody."[3] Although detainers request that local authorities briefly maintain custody of the alien to allow DHS to assume custody, the notice condition expressly disclaims any requirement to "maintain (or detain) any individual in custody beyond the date and time the individual would have been released in the absence of this condition." C.A. App. 62 (¶ 55.4.B).[4]

The second condition at issue -- referred to below as the access condition -- concerns federal agents' ability to meet with aliens in grant recipients' custody. Federal law authorizes immigration officials, without obtaining a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. 1357(a)(1). Although aliens are not compelled to speak with ICE agents, voluntary

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[3] DHS, Form I-247A: Immigration Detainer -- Notice of Action 1-2 (Mar. 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

[4] United States Immigration and Customs Enforcement (ICE) policy authorizes issuance of a detainer only for an alien who has been arrested for a criminal offense. ICE, Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers § 2.5, https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. The policy also requires that the ICE officer have probable cause to believe that the alien is removable from the United States based on certain categories of reliable information, and it precludes the issuance of a detainer solely based on evidence that the alien is foreign born and the absence of records in available databases. Id. § 5.1. The policy requires that the detainer request be accompanied by an administrative warrant issued by a supervisory immigration officer. Id. §§ 2.4, 5.2. ICE officers, in turn, are authorized to arrest an alien on the basis of such a warrant. See 8 U.S.C. 1226(a).

interviews in jails and prisons can assist ICE in assessing an alien's likely immigration status -- especially when the alien does not appear in the relevant databases. Such interviews can be frustrated, however, if federal agents are prevented from meeting with aliens in custody. The access condition accordingly requires that, with respect to any "program or activity" funded by the grant, the grantee must have a policy designed to ensure that federal agents are "in fact given access" to correctional facilities to "meet with individuals who are (or are believed * * * to be) aliens and to inquire as to such individuals' right to be or remain in the United States." C.A. App. 63 (¶ 56.1.A).

2. On August 7, 2017, the City brought this suit against the Attorney General in the Northern District of Illinois challenging (as relevant here) the notice and access conditions. Compl. ¶ 70. It claimed that those conditions were unlawful and sought a preliminary injunction against their imposition nationwide. Id. ¶¶ 55-135; see D. Ct. Doc. 21, ¶ 3 (Aug. 10, 2017); D. Ct. Doc. 23, at 7-9, 21-24 (Aug. 10, 2017). The City alleged that complying with those conditions -- which are aimed solely at cooperation with respect to removal of aliens who have been arrested for criminal offenses -- would undermine the City's goodwill with the immigrant community. See Compl. ¶ 70. The City did not contend that it is harmed by application of the conditions to other grant applicants. Nevertheless, it sought a nationwide preliminary

injunction barring imposition of the conditions with respect to any grant applicants. D. Ct. Doc. 69, at 15 (Aug. 31, 2017).

On September 15, 2017, the district court granted the requested injunction in relevant part. Add. 50-90. It determined that the City was likely to succeed on the merits on the ground that the statute does not authorize the notice and access conditions. Add. 60-68. The court credited the City's contention that it would suffer irreparable harm if it accepted grants containing the notice and access conditions. Add. 85-86. But the court found that the balance of equities and the public interest favored neither party because both parties "have strong public policy arguments." Add. 89. Considering those factors, the court granted a "preliminary injunction against the Attorney General's imposition of the notice and access conditions on the Byrne JAG grant." Add. 89-90. It stated that "[t]h[e] injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction." Add. 90.[5]

[5] Chicago also challenged a third condition, not at issue here, that requires certification that the applicant complies with 8 U.S.C. 1373, which prohibits state and local government and law-enforcement officials from restricting the sharing of information with DHS, ibid.; C.A. App. 59 (¶ 52). The district court denied the City's request to enjoin that condition, finding that the City had not shown a likelihood of success on the merits. Add. 69-84.

3. The government promptly appealed and filed a motion in the district court seeking a partial stay of the preliminary injunction pending appeal to the extent that the injunction applied to grant applicants other than Chicago. D. Ct. Docs. 79, 80, 81 (Sept. 26, 2017). On October 13, 2017, the district court denied the motion. Add. 91-107. The court stated that it had broad remedial authority to address the alleged violation of law and that the legal issues would not differ from jurisdiction to jurisdiction. Add. 94-96. The court reasoned that "judicial economy counsels against" requiring other jurisdictions that might want to challenge the conditions "to file their own lawsuits," particularly because some had participated as amici curiae. Add. 101.

The government immediately sought the same partial stay in the court of appeals. C.A. Doc. 8-1 (Oct. 13, 2017). After suspending proceedings to allow the district court to address a motion the City had filed seeking reconsideration of the denial of an injunction with respect to a third condition, Add. 109-110, which the district court denied, Add. 111-141, the court of appeals denied the stay and directed briefing on the merits. Add. 142-143.

4. On April 19, 2018, a panel of the court of appeals affirmed the preliminary injunction. Add. 1-35.

a. The court of appeals concluded that the City was likely to succeed on its claim that the statute governing the Byrne JAG Program does not authorize the notice and access conditions. Add.

15-24. The court stated that the statutory text authorizing the Assistant Attorney General to "'exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants,'" does not constitute a "stand-alone grant of authority" to impose conditions on grants. Add. 17, 19 (quoting 34 U.S.C. 10102(a)(6)) (emphasis omitted). And the court concluded that no other statutory provision vests authority to impose the conditions at issue in either the Assistant Attorney General or the Attorney General, and therefore Section 10102(a)(6) does not permit the Assistant Attorney General to exercise that authority. Add. 18-19.

In a divided portion of its ruling, the panel majority also affirmed the nationwide scope of the preliminary injunction. Add. 24-35. The majority acknowledged "the possible hazards of the use of nationwide injunctions," including that they "can stymie the development of the legal issues through the court system" and invite "forum shopping." Add. 24-25. The majority nevertheless determined that, "for issues of widespread national impact, a nationwide injunction can be beneficial" by providing "efficiency" and "certainty," avoiding irreparable harm, and advancing the public interest. Add. 26. The majority construed this Court's decision in Trump v. IRAP, 137 S. Ct. 2080 (2017) (per curiam) --

which granted a partial stay of nationwide preliminary injunctions entered against an Executive Order suspending entry of aliens from abroad -- as endorsing nationwide injunctions. Add. 26-28.

The panel majority disagreed with the government's argument that Chicago lacks standing to seek to enjoin federal policies as to nonparties, reasoning that "[t]he City had standing to seek injunctive relief" and that the scope of the injunction was merely a matter of balancing the equities left to the district court. Add. 28. The majority also rejected the government's arguments that nationwide relief here violated the equitable rule "requir[ing] that the injunction be no more burdensome than necessary to provide complete relief to the City"; that the district court's remedial analysis conflated the breadth of the City's legal argument with the scope of relief; and that the injunction eviscerated requirements for and protections of class actions. Add. 29. The majority reasoned that "[t]hose arguments would seek a bright-line rule" against nationwide injunctions, which the majority held would be inconsistent with IRAP and various lower-court rulings imposing nationwide injunctions. Ibid.

The panel majority concluded that nationwide relief is appropriate here because Chicago's legal challenge "presents purely a narrow issue of law" that is "not fact-dependent" and would not "benefit from consideration in multiple courts." Add. 30-31. It also concluded that "the balance of equities" supports such relief.

Add. 32. The majority reasoned that the challenged conditions would harm nonparty applicants' relationships with their communities and that grant applicants are "interconnected" because of the Byrne JAG Program's funding formula. Add. 34; see Add. 31-34. And it believed that requiring individual applicants to bring separate suits would not serve the public interest. Add. 32-33.

b. Judge Manion concurred in the judgment in part but dissented with respect to the injunction's scope. Add. 36-49. He observed that "[t]he Notice and Access conditions, viewed in isolation, are perfectly reasonable," and that "[n]o one should find it surprising that the federal government would require cooperation with its law enforcement efforts in exchange for the receipt of federal law enforcement funds." Add. 39. He nevertheless agreed with the majority's statutory interpretation and would have affirmed "a preliminary injunction prohibiting the Attorney General from imposing [the notice and access] conditions on Chicago," which is "the only plaintiff in this suit." Add. 41.

Judge Manion disagreed, however, with the majority's approval of an injunction that sweeps far beyond Chicago to reach numerous nonparties. Add. 41-49. That injunction, he explained, is "a gratuitous application of an extreme remedy," and the majority's ruling upholding it "bypasses Supreme Court precedent, disregards what the district court actually concluded concerning the equities in this case, and misreads the effect of providing relief to

Chicago." Add. 42. A "nationwide injunction," Judge Manion observed, "is similar in effect to nonmutual offensive collateral estoppel," which this Court has held is inapplicable to the federal government because it would "'substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.'" Add. 42-43 (quoting United States v. Mendoza, 464 U.S. 154, 160 (1984)). The majority's position that allowing development of the law is unnecessary for "'purely legal' issue[s]," Judge Manion explained, "directly conflict[s]" with these principles. Add. 44 (citations omitted). In his view, a court of appeals "should not presume to decide legal issues for the whole country" once and for all. Ibid.

Judge Manion further explained that the majority improperly "second-guess[ed]" the district court's "express[] determin[ation] that the balance of the equities and the public interest 'favor neither party.'" Add. 45 (citation omitted). The majority's concern about "'widespread, duplicative litigation,'" he opined, was unfounded because "Chicago could have filed a class action," and "[r]equiring a class action has the benefit of dealing with the one-way-ratchet nature of the nationwide injunction." Add. 45-46. He also explained that, unlike cases where the plaintiff's injuries can be redressed only in ways that unavoidably benefit nonparties, the "need to protect third parties to provide complete relief is not present here": Chicago "ha[d] certainly not shown

how an injunction preventing the Attorney General from enforcing the conditions at all is necessary to protect its own interest in collecting its allotment." Add. 48-49. And even "[i]f money were withheld and redistributed from other jurisdictions," Judge Manion noted, "Chicago would benefit by getting more money." Add. 49.

5. On April 23, the government filed a motion in the court of appeals for a stay of the preliminary injunction pending a forthcoming petition for rehearing en banc and any further proceedings in this Court. C.A. Doc. 115. On April 24, the panel denied the motion "without prejudice to renewal" upon the filing of a petition for rehearing en banc. Add. 144.

On April 27, the government filed a petition for rehearing en banc and a renewed stay motion. C.A. Docs. 118, 120. The panel directed Chicago to respond to the petition but denied the stay motion, over Judge Manion's dissent. Add. 145-146 & n.1. The government moved that its renewed stay motion be placed before the en banc court; on May 2, the panel ordered that the stay motion would be "taken under advisement for consideration by the full court should rehearing en banc be granted." Add. 147.

On June 4, the court of appeals granted the government's request for partial rehearing en banc to address "the geographic scope of the preliminary injunction," Add. 149, but it did not rule on the government's stay motion. On June 14, the government informed the court by letter that it would seek relief from this

Court if the court of appeals did not act on the pending stay motion by June 18. Add. 148. In an order the same day, the court of appeals stated that it would not rule immediately on the stay motion and instead had "decided to await [this] Court's resolution of Trump v. Hawaii (2018) (No. 17-965)," which the court "expect[ed] * * * may facilitate [its] disposition of the pending motions." Ibid.

ARGUMENT

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has the authority to stay a district-court order pending appeal to a court of appeals.[6] In considering the application, the Court or Circuit Justice considers (1) whether four Justices are likely to vote to grant certiorari if the court of appeals ultimately rules against the applicant; (2) whether five Justices would then likely conclude that the case was erroneously decided below; and (3) whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); see Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). All of those factors strongly support a partial stay to the extent the injunction grants relief beyond Chicago. See United States Dep't

[6] See, e.g., Trump v. Hawaii, 138 S. Ct. 542 (2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

of Def. v. Meinhold, 510 U.S. 939, 939 (1993) (granting stay pending appeal of "so much of" injunction "as grant[ed] relief to persons other than" only plaintiff); Heckler v. Lopez, 463 U.S. 1328, 1331 (Rehnquist, J., in chambers) (granting partial stay pending appeal of injunction that went "far beyond the application of [circuit precedent] to [the] concrete cases before [the district court]"), motion to vacate stay denied, 464 U.S. 879 (1983).

If the en banc court affirms, this Court is likely to grant certiorari. The Court's review is warranted because the injunction effectively nullifies nationwide two conditions on federal grants made to state and local governments across the country, all at the behest of a single plaintiff. Review is especially appropriate because the injunction extends a concerning trend among lower courts of issuing categorical, absent-party relief.

There is also a fair prospect that this Court would hold the injunction's scope invalid to the extent it applies beyond Chicago. The injunction goes far beyond redressing any plausible injury to the City by enjoining the two challenged conditions everywhere. That sweeping remedy contravenes Article III and longstanding principles of equity, both of which prohibit a district court in a suit such as this from imposing injunctive relief that goes beyond what is necessary to redress cognizable, irreparable harm to the plaintiffs before it.

The balance of equities also strongly supports a partial stay. The injunction is causing irreparable injury to the government and the public interest by disrupting the operation of a nationwide grant program at a crucial point in the grant cycle and eviscerating a federal policy. By contrast, the City will suffer no injury, let alone irreparable harm, if the injunction is stayed to the extent it applies outside Chicago pending proceedings in this Court.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI

If the en banc court of appeals affirms the injunction's scope, this Court is likely to grant review. As the grant of rehearing en banc reflects, cf. Fed. R. App. P. 35(a), the propriety of categorical, absent-party injunctions against federal policies is an issue of great importance. This case squarely presents that issue. Based on claimed injuries to a single city, the injunction effectively nullifies two conditions on federal grants nationwide.

Review is warranted because the decision below extends a disturbing but accelerating trend among lower courts of issuing categorical injunctions designed to benefit nonparties. Lower courts, including the Seventh Circuit, once recognized that injunctions should be limited to redressing irreparable harm to the plaintiffs. See McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) (Easterbrook, J.) (reversing injunction against entire city demolition program and holding that "plaintiffs lack[ed] standing to seek -- and the district court therefore

lack[ed] authority to grant -- relief that benefits third parties"); see also, e.g., Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 392-394 (4th Cir. 2001) (narrowing injunctive relief against federal policy to apply only to plaintiff), overruled on other grounds, The Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544 (4th Cir. 2012), cert. denied, 568 U.S. 1114 (2013); Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (same). Increasingly, however, these same courts and others have disregarded this bedrock rule and approved categorical, absent-party injunctions against federal policies nationwide. See, e.g., Add. 1-35; IRAP v. Trump, 883 F.3d 233, 272-274 (4th Cir. 2018), petition for cert. pending, No. 17-1194 (filed Feb. 23, 2018); Hawaii v. Trump, 878 F.3d 662, 701-702 (9th Cir. 2017), cert. granted, No. 17-965 (argued Apr. 25, 2018); see also Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 457-460 (2017) (cataloguing recent cases).

Amplifying the need for this Court's intervention, lower courts have upheld such absent-party injunctions based in part on their misreading of this Court's precedent. For example, the panel majority here relied heavily on this Court's decision partially staying a nationwide injunction in Trump v. IRAP, 137 S. Ct. 2080 (2017) (per curiam), as evincing affirmative approval of nationwide injunctions in general. Add. 26-28. The district court likewise mistakenly relied on IRAP and other decisions of this Court to

support the sweeping remedy it adopted, see Add. 96-99, as have other courts in issuing or affirming similarly overbroad injunctions, see IRAP, 883 F.3d at 272-274; Hawaii, 878 F.3d at 701-702. The lower courts' reading of IRAP is incorrect, pp. 32-33, infra, but without this Court's intervention that recurring error will persist. The extension of that trend here to invalidate grant conditions nationwide at the request of a single city warrants this Court's review.

Review is especially warranted because the courts below have thwarted the implementation of modest steps to facilitate federal law-enforcement agencies' efforts to protect the Nation by enforcing the immigration laws against aliens arrested for criminal offenses. This Court has granted certiorari to address "important questions" of interference with "federal power" over "the law of immigration and alien status." Arizona v. United States, 567 U.S. 387, 394 (2012); see Trump v. Hawaii, 138 S. Ct. 923 (2018); United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). It should do so here to address the propriety of enjoining a federal immigration policy everywhere at the behest of one litigant.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL REVERSE IF THE EN BANC COURT OF APPEALS AFFIRMS THE INJUNCTION'S SCOPE

There is also at least a "fair prospect," Lucas, 486 U.S. at 1304 (Kennedy, J., in chambers), that, if the en banc court affirms the injunction's scope, this Court will reverse. The injunction transgresses both Article III and longstanding equitable principles

by affording relief that is not even arguably necessary to redress any cognizable, irreparable injury to the only plaintiff, Chicago. And it frustrates the development of the law, while obviating the requirements for and protections of class-action litigation.

A. The Injunction Violates Article III And Principles Of Equity By Granting Relief Beyond What Is Necessary To Redress Any Cognizable, Irreparable Injury To Chicago

1. a. Chicago lacks Article III standing to seek injunctive relief beyond what is needed to redress an actual or imminent injury-in-fact to Chicago itself. "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing * * * for each form of relief that is sought." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (citations omitted). "The remedy" sought thus "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)). "The actual-injury requirement would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches, if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." Ibid. (quoting Lewis, 518 U.S. at 357) (brackets omitted).

Applying that principle, this Court has invalidated injunctions that afforded relief that was not shown to be

necessary to prevent cognizable injury to the plaintiff himself. For example, in Lewis, the Court held that an injunction directed at certain prison practices was overbroad, in violation of Article III, because it enjoined practices that had not been shown to injure any plaintiff. 518 U.S. at 358. The injunction "mandated sweeping changes" in various aspects of prison administration designed to improve prisoners' access to legal services, including library hours, lockdown procedures, access to research facilities and training, and "'direct assistance'" from lawyers and legal support staff for "illiterate and non-English-speaking inmates." Id. at 347-348 (citation omitted).

This Court held that the plaintiffs lacked standing to seek, and the district court thus lacked authority to grant, such broad relief. Lewis, 518 U.S. at 358-360. The district court had "found actual injury on the part of only one named plaintiff," who claimed that a legal action he had filed was dismissed with prejudice as a result of his illiteracy and who sought assistance in filing legal claims. Id. at 358. "At the outset, therefore," this Court held that "[it] c[ould] eliminate from the proper scope of the injunction provisions directed at" the other claimed inadequacies that allegedly harmed "the inmate population at large." Ibid. "If inadequacies of th[at] character exist[ed]," the Court explained, "they ha[d] not been found to have harmed

any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation." Ibid.

Here, likewise, Chicago lacks standing to seek an injunction against the imposition of grant conditions on other applicants. The alleged "inadequacy," Lewis, 518 U.S. at 357, that purportedly would cause Chicago's injury is the inclusion of the notice and access conditions in a federal grant to Chicago itself. The City has not shown, or even alleged, that it has suffered any concrete injury from the imposition of any conditions on any other applicant. Even assuming that application of the conditions to other applicants would be unlawful, Chicago thus has no concrete stake in seeking to enjoin the conditions as to them. Indeed, a geographically bounded local government like Chicago has no cognizable interest in enjoining restrictions on federal grants to other governments. The fact that nonparties might suffer harms similar to Chicago's does not entitle Chicago to seek categorical, absent-party relief.

b. This Court also has recognized and applied the corollary principle that, where a plaintiff faces actual or imminent injury at the outset of a suit but that injury is subsequently redressed or otherwise becomes moot, the plaintiff no longer can seek injunctive relief to redress alleged harms to anyone else -- unless the plaintiff is the representative of a certified class. For example, in Alvarez v. Smith, 558 U.S. 87 (2009), the Court held that the plaintiffs' challenge to a state-law procedure for

disputing the seizure of vehicles or money had become moot because their "underlying property disputes" with the State "ha[d] all ended": the cars that had been seized from the plaintiffs had been returned, and the plaintiffs had either forfeited the money seized or had "accepted as final the State's return of some of it." Id. at 89; see id. at 92. The Court accordingly held that the plaintiffs could no longer seek declaratory or injunctive relief against the State's policy. Id. at 92. Although the plaintiffs had "sought certification of a class," class certification had been denied, and that denial was not appealed. Ibid. "Hence the only disputes relevant" in this Court were "those between th[ose] six plaintiffs" and the State concerning specific seized property, "and those disputes [were] * * * over." Ibid. And although the plaintiffs "continue[d] to dispute the lawfulness of the State's hearing procedures," their "dispute [was] no longer embedded in any actual controversy about the plaintiffs' particular legal rights." Ibid.

Similarly, in Summers v. Earth Island Institute, 555 U.S. 488 (2009), the Court held that a plaintiff lacked standing to seek to enjoin certain Forest Service regulations after the parties had resolved the controversy regarding the application of those regulations to the specific project that had caused that plaintiff's own claimed injury. Id. at 494-497. The plaintiff's "injury in fact with regard to that project," the Court held, "ha[d] been remedied," and so he lacked standing to maintain his

challenge to the regulations. Id. at 494. The Court expressly rejected a contrary rule that, "when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action" -- in Earth Island, "the regulation in the abstract" -- "apart from any concrete application that threatens imminent harm to his interests." Ibid. Such a rule would "fly in the face of Article III's injury-in-fact requirement." Ibid.

The same conclusion logically follows where, as here, a plaintiff's only injury has been eliminated by an injunction barring application of the challenged law or policy to the plaintiff. If a plaintiff himself is no longer in any imminent danger of suffering injury from the law or policy -- whether because his injury has become moot through happenstance or settlement, as in Alvarez and Earth Island, or because a plaintiff-specific injunction prevents any future injury to that plaintiff from the law or policy -- he lacks standing to press for additional injunctive relief. The fact that the challenged law or policy would still cause concrete injury to nonparties is irrelevant. As Alvarez and Earth Island both demonstrate, the plaintiff must show the relief he seeks is necessary to redress his own actual or imminent injury-in-fact; potential injuries to others who are not parties to the case do not entitle the plaintiff to seek relief on their behalf.

c. In the since-vacated portion of its decision, the panel majority did not identify any imminent, concrete injury Chicago would suffer from the application of the conditions to other applicants. It stated that "the recipients of the grant are interconnected" because funds may be "withheld" from one recipient "as a penalty for non-compliance" and "reallocated to other, compliant * * * recipients." Add. 34. But as Judge Manion observed in dissent, "the statute is completely silent on what happens if a potential grantee is denied or if it simply fails to submit an application" based on its refusal to comply with certain conditions. Add. 48. Moreover, even "[i]f money were withheld and redistributed from other jurisdictions" that refuse to comply with the notice and access conditions, if anything "Chicago would benefit by getting more money." Add. 49. The majority also stated that "the City is obligated to apply for Byrne JAG funds not only for itself but for eleven neighboring counties." Add. 34. But it did not explain why exempting even those nonparty municipalities from the challenged conditions is necessary to prevent harm to Chicago, let alone why exempting all other applicants nationwide is necessary.

The panel majority nevertheless dismissed Chicago's lack of standing to seek to enjoin application of the conditions to other applicants. Add. 28. It reasoned that "[t]he City had standing to seek injunctive relief" of some kind, and the proper scope of relief was then left to the district court's discretion. Ibid.

That reasoning contradicts this Court's teaching that "standing is not dispensed in gross" and that "the remedy" a district court may impose "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." DaimlerChrysler, 547 U.S. at 353 (citation omitted). The court of appeals' reasoning is also irreconcilable with this Court's decisions holding that a plaintiff whose own injury has become moot can no longer seek judicial relief. See Alvarez, 558 U.S. at 92-93; Earth Island, 555 U.S. 494-497. If an injunction were entered against application of the conditions to Chicago, the City would be in the same position as a plaintiff whose injuries have disappeared through settlement or happenstance. Chicago's only injury would be redressed, and it would lack any continuing concrete stake in enjoining the conditions as to other applicants.

2. a. Independent of Article III, the injunction here violates fundamental rules of equity by granting relief broader than necessary to prevent irreparable harm to Chicago. This Court has long recognized that injunctive relief must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted). Where no class has been certified, a plaintiff must show that the requested relief is necessary to redress his own irreparable harm; he cannot seek injunctive relief in order to prevent harm to others. See Monsanto

Co. v. Geertson Seed Farms, 561 U.S. 139, 163 (2010) (plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency order] on the ground that it might cause harm to other parties"). Even where a class has been certified, relief is limited to what is necessary to redress irreparable injury to members of that class. See Lewis, 518 U.S. at 359-360 (citing Califano v. Yamasaki, 442 U.S. 682, 702 (1979)). "[T]he scope of injunctive relief is dictated by the extent of the violation established" that injured class members, "not by the geographical extent of the plaintiff class." Yamasaki, 442 U.S. at 702.

Applying that principle, this Court held in Lewis that a "systemwide" injunction was improper as a matter of equity even as to the particular claimed inadequacy that had been found to cause Article III injury: inadequate services for illiterate inmates that allegedly deprived them of access to the courts. 518 U.S. at 359-360 & n.7. The district court's "only findings" supporting systematic relief as to that inadequacy -- one inmate's dismissed complaint, and one instance in which another inmate "had once been 'unable to file a legal action'" -- "were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." Id. at 359 (brackets and citation omitted). There was no finding that any other "illiterate prisoners c[ould not] obtain the minimal help necessary to file particular claims that they wish[ed] to bring

before the courts." Id. at 360. The Court accordingly held that, even though a class had been certified, "[t]he constitutional violation" that had injured those two inmates "ha[d] not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to [those two inmates] was therefore improper." Ibid.

The panel majority's ruling is inconsistent with Lewis and similar cases. The only plaintiff is Chicago, and its only asserted irreparable harms stem from application of the two conditions to the City itself. Those claimed harms would be fully redressed by an injunction limited to Chicago. The City has never demonstrated, and neither lower court found, that if it were freed from complying with the two challenged conditions, an injunction barring application of the conditions to other grant applicants would be necessary to redress any imminent, irreparable harm to Chicago.

b. History confirms that the relief the lower courts imposed violates "traditional principles of equity jurisdiction." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999) (citation omitted). This Court "ha[s] long held that the jurisdiction" conferred by the Judiciary Act of 1789 "over 'all suits . . . in equity' * * * is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of

the two countries." Id. at 318 (brackets, citation, and other internal quotation marks omitted). "Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." Ibid. (citation omitted).

Absent-party injunctions were not "traditionally accorded by courts of equity." Grupo Mexicano, 527 U.S. at 319. Indeed, they did not exist at equity at all. They are a modern aberration, with no direct antecedent in English practice, or apparently even in the United States until the mid-20th century. Bray 425 ("There is an easy, uncomplicated answer to the question whether the national injunction is traceable to traditional equity: no."); see Bray 424-445 (detailing historical English practice and U.S. practice from Founding to present). Thus, in the late 19th century, this Court rejected injunctive relief that barred enforcement of a law to nonparties. Bray 429 (discussing Scott v. Donald, 165 U.S. 58 (1897)). As a consequence, for example, in the 1930s courts issued more than 1600 injunctions against enforcement of a single federal statute. Bray 434.

c. The panel majority did not dispute that equitable principles limit injunctive relief to redressing the plaintiff's own irreparable harm, and it did not identify any irreparable harm Chicago would suffer from application of the conditions to other

grant applicants. The majority also did not dispute that global, absent-party injunctions did not exist at the Founding or for long thereafter. Add. 29. The majority nevertheless refused to adhere to those equitable principles because it believed they would yield "a bright-line rule" against nationwide injunctions "that is both inconsistent with precedent and inadvisable." Ibid. Each step in that reasoning is mistaken.

The majority's premise that adherence to equitable principles would categorically bar all injunctions affording relief that benefits nonparties outside the class-action context is unfounded. As Judge Manion explained, "broad relief, even relief that benefits non-parties, is sometimes necessary to provide complete relief to the actual plaintiffs." Add. 47. A "classic example[]" is a desegregation case, where "'the very nature of the right[]'" the plaintiffs assert would "'require[] that the decree run to the benefit not only of the plaintiffs but also for all persons similarly situated.'" Ibid. (brackets and citation omitted). To be sure, even in such cases, injunctions are not boundless; the scope of relief still must be limited to redressing harm to the plaintiffs. See, e.g., Missouri v. Jenkins, 515 U.S. 70, 74, 89-91 (1995) (holding injunction in school-desegregation case overbroad because court found an "intradistrict violation" of constitutional requirements, but injunction imposed "interdistrict relief"). But

in certain cases, a plaintiff's injury cannot be redressed without also benefitting nonparties. This, however, is not such a case.

The panel majority also erred in construing this Court's precedent as endorsing nationwide injunctions. The majority misread this Court's decision partially staying a global injunction in IRAP, 137 S. Ct. 2080, as approving nationwide injunctions as a general matter because this Court did not stay the injunction in that case in its entirety. Add. 26-29, 31-32. But as this Court explained in IRAP, it was "not asked to grant a preliminary injunction, but to stay one," and accordingly the Court did not determine the proper limits of the preliminary injunction in the first instance. 137 S. Ct. at 2087. Instead, the Court "br[ought] to bear an equitable judgment of [its] own" and balanced the equities to permit enforcing the temporary suspension as to all aliens who lacked a credible claim of a bona fide relationship with a U.S. person or entity. Ibid.; see id. at 2088-2089.

Moreover, although the government disagrees with the global injunctions issued in IRAP, the circumstances in IRAP differ significantly from those at issue here. At the very least, the temporary entry suspension in IRAP restricted the entry of aliens from abroad through any U.S. port of entry, and the Fourth Circuit had stated that the "[p]laintiffs [were] dispersed throughout the United States." IRAP v. Trump, 857 F.3d 554, 605 (4th Cir.) (en banc), vacated as moot, 138 S. Ct. 353 (2017) (citing United States

v. Munsingwear, Inc., 340 U.S. 36, 39 (1950)). Here, in contrast, the notice and access conditions have no effect on aliens abroad, and the only plaintiff, Chicago, is located in one State. The City has not attempted to show how application of those conditions to other grant applicants will have any spillover effect on Chicago. IRAP lends no support to the panel majority's conclusion.[7]

B. Nationwide, Absent-Party Injunctions Frustrate The Development Of The Law And Eviscerate Requirements For And Protections Provided By Class-Action Litigation

1. The injunction here also impedes the orderly, evenhanded development of the law. As Judge Manion explained, an order by one lower court enjoining any application of a federal policy, including as to nonparties, effectively imposes a rule of "nonmutual offensive

[7] The district court also cited Texas v. United States, 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2016) (per curiam), see Add. 95, but it is also inapposite. The Fifth Circuit reasoned that a nationwide injunction against implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA) was warranted due to what it perceived as the importance of uniformity in federal immigration law and the prospect that a "geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states." 809 F.3d at 187-188. None of those factors warranted nationwide relief in Texas, see, e.g., Gov't C.A. Br. at 54-56, Texas, supra (No. 15-40238), and in any event they are inapplicable here. The notice and access conditions apply only to state-federal cooperation regarding aliens who have been arrested by law enforcement. See pp. 6-8, supra. Enjoining the conditions nationwide is not even arguably necessary to maintain uniform enforcement of the Nation's immigration laws. Jurisdictions already can decline to accept Byrne JAG grants and avoid committing to the notice and access conditions; conversely, even jurisdictions that do not receive grants can provide the same forms of cooperation. Enjoining the conditions nationwide would increase the potential for disuniformity by enabling state and local governments to establish divergent policies even while accepting grant funds.

collateral estoppel." Add. 42 (citing United States v. Mendoza, 464 U.S. 154 (1984)). In holding that such estoppel "does not apply against the Government," this Court explained that a rule requiring the government to adhere to lower courts' legal determinations in litigation involving different adverse parties "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." Mendoza, 464 U.S. at 160, 162; see id. at 163-164. "Allowing only one final adjudication" in turn "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." Id. at 160. As Judge Manion observed, the injunction the court of appeals affirmed invites precisely those problems. Add. 42-44.

The panel majority "implicitly attempt[ed] to distinguish" Mendoza, but its purported distinction is illusory. Add. 43 (Manion, J., dissenting in part). The majority reasoned that there is no need to leave room for other courts to opine on the merits because this case "presents purely a narrow issue of law" that is "not fact-dependent and will not vary from one locality to another," and therefore will not "benefit from consideration in multiple courts." Add. 30-31. But that is true of every case that turns on interpreting a statute. As Judge Manion observed, "if a lack of factual differentiation is all that is needed to distinguish Mendoza, then a nationwide injunction is appropriate in every

statutory-interpretation case," and "[t]hat cannot be the law." Add. 43. "Courts faced with difficult statutory questions," including this Court, "are the ones who benefit the most from the existence of multiple well-reasoned decisions from which to draw." Ibid. Lower-court judges "should not discount the fact that [their] honorable colleagues in other districts and other circuits may view things differently." Add. 44 (Manion, J., dissenting in part).

2. Absent-party injunctions also undermine the primary tool that federal law prescribes for adjudicating in a single proceeding legal issues that affect many persons: class actions. As Judge Manion noted, "Chicago could have filed a class action pursuant to Rule 23(b)(2) seeking declaratory and injunctive relief on behalf of all jurisdictions that do not want to comply with the conditions," provided that it met Rule 23's requirements. Add. 46. "Requiring a class action has the benefit of dealing with the one-way-ratchet nature of the nationwide injunction." Ibid. As Judge Manion observed, "[a] nationwide injunction ties the Attorney General's hands when he loses, but if Chicago had lost here, then some other municipality could have filed suit against the Attorney General in some other jurisdiction, and that process could in theory continue until a plaintiff finally prevailed." Ibid. In contrast, "[w]ith a class action, a decision would bind those other municipalities just as it would bind the Attorney General, and they could not run off to the 93 other districts for more bites at the apple." Ibid.

The panel majority offered no persuasive reason to excuse the City from seeking and securing class certification before obtaining class-like relief. It noted that in IRAP this Court declined to stay an injunction that benefited nonparties despite the absence of a certified class. Add. 27, 29. As explained above, however, that stay ruling is inapposite here. See pp. 32-33, supra. Moreover, the majority's own characterization of this case suggests that it likely would have deemed class treatment appropriate: it emphasized that "a significant number of award recipients oppose the conditions" and that the facts of this (or presumably any) particular case are immaterial to the statutory analysis. Add. 33. If class treatment would have been proper (a doubtful proposition), imposing class-like relief without requiring class certification is perplexing. And if instead the City could not satisfy one or more of Rule 23's elements, then leaving adjudication of other challenges to the conditions to separate suits is all the more necessary, and the lower courts' imposition of a categorical remedy is all the more inappropriate.

III. THE BALANCE OF EQUITIES SUPPORTS A STAY

A. The injunction causes direct, irreparable injury to the interests of the government and the public, which merge here, see Nken v. Holder, 556 U.S. 418, 435 (2009). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable

injury." Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). The injunction here similarly inflicts severe, concrete harm on the federal government by barring imposition nationwide of conditions in federal grants that implement important federal policies.

A stay is necessary to avoid interference with the operation of a nationwide grant program at a crucial point in the grant cycle. OJP has received nearly 1000 applications from state and local jurisdictions for more than $250 million in available Fiscal Year 2017 Byrne JAG Program funds. Add. 151-152 (¶¶ 4, 6). Before the entry of the nationwide preliminary injunction, OJP had aimed to issue Fiscal Year 2017 Byrne JAG Program awards by September 30, 2017. Add. 152 (¶¶ 7-8). But because of the injunction, DOJ cannot issue grants with two conditions that are designed to promote a basic level of cooperation between governments in fulfilling their respective law-enforcement responsibilities -- cooperation very much in the public interest. DOJ thus has not distributed Fiscal Year 2017 grants to any jurisdiction since.

If the government were to issue grants subject to the terms of the injunction, it may well lose the practical ability to include the conditions this year even if this Court later holds the injunction to be improper. States and localities can spend the funds as soon as they are distributed, and attempts to include the conditions at a later date would face many difficulties.

Although DOJ has been delaying issuance of grants, further delay "would hinder the reasonably timely and reliable flow of funding" to support law-enforcement activity around the country, impose particular burdens for localities with relatively small budgets, and disrupt state grant-making processes under which states issue sub-awards of Byrne JAG Program funds. Add. 153 (¶ 10); see ibid. (¶¶ 11-12).

In contrast, the City will suffer no injury whatsoever if the injunction is stayed to the extent it extends beyond Chicago. As discussed above, the City has never identified any way in which application of those conditions in grants to other applicants will harm Chicago. Its claim of harm is premised on application of the notice and access conditions to the City itself. See pp. 8, 23, supra. The City certainly cannot show it would suffer irreparable harm from a partial stay of the injunction as to other applicants pending rehearing en banc and any proceedings in this Court.

B. In the now-vacated portion of its decision, the panel majority concluded that "the balance of equities supports the district court's determination to impose the injunction nationwide," Add. 31, but its reasoning is deeply flawed and provides no sound basis for denying a stay. The majority purported to agree with the district court's "assess[ment]" of the "balance of harms." Ibid. But as Judge Manion observed, "the district court specifically concluded the balance of equities and the public interest did not

favor Chicago." Add. 38 n.2 (emphasis added). The court entered an injunction because it mistakenly believed Chicago did not have to meet all four factors set forth in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008) -- including "that the balance of equities tips in [its] favor," id. at 20 -- to obtain an injunction. Add. 38 n.2 (Manion, J., dissenting in part); Add. 89.

The majority also stated that the burden of a nationwide injunction on the federal government is "minimized" because it "can distribute the funds without mandating the conditions." Add. 32. But that would defeat the federal government's interest in securing a basic level of cooperation from grant recipients. Under the injunction, the government must either forgo distributing grant money or distribute it even to local governments that refuse to provide minimal law-enforcement assistance. The majority posited that some local governments might voluntarily comply with the conditions and that the burden on the federal government "is limited to those jurisdictions who oppose the conditions." Ibid. Yet the majority itself observed that "a significant number of award recipients oppose the conditions." Add. 33.

In any event, the panel majority identified no irreparable harm to Chicago absent a nationwide remedy that could outweigh the harm to the government. It cited the conditions' purported "impact" on other grant applicants, Add. 32, but identified no irreparable harm Chicago would suffer if the injunction were confined to the

City, see Winter, 555 U.S. at 20 (plaintiff must show "that he is likely to suffer irreparable harm" (emphasis added)); see also pp. 26-27, 30-31, supra. The majority also stated that the "public interest" in avoiding "simultaneous litigation" supported nationwide relief. Add. 32-33. But the majority identified no legal basis substantiating that asserted "public interest." Add. 32. And to the contrary, as this Court in Mendoza, 464 U.S. at 160, 163-164, and Judge Manion in his dissent, Add. 42-44, each recognized, litigation in multiple fora is in fact a valuable feature of the judicial system that fosters the development of the law. Moreover, that asserted "public interest" cannot outweigh the government's interest because those interests "merge" where the government is a party, Nken, 556 U.S. at 435, and in any event any interest in avoiding parallel litigation is dwarfed by the public's interest in preventing overbroad court orders from improperly nullifying policies adopted by Congress or the Executive.

CONCLUSION

The preliminary injunction should be stayed to the extent it applies beyond the City of Chicago pending rehearing en banc and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and further proceedings in this Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JUNE 2018

ADDENDUM

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-2991

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-05720 — **Harry D. Leinenweber**, *Judge*.

ARGUED JANUARY 19, 2018 — DECIDED APRIL 19, 2018

Before BAUER, MANION, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. This appeal is from the grant of a preliminary injunction in favor of the City of Chicago (the "City") and against Jefferson Beauregard Sessions III, the Attorney General of the United States, enjoining the enforcement of two conditions imposed upon recipients of the Edward Byrne Memorial Justice Assistance Grant Program (the "Byrne JAG program"). See 34 U.S.C. § 10151 (formerly 42

U.S.C. § 3750). The Byrne JAG grant, named after a fallen New York City police officer, allocates substantial funds annually to provide for the needs of state and local law enforcement, including personnel, equipment, training, and other uses identified by those entities. The Attorney General tied receipt of the funds to the grant recipient's compliance with three conditions which the City argued were unlawful and unconstitutional. The district court agreed with the City as to two of the three conditions—the "notice" condition mandating advance notice to federal authorities of the release date of persons in state or local custody who are believed to be aliens, and the "access" condition which required the local correctional facility to ensure agents access to such facilities and meet with those persons. Compliance with those conditions in order to receive the funding awarded under the Byrne JAG grant would require the allocation of state and local resources, including personnel. The district court granted the preliminary injunction as to those two conditions, applying it nationwide. The court subsequently denied the Attorney General's motion to stay the nationwide scope of the injunction, and this court denied the stay on appeal. The Attorney General now appeals that preliminary injunction.

Our role in this case is not to assess the optimal immigration policies for our country; that is not before us today. Rather, the issue before us strikes at one of the bedrock principles of our nation, the protection of which transcends political party affiliation and rests at the heart of our system of government—the separation of powers.

The founders of our country well understood that the concentration of power threatens individual liberty and es-

tablished a bulwark against such tyranny by creating a separation of powers among the branches of government. If the Executive Branch can determine policy, and then use the power of the purse to mandate compliance with that policy by the state and local governments, all without the authorization or even acquiescence of elected legislators, that check against tyranny is forsaken. The Attorney General in this case used 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. In fact, Congress repeatedly refused to approve of measures that would tie funding to state and local immigration policies. Nor, as we will discuss, did Congress authorize the Attorney General to impose such conditions. It falls to us, the judiciary, as the remaining branch of the government, to act as a check on such usurpation of power. We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.

I.

The path to this case began in 2006, which was both the year that the City enacted its Welcoming City ordinance, and the year that the federal government first established the Byrne JAG program. For many years, the two coexisted without conflict. In the past few years, numerous pieces of legislation were introduced in the House and Senate seeking to condition federal funding on compliance with 8 U.S.C. § 1373—which was intended to address "sanctuary cities" and prohibit federal, state or local government officials or entities from restricting the exchange of information with the

immigration authorities regarding citizenship or immigration status. None of those efforts were passed by Congress. 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. 2146, 114th Cong. § 3(a) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2 (2015) (all available at https://www.congress.gov). see also Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 Santa Clara L. Rev. 539, 553 n. 87 (2017) (listing eight pieces of legislation introduced during that time, all of which were unsuccessful).

Determined to forge a different path in immigration enforcement, the President on January 25, 2017 issued an Executive Order directing the Attorney General and the Department of Homeland Security (DHS) Secretary, in their discretion and to the extent consistent with law, to ensure that sanctuary jurisdictions are not eligible to receive Federal grants except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. Exec. Order No. 13,768, 82 Fed. Reg. 8799 at § 9(a) (Jan. 25, 2017). That Executive Order was challenged in court and preliminarily enjoined by a district court on April 25, 2017—and subsequently permanently enjoined. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017); *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017). Shortly thereafter—in the face of the failure of Congress to pass such restrictions and the issues with the legality of the Executive Order—on July 25, 2017, the Attorney General pursued yet

another path to that goal and issued the conditions for recipients of the Byrne JAG funds that are challenged here.

The Byrne JAG program is the primary provider of federal criminal justice funding to state and local governments. The funds have been used to meet a wide range of needs for those law enforcement entities, including funding the acquisition of body cameras and police cruisers, and support for community programs aimed at reducing violence. The City, which challenges the new conditions imposed, had targeted the fiscal year 2017 funds for several purposes including expansion of the use of ShotSpotter technology to allow officers to quickly identify the location of shooting incidents and deploy a more precise response. Under the new provisions imposed by the Attorney General, state and local governing authorities who were awarded grants under the Byrne JAG program could not receive any of the funds unless they complied with the new conditions.

Specifically, the Attorney General imposed "notice," "access," and "compliance" conditions, on Byrne JAG grant recipients, only the first two of which are at issue in this appeal. The "notice" and "access" conditions require that for local governments, throughout the period for the award:

> A. A local ordinance, -rule, -regulation, -policy, or -practice (or an applicable State statute, -rule, -regulation, -policy, or -practice) must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given access [to] a local-government (or local-government-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as

> to such individuals' right to be or remain in the United States.
>
> B. A local ordinance, -rule, -regulation, -policy, or -practice (or an applicable State statute, -rule, -regulation, -policy, or -practice) must be in place that is designed to ensure that, when a local-government (or local-government-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and—as early as practicable (see "Rules of Construction" incorporated by para. 4.B. of this condition)—provide the requested notice to DHS.

OJP Form 4000/2 (Rev. 4-88);
https://www.bja.gov/Jag/pdfs/SampleAwardDocument-FY2017JAG-Local.pdf at 19 (last visited 03-20-18).

It further provides that "[n]othing in this condition shall be understood to authorize or require … any entity or individual to maintain (or detain) any individual in custody beyond the date and time the individual would have been released in the absence of this condition." *Id*. at 18. Identical provisions apply when the states are the grant recipients rather than local governments. *Id*. Under the notice condition, grant recipients were initially required to provide 48 hours' advance notice to the DHS as to the scheduled release date and time of any individuals in the jurisdiction's custody suspected of immigration violations. When the City sued and sought a preliminary injunction, it argued in part that the requirement was impossible to implement in Chicago which operated only temporary lock-up facilities and held

the vast majority of persons for less than 24 hours, and that holding them for a longer period in order to comply would violate the Fourth Amendment of the United States Constitution. The Attorney General subsequently modified the notice condition, requiring that advance notice be provided as early as practicable. The access condition required the local authorities to provide immigration agents with access to the local detention facilities and to the individuals detained there to question such individuals.

Those conditions were inconsistent with the provisions in the Welcoming City Ordinance, and the City challenged the imposition of those conditions by the Attorney General. 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 Municipal Code, Welcoming City Ordinance, § 2-173-005 "Purpose and Intent." The City recognized that the maintenance of public order and safety required the cooperation of witnesses and victims, whether documented or not, and the cooperation of Chicago's immigrant communities. *Id*. Finally, the City concluded that immigrant community members, whether or not documented, should be treated with respect and dignity by all City employees. *Id*. Toward that end, the City set forth some standards for the treatment of persons within its jurisdiction, which included prohibitions on requesting or disclosing information as to immigration status, and on detaining persons based on a belief as to that status or based on immigration detainers when such immigration detainer is based solely on a violation of civil immigration

law. *Id*. at § 2-173-020, -030, -042. It also provides in § 2-173-042 that unless acting pursuant to law enforcement purposes unrelated to the enforcement of civil immigration law, no agency or agent shall permit Immigrations and Customs Enforcement (ICE) agents access to a person being detained or permit the use of agency facilities for investigative interviews, nor can an agency or agent while on duty expend time responding to ICE inquiries or communicating with ICE as to a person's custody status or release date. The Ordinance explicitly clarifies that those provisions in § 2-173-042 do not apply when the subject of the investigation "has an outstanding criminal warrant, … has been convicted of a felony, … is a defendant … where … a felony charge is pending, … or has been identified as a known gang member either in a law enforcement agency's database or by his or her own admission." *Id*. at § 2-173-042(c).

The City therefore could not comply, consistent with its Ordinance, with the conditions imposed by the Attorney General on those seeking funds under the Byrne JAG program, and filed this suit alleging that the conditions were unlawful under the statute and unconstitutional as a violation of separation of powers principles. In a thorough and well-reasoned opinion, Judge Leinenweber in the district court granted the City's motion for a preliminary injunction as to the notice and access conditions, but denied it as to the compliance condition which is not challenged in this appeal and of which we express no opinion. The district court noted that nothing in the Byrne JAG statute granted express authority to the Attorney General to impose the notice and access conditions, and rejected the Attorney General's claim that a provision in a different subsection, 34 U.S.C. § 10102, could be interpreted to allow such authority. The court fur-

ther concluded that a nationwide preliminary injunction was required to provide full relief in this case.

II.

Underlying this case are the sometimes-clashing interests between those of the federal government in enforcing its laws and those of the state or local government in policing and protecting its communities. Here, the federal executive branch, in the person of the Attorney General, has concluded that its interests will be best served by harnessing the local authorities to identify and to make accessible persons in their custody who are potentially in the country unlawfully, so as to facilitate efficient civil immigration enforcement. State and local law enforcement authorities, however, are concerned with maximizing the safety and security of their own communities. For some communities, those goals might be maximized by cooperating with the federal immigration authorities and assisting them in identifying and seizing undocumented individuals in their communities.

Other communities, such as the City in this case, however, have determined that their local law enforcement efforts are handcuffed by such unbounded cooperation with immigration enforcement. They have concluded that persons who are here unlawfully—or who have friends or family members here unlawfully—might avoid contacting local police to report crimes as a witness or a victim if they fear that reporting will bring the scrutiny of the federal immigration authorities to their home.[1] In the case of domestic violence or

[1] That fear of the reach of immigration authorities would not be unfounded. According to the Fiscal Year 2017 ICE Enforcement and Removal Operations Report, approximately 11% of the arrested alien popu-

crimes of that nature, the reluctance to report that is endemic to such offenses could be magnified in communities where reporting could turn a misdemeanor into a deportation. And the failure to obtain that 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. Those competing interests, between the Attorney General in pursuing civil immigration compliance and the state and local law enforcement authorities in ensuring the safety and security of their communities, are placed into direct conflict because the Attorney General in requiring these conditions forces the states and localities to devote resources to achieving the federal immigration goals or forfeit the funds. State and local law enforcement authorities are thus placed in the unwinnable position of either losing needed funding for law enforcement, or forgoing the relationships with the immigrant communities that they deem necessary for efficient law enforcement

Although the City uses the term Welcoming City in its ordinance, localities which have concluded that cooperation in federal civil immigration efforts is counterproductive or simply offensive are often labeled "sanctuary" cities or states, but that term is commonly misunderstood. The term

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lation had no known criminal convictions or charges, reflecting ICE's avowed goal of expanding its efforts "to address all illegal aliens encountered in the course of its operations." https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf at 3-4 (last visited 03-20-2018). Of those with criminal convictions, 25% were convictions for immigration violations or non-DUI traffic offenses. *Id*. at 4 Table 2.

signifies a place of refuge or protection, *see e.g* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/sanctuary, and is used for example to describe a house of worship, into which, if a person flees, law enforcement authorities commonly will not enter to forcibly remove the person. That definition has no correlation to the so-called sanctuary cities at issue here. The City, like other "welcoming" or "sanctuary" cities or states, does 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. Accord *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 591, 602 (E.D. Pa. 2017). The federal government can and does freely operate in "sanctuary" localities.

And the level of refuge provided by sanctuary cities is not unbounded. For instance, the City cooperates with immigration enforcement authorities for persons who pose a threat to public safety, exempting from the Ordinance investigations involving persons for whom there is an outstanding criminal (as opposed to civil) warrant, persons convicted of or charged with a felony, or persons who are known gang members. Thus, for the persons most likely to present a threat to the community, City law enforcement authorities will cooperate with ICE officials even in "sanctuary" cities. The decision to coordinate in such circumstances, and to refuse such coordination where the threat posed by the individual is lesser, reflects the decision by the state and local authorities as how best to further the law enforcement objectives of their communities with the resources at their disposal.

Moreover, as to the persons who have proven to be a threat to society such as those in longer-term incarceration, other programs already in place would alert ICE to potential immigration issues. For instance, the "Secure Communities" program was first instituted in 2008 and reactivated in 2017 in order to carry out ICE's enforcement priorities regarding persons in the custody of another law enforcement agency. See Official Website of DHS, https://www.ice.gov/secure-communities at 1. Local law enforcement agencies as a matter of routine submit fingerprints of individuals in their custody to the FBI for criminal background checks and, under Secure Communities, the FBI automatically forwards that information to the DHS to check the prints against its immigration databases. *Id.*; *City of Philadelphia,* 280 F. Supp. 3d at 633. According to the DHS, "ICE completed full implementation of Secure Communities to all 3,181 jurisdictions within 50 states, the District of Columbia, and five U.S. territories on January 23, 2013." See Official Website of DHS, https://www.ice.gov/secure-communities at 1. With that ability to identify undocumented individuals, at least as to those serving prison sentences for whom the pressure of time and the possibility of a quick release are not issues, ICE could procure a judicial warrant and obtain a transfer of custody.

III.

To establish its entitlement to preliminary relief, the City must demonstrate that "(1) without such relief, [it] will suffer irreparable harm before [its] claim is finally resolved; (2) [it] has no adequate remedy at law; and (3) [it] has some likelihood of success on the merits." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017). If that burden is met, the court must weigh the harm that the plaintiff will suffer absent an

injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest. *Id.*; *Higher Soc'y of Indiana v. Tippecanoe Cty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017). The district court weighed all of those factors and granted the preliminary injunction as to the notice and access conditions, denying it as to the compliance condition. On this appeal from the grant of the preliminary injunction as to those two conditions, we ask only whether the district court abused its discretion. *Harlan*, 866 F.3d at 758. In the absence of any clear error of fact or law, we accord great deference to the district court's weighing of the relevant factors. *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 896 (7th Cir. 2001).

With respect to the preliminary injunction factors, the Attorney General challenges only the district court's conclusion as to the likelihood of success on the merits, and the scope of the preliminary injunction. The district court held that the Attorney General lacked the statutory authority to impose the notice and access conditions, and consequently the efforts to impose them violated the separation of powers doctrine and were *ultra vires*. Dist. Ct. at 19.

In considering on appeal the likelihood of success on the merits, it is necessary to focus narrowly on the dispositive question and to avoid the invitation of the parties to weigh in on broader policy considerations. For instance, the Attorney General repeatedly characterizes the issue as whether localities can be allowed to thwart federal law enforcement. That is a red herring. First, nothing in this case involves any affirmative *interference* with federal law enforcement at all, nor is there any interference whatsoever with federal immigration authorities. The only conduct at issue here is the re-

fusal of the local law enforcement to aid in civil immigration enforcement through informing the federal authorities when persons are in their custody and providing access to those persons at the local law enforcement facility. Some localities might choose to cooperate with federal immigration efforts, and others may see such cooperation as impeding the community relationships necessary to identify and solve crimes. The choice as to how to devote law enforcement resources—including whether or not to use such resources to aid in federal immigration efforts—would traditionally be one left to state and local authorities. Whether the conscription of local and state law enforcement for federal immigration enforcement through the sword of withholding federal funds presents other Constitutional concerns is not before us. See generally *Nat. Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (noting, for example, that the Constitution may be implicated where "'the financial inducement offered by Congress' was 'so coercive as to pass the point at which pressure turns into compulsion'"); *Printz v. United States*, 521 U.S. 898 (1997); *South Dakota v. Dole*, 483 U.S. 203 (1987). This appeal turns on the more fundamental question of whether the Attorney General possessed the authority to impose the conditions at all.

The Attorney General also complains that "[n]othing in the statute supports the counterintuitive conclusion that applicants can insist on their entitlement to federal law enforcement grants even as they refuse to provide the most basic cooperation in immigration enforcement, which the Attorney General has identified as a federal priority." Appellant's Brief at 17. In fact, throughout the briefs in this case, the Attorney General is incredulous that localities receiving federal funds can complain about conditions attached to the

distribution of those funds. But that repeated mantra evinces a disturbing disregard for the separation of powers. The power of the purse does not belong to the Executive Branch. It rests in the Legislative Branch. Congress may, of course, delegate such authority to the Executive Branch, and indeed the case today turns on whether it did so here, but the Executive Branch does not otherwise have the inherent authority as to the grant at issue here to condition the payment of such federal funds on adherence to its political priorities.

In fact, the Attorney General otherwise acknowledges that limitation when addressing the legal issues here. The Attorney General does not claim to possess inherent executive authority to impose the grant conditions, and instead recognizes that the authority must originate from Congress.

We turn, then, to that core issue in the Attorney General's challenge to the preliminary injunction—whether Congress granted to the Assistant Attorney General the unbounded authority to impose his or her own conditions on the release of the Byrne JAG funds. The Byrne JAG statute itself grants the Attorney General explicit authority to carry out specific actions under the Act in 34 U.S.C. §§ 10152–10158, including: to make grants "in accordance with the formula established under section 10156," § 10152(a)(1); to develop a program assessment component in coordination with the National Institute of Justice, and to waive that requirement if the program is not of sufficient size to justify it, § 10152(c); to certify that extraordinary and exigent circumstances exist that would allow the use of the funds for purposes that fall within the prohibited use categories, § 10152(d)(2); to grant renewals and extensions beyond the four year period, § 10152(f); to determine the form of the application and the

certification, § 10153(a); to provide technical assistance to states and local governments, § 10153(b); to approve or disapprove applications after affording the applicant reasonable notice of deficiencies and the opportunity for correction and reconsideration, § 10154; to issue rules to carry out this part, § 10155; to allocate funds pursuant to the statutory formula, § 10156; to certify that a unit of local government bears disparate costs as defined in the statute to allow for disparate allocations under that formula, § 10156(d)(4); to reallocate funds not used by the state, § 10156(f); to reserve not more than $20,000,000 for use by the National Institute of Justice and for antiterrorism programs, § 10157(a); to reserve not more than 5 percent, to be granted to 1 or more states or local governmental units, to address precipitous or extraordinary increases in crime or in types of crimes, or to mitigate significant programmatic harm resulting from the operation of the formula for allocating funds, § 10157(b); and to reduce the amounts paid if a state or local unit of government fails to expend the funds within the grant period and fails to repay it, § 10158. None of those provisions grant 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 the failure to comply with those conditions. The Attorney General does not argue otherwise; he does not argue that any provision in the Byrne JAG statute authorizes the imposition of the conditions.

Instead, in his appeal, the Attorney General places all his purported authorization in one statutory basket, pointing to 34 U.S.C. § 10102(a)(6) as authorizing the Assistant Attorney General to impose these—and indeed any—conditions on grant recipients. Section 10102 sets forth the duties and func-

tions of the Assistant Attorney General for the Office of Justice Programs and provides:

> § 10102. Duties and functions of Assistant Attorney General
>
> (a) Specific, general and delegated powers
>
> The Assistant Attorney General shall—
>
> (1) publish and disseminate information on the conditions and progress of the criminal justice systems;
>
> (2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice;
>
> (3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice;
>
> (4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice;
>
> (5) coordinate and provide staff support to coordinate the activities of the Office and the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention; and
>
> (6) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General**, including placing special conditions on all grants, and determining priority purposes for formula grants.**

34 U.S.C.A. § 10102 [emphasis added]. The Attorney General contends that the bolded language constitutes a grant of authority to the Assistant Attorney General to impose any conditions he or she sees fit, and applies to the Byrne JAG grants as well even though the grants are in a different subchapter.

It is well-established that the plain language of a statute is "the best indicator of Congress's intent," and that "'[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Fed. Nat'l Mortg. Ass'n. v. City of Chicago*, 874 F.3d 959, 962 (7th Cir. 2017), quoting *Lewis v. Epic Sys. Corp*., 823 F.3d 1147, 1152 (7th Cir. 2016); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). The Attorney General's interpretation is contrary to the plain meaning of the statutory language. The word "including" by definition is used to designate that a person or thing is part of a particular group. See e.g. Oxford English Dictionary, Third Ed., Sept. 2016, www.oed.com (defining "including" as "[u]sed to indicate that the specified person or thing is part of the whole group or category being considered: with the inclusion of") (last visited 03-12-18.) In this section, its plain meaning 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 delegation of the Attorney General.

The inescapable problem here is that the Attorney General does not even claim that the power exercised here is authorized anywhere in the chapter, nor that the Attorney General possesses that authority and therefore can delegate

it to the Assistant Attorney General. In fact, as set forth above, the Byrne JAG provisions set forth the duties of the Attorney General and do not provide any open-ended authority to impose additional conditions. See 34 U.S.C. §§ 10152–10157. Therefore, the Attorney General's argument is that the "including" clause itself is a stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants in that subchapter or other subchapters even though that authority is not otherwise provided in the chapter and is not possessed by the Attorney General. Because that interpretation is so obviously belied by the plain meaning of the word "including," the Attorney General's position is untenable.[2]

That *alone* is sufficient to end the inquiry and affirm the determination of a likelihood of success on the merits. But we note that our plain reading of the statute is also consistent with the structure of § 10102 and of the Byrne JAG statute.

First, § 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 recog-

[2] The Attorney General's argument might fail for an additional reason, that the term "special conditions" is a term of art referring to conditions for high-risk grantees with difficulty adhering to grant requirements, and cannot be read as an unbounded authority to impose "any" conditions generally. See *City of Philadelphia*, 280 F. Supp. 3d at 617. In light of our analysis of the clause as a whole, we need not address that argument.

nizing 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. The structure of § 10102 therefore is consistent with the plain language interpretation—that the "including" clause merely exemplified the type of other powers that the Assistant Attorney General may possess by delegation elsewhere.

Moreover, an interpretation such as is argued by the Attorney General, that would allow the Assistant Attorney General to impose any conditions on the grants at will, is inconsistent with the goal of the statute to support the needs of law enforcement while providing flexibility to state and local governments. And the notion of the broad grant of authority to impose any conditions on grant recipients is at odds with the nature of the Byrne JAG grant, which is a formula grant rather than a discretionary grant. As a formula grant, it is structured so that the funds are allocated based on a carefully defined calculation which determines a minimum base allocation which can be enhanced based on the state's share of the national population and the state's share of the country's violent crime statistics. Once calculated, 60 percent of the state's allocation is awarded to the state and 40 percent to the eligible local government units. See 34 U.S.C. § 10156; Edward Byrne Memorial Justice Assistance Grant (JAG)

Program Fact Sheet, https://www.bja.gov/programs/JAG-Fact-Sheet.pdf (last visited 03-07-18). The Attorney General is authorized under the statute to make grants "in accordance with the formula established under section 10156." 34 U.S.C. § 10152(a). If Congress sought to provide an agency the ability to exercise its judgment in the selection of the grantees, it would have made sense for it to do so by employing the discretionary grant model rather than the formula grant structure used here. Located in a different subpart of the same statute, the provision for discretionary grants imbues the Director (who reports to the Assistant Attorney General) with the authority to award funds on terms and conditions that the Director determines to be consistent with that subpart. See 34 U.S.C. § 10142.

The ability of the Attorney General to depart from the distribution mandated by the formula is strictly circumscribed. For instance, of the total amount available in a given fiscal year, the Attorney General is authorized to reserve "not more than 5 percent, to be granted to 1 or more States or units of local government" for one or more of the allowed statutory purposes, "pursuant to his determination that the same is necessary (1) to combat, address, or otherwise respond to precipitous or extraordinary increases in crime, or in a type or types of crime; or (2) to prevent, compensate for, or mitigate significant programmatic harm resulting from operation of the formula … ." 34 U.S.C. § 10157(b). Moreover, the Attorney General is authorized by other statutes to reduce the funding in certain circumstances, but even then the amount of the reduction is set by statute. For example, the Sex Offender Registration and Notification Act mandates a 10 percent reduction in JAG funding if a state fails to substantially implement its provisions. 34 U.S.C. § 20927(a).

And the Prison Rape Elimination Act of 2003 stipulates that a state that does not certify full compliance with its national standards can forfeit 5 percent of JAG funds unless it certifies that no less than 5 percent of such funds will be used solely to achieve compliance. 34 U.S.C. § 30307(e)(2)(A).

Therefore, the statute precisely describes the formula through which funds should be distributed to states and local governments, and imposes precise limits on the extent to which the Attorney General can deviate from that distribution. Against that backdrop, it is inconceivable that Congress would have anticipated that the Assistant Attorney General could abrogate the entire distribution scheme and deny all funds to states and localities that would 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. Indeed, the statute which purportedly grants that power to the Assistant Attorney General was passed in the same Omnibus Act as the Byrne JAG statute, yet nothing in the Byrne JAG statute cross-references that alleged authority or even hints that the tightly-circumscribed structure of the Byrne JAG grants can be upended by some unbounded authority in § 10102 of the Assistant Attorney General to impose new conditions.

Finally, Congress knew how to grant such authority, and explicitly did so in another statute within the same Act that added the "including" language. *See generally* Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, Pub. L. No. 109-162, 119 Stat. 2960 (2006). The Violence Against Women Act provided that "[i]n disbursing grants under this subchapter, the Attorney Gen-

eral may impose reasonable conditions on grant awards to ensure that the States meet statutory, regulatory, and other program requirements." 34 U.S.C. § 10446(e)(3). In contrast, as set forth above, the Byrne JAG statute provides the Attorney General authority over a carefully delineated list of actions, with no such broad authority to impose reasonable conditions. If Congress had wanted to vest such authority in the Attorney General regarding the Byrne JAG grant, one would expect it to include explicit language in the grant statute itself, as it did in the Violence Against Women Act. The Attorney General's argument that such sweeping authority over the major source of funding for law enforcement agencies nationwide was provided to the Assistant Attorney General by merely adding a clause to a sentence in a list of otherwise-ministerial powers defies reason. The authority to impose any conditions desired to the Byrne JAG grant—and by the Attorney General's reasoning to all other grants under the Assistant Attorney General's domain—is a tremendous power of widespread impact, and is not the type of authority that would be hidden in a clause without any explanation, and without any reference or acknowledgment of that authority in the statute that actually contains the grant itself. *See e.g. Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (rejecting the Attorney General's argument that the power to deregister a physician in the public interest included the power to criminalize the actions of registered physicians when they engage in conduct he deems illegitimate, and holding that "[i]t would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside 'the course of

professional practice,' and therefore a criminal violation"); *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (noting that the Court would expect Congress to speak clearly if it wished "to assign to an agency decisions of vast 'economic and political significance.'"), quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.") As the Supreme Court has repeatedly held, "'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.'" *Gonzales*, 546 U.S. at 267, quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

Accordingly, the district court did not err in determining that the City established a likelihood of success on the merits of its contention that the Attorney General lacked the authority to impose the notice and access conditions on receipt of the Byrne JAG grants. The Attorney General raises no challenge to the district court's application of other preliminary injunction factors, and therefore, the district court properly determined that preliminary relief was warranted.

IV.

The Attorney General additionally challenges the scope of the preliminary injunction, arguing that the district court erred in granting nationwide relief, rather than more narrowly limiting the geographic scope of the injunction to the City of Chicago. We are cognizant of the possible hazards of the use of nationwide injunctions, as was the district court in this case. Commentators have cautioned that the use of na-

tionwide injunctions can stymie the development of the legal issues through the court system as a whole. *See e.g.* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction,* 131 Harvard L. Rev. 417 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095 (2017); *but see* Spencer E. Amdur and David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harvard L. Rev. F. 49 (2017) When relief is limited in geographic scope, multiple cases may be filed in numerous jurisdictions, and the reviewing courts may therefore gain a wider range of perspectives and the opportunity to explore the impact of those legal issues in other factual contexts. That process may be truncated, however, if a district court issues a nationwide injunction.

Moreover, where nationwide injunctions are possible, courts must be cognizant of the potential for forum shopping by plaintiffs. Commentators have documented this phenomenon over the past decades, which transcends administrations and political parties. For instance, under the Obama administration, such injunctions stymied many of the President's policies, with five nationwide injunctions issued by Texas district courts in just over a year. See Bray, *Multiple Chancellors*, 131 Harvard L. Rev. at 458–59 and cases cited therein. At that time, then-Senator and now-Attorney General Sessions characterized the upholding of one such nationwide preliminary injunction as "a victory for the American people and for the rule of law." Press Release, Sen. Jeff Sessions III, June 23, 2016. Now, many who advocated for broad injunctions in those Obama-era cases are opposing them.

In fact, support for or opposition to nationwide injunctions would likely vary with the nature of the controversial

issue at stake and the identity of the persons in power. For example, if a different Administration concluded that certain weapons were a threat to public safety, and conditioned receipt of Byrne JAG funds on a state or locality adopting a policy banning assault weapons, it is quite likely that the sides would reverse once again as to the need for and appropriateness of nationwide injunctions. Although the pursuit of nationwide injunctions may be influenced by shifting political motivations, that neither means that nationwide injunctions themselves are inherently evil, nor that such injunctions should never be issued. Instead, courts in determining the proper scope of injunctive relief, must be cognizant of the potential for such injunctions to have a profound impact on national policy.

In light of those concerns with limiting the input of other courts and with forum shopping, nationwide injunctions should be utilized only in rare circumstances. That said, nationwide injunctions nevertheless play an important and proper role in some circumstances. Certainly, for issues of widespread national impact, a nationwide injunction can be beneficial in terms of efficiency and certainty in the law, and more importantly, in the avoidance of irreparable harm and in furtherance of the public interest.

In fact, the Supreme Court in *Trump v. Intern. Refugee Assistance Project*, 137 S. Ct. 2080 (2017), recently denied in part a request for a stay of a nationwide injunction in a challenge to an Executive Order that suspended entry of foreign nationals from seven countries. The Court recognized that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it pre-

sents." *Id*. at 2087. The Court refused to stay the nationwide injunction as to enforcement against foreign nationals who have a credible claim of a bona fide relationship with persons or entities in the United States. *Id*. at 2088. The district court in fashioning that preliminary injunction, and in weighing the equities, had focused on the concrete burdens that would fall on the particular named individuals in the case who sought injunctive relief, and reasoned that the hardships were sufficiently weighty and immediate to outweigh the Government's interest. *Id*. at 2087. The court then approved injunctions that covered not merely those individuals, but parties similarly situated to them nationwide, and the Supreme Court determined that the injunction should remain in place even as to those similarly-situated persons. *Id*. 2088.

The dissent in *Trump* raised the same objections that the Attorney General asserts in this case, but those arguments did not carry the day in *Trump* and should not do so here either. The *Trump* dissenters argued that it could have been reasonable for the Court to have left the injunctions in place as to the individuals who sought relief in the case, but that it was improper to allow the injunction to remain as to an "unidentified, unnamed group of foreign nationals abroad." *Id*. at 2090. The dissenters complained that no class had been certified, and the parties had not asked for the scope of relief provided. *Id*. Concluding that injunctive relief should be "'no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs* ' in the case," the dissenters disagreed with the determination to allow the injunction to remain in place beyond those individual plaintiffs. *Id*., quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Attorney General in this case also argues that injunctive re-

lief should not extend beyond that necessary to provide complete relief to the particular plaintiff—here, the City—but as *Trump* demonstrates, that limitation will not necessarily be proper where the balance of equities and the nature of the claims require broader relief. See also *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (upholding a nationwide injunction even though factfinding focused on Milwaukee County, because the case had evolved to challenging the facial constitutionality with the evidence regarding Milwaukee County merely discussed as illustration).

The district court in this case was aware of all of the concerns identified above, and in fact on its own identified and considered the articles by the commentators detailing the history of the nationwide injunction and the concerns with the use of it as a remedy. The court nevertheless held that the "equitable balance" necessitated such a remedy in this case. On appeal, we review the district court's determination as to the scope of the injunction only for an abuse of discretion. *Harlan*, 866 F.3d at 758.

The Attorney General raises three challenges to the nationwide injunction. First, the Attorney General argues that the City must seek standing as to each form of relief sought, and that it lacks standing to seek relief that benefits third parties. That argument is a non-starter. The City had standing to seek injunctive relief, and the district court had the authority to fashion the terms of that injunction as it determined necessary for the public interest in light of its determination that the City was likely to succeed on its claim that the actions violated the constitutional principles of separation of powers. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *Zamecnik v. Indian Prairie Sch.*

Dist. No. 204, 636 F.3d 874, 879 (7th Cir. 2011) ("'When the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself.'") quoting 1 Dan B. Dobbs, *Law of Remedies* § 2.4(6), p. 113 (2d ed.1993). Courts, including the Supreme Court recently in *Trump* as discussed above, have not found a lack of jurisdiction solely because a nationwide injunction was imposed in the absence of a class action.

The Attorney General maintains that even apart from Article III concerns, equitable principles require that the injunction be no more burdensome than necessary to provide complete relief to the City, and that the nationwide injunction exceeds that limit. Along a similar vein, the Attorney General also argues that the district court erred in conflating the scope of Chicago's legal argument with the scope of relief necessary to remedy the alleged injury, and that the City as an individual plaintiff should not obtain the equivalent of class-wide relief.

Those arguments would seek a bright-line rule that is both inconsistent with precedent and inadvisable. Essentially, the Attorney General's approach would limit nationwide injunctions to class actions, but that is inconsistent with *Trump* and the myriad cases preceding it in which courts have imposed nationwide injunctions in individual actions.

Nor should the district court be so handcuffed in determining the scope of relief that is proper. Certainly, the ability to impose a nationwide injunction is a powerful remedy that should be employed with discretion. Regardless, there are checks in the system to lessen the potential for any misuse of nationwide injunctions by the court. First, the appellate process itself operates to minimize the potential for er-

roneous or overbroad injunctions. In fairly short order, the appellate process can ensure that multiple judges review the determination, thus acting as a check on the possibility of a judge overly-willing to issue nationwide injunctions. And of course, nationwide injunctions, because of the widespread impact, are also more likely to get the attention of the Supreme Court.

Moreover, that focus on the potential shortcomings of nationwide injunctions, though proper, fails to recognize the need for such relief where the balance of equities weighs strongly in favor of such relief. Courts must be able to determine whether an action implicates the Constitution, and once a court determines that preliminary relief is required, the court must be able to engage in the "equitable balancing" to determine the relief necessary. Rarely, that will include nationwide injunctions. Granted, it is an imprecise process, but that is endemic to injunctions, and courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits.

The case before us presents an example of the type of case in which a district court should properly be able to apply an injunction nationwide. The case presents essentially a facial challenge to a policy applied nationwide, the balance of equities favors nationwide relief, and the format of the Byrne JAG grant itself renders individual relief ineffective to provide full relief.

First, the challenge here presents purely a narrow issue of law; it is not fact-dependent and will not vary from one locality to another. The plaintiffs have demonstrated a likelihood of success on the claim that the Attorney General lacked any Constitutional authority to impose the conditions

upon the grant recipients, and therefore that the actions violated the separation of powers principles. We are faced, then, with conditions on the receipt of critical law enforcement funds that have been imposed by the Attorney General without any authority in a manner that usurps the authority of Congress—made more egregious because Congress itself has repeatedly refused to pass bills with such restrictions. A narrow question of law such as is present here is more likely to lend itself to broader injunctive relief, and that is particularly true where the plaintiff has established a likelihood of success on a claim that the Attorney General acted *ultra vires* in imposing the conditions and those conditions apply uniformly on all grant recipients. Accordingly, this does not present the situation in which the courts will benefit from allowing the issue to percolate through additional courts and wind its way through the system in multiple independent court actions. There are some legal issues which benefit from consideration in multiple courts—such as issues as to the reasonableness of searches or the excessiveness of force—for which the context of different factual scenarios will better inform the legal principle. But a determination as to the plain meaning of a sentence in a statute is not such an issue. For that issue, the duplication of litigation will have little, if any, beneficial effect.

Moreover, the balance of equities supports the district court's determination to impose the injunction nationwide. As the *Trump* Court noted, in determining the proper scope of an injunction, the court must weigh the balance of equities, which explores the relative harms to the plaintiff and defendant as well as the interests of the public at large. *Trump*, 137 S. Ct. at 2087. The district court properly assessed that balance of harms here. The harm to the Attorney Gen-

eral is minimized because the Attorney General can distribute the funds without mandating the conditions—as has been done for over a decade—and nothing in the injunction prevents any state or local government from coordinating its local law enforcement with the federal authorities and complying with the conditions sought here. And we have seen that even objecting governments such as the City willingly cooperate with federal authorities as to those individuals who commit serious offenses. The adverse impact to the Attorney General is limited to those jurisdictions who oppose the conditions, which presumably would be the jurisdictions that would join in pursuing the multiplicitous cases that would be needed to obtain the relief provided here, or which would not have the means to pursue such litigation and would face the choice of complying with the apparently-unconstitutional conditions or losing crucial law enforcement funds. On the other hand, the impact on localities forced to comply with these provisions could be devastating. Those local and state governments have concluded that the safety of their communities is furthered by a relationship of trust with the undocumented persons and lawful immigrants residing therein—and those localities are clearly in the best position to determine the security needs of their own communities. Such trust, once destroyed by the mandated cooperation and communication with the federal immigration authorities, would not easily be restored. And given the significance of the federal funds at issue, amounting to hundreds of thousands to millions of dollars for each state, noncompliance is a particularly poor option.

Moreover, the public interest, which is also a factor in the balance of equities, see *Trump*, 137 S. Ct. at 2087, weighs in favor of the nationwide injunction. The public interest

would be ill-served here by requiring simultaneous litigation of this narrow question of law in countless jurisdictions. And it is clear from the nature of the claim and the response of amici in this case that litigation on this matter would indeed be widespread and simultaneous. First, the actions would have to be brought swiftly in each jurisdiction, because the conditions are imposed by the Attorney General in the award of the grant itself, and therefore the window for challenging the conditions is limited to the 45-day period between the award of the grant and the deadline for accepting or rejecting that award. This is not a situation in which courts would be able to benefit from perusing the decisions of other courts in the matter.

And it is clear that a significant number of award recipients oppose the conditions and would challenge the conditions if financially able to do so. Among the amici asking the district court to uphold the injunction in the stay proceedings were 37 cities and counties. In fact, while the motion to stay was pending in the district court, the United States Conference of Mayors, representing the interests of 1,400 cities nationwide, including many Byrne JAG grant applicants, moved to intervene, but that motion was denied in part because the nationwide injunction was sufficient to protect the interests of its members. Moreover, 14 states and the District of Columbia filed an amicus brief in this court also arguing for affirmance of the nationwide injunction, thus further exhibiting the likelihood of widespread, duplicative litigation in the absence of such relief. The district court appropriately held that judicial economy counseled against requiring all of those jurisdictions, and potentially others, from filing individual lawsuits to decide anew the narrow legal question in this case.

Finally, the structure of the Byrne JAG program itself supports the district court's determination to impose a nationwide injunction because the recipients of the grant are interconnected. Funding under the statute is allocated among states and localities from one pool based on a strict formula. The states and cities seeking grants under the Byrne JAG program are not islands, in which actions as to one are without impact on others. The conditions imposed on one can impact the amounts received by others. For instance, the amounts allocated under the Byrne JAG program can vary based on the participation of the states and localities, and the distribution structure includes explicit provisions for reallocation of funds in some circumstances—such as to units of local government if the State is unable to qualify to receive funds or chooses not to participate. 34 U.S.C. § 10156(f). Furthermore, funds allocated to Byrne JAG recipients can be withheld as a penalty for non-compliance with other statutory requirements, and those funds are then reallocated to other, compliant, Byrne JAG recipients. See e.g. 34 U.S.C. § 20927, § 30307(e). The City further points out that under its provisions, the City is obligated to apply for Byrne JAG funds not only for itself but for eleven neighboring localities. Thus, the recipients of Byrne JAG funding are interconnected and an impact to one recipient can have a ripple effect on others. Under such a formula grant in which the states and local governments are intertwined, and where the conditions imposed preclude all funding to those who refuse to comply, piecemeal relief is ineffective to redress the injury, and only nationwide relief can provide proper and complete relief. In sum, this is an instance in which the court could, and did in the exercise of its discretion, appropriately enter a nationwide injunction.

Our review here is a narrow one. We can reverse only if the Attorney General has established that the district court abused its discretion in determining that the scope of the injunction should be nationwide. Judge Leinenweber in this case set forth his thoughtful consideration of the appropriate factors in the decision below denying the stay, and given the purely legal nature of the issue here, the broad and uniform impact on all grant recipients, the minimal harm to the Attorney General given the continued ability for voluntary cooperation, and the structure of the Byrne JAG statute that interconnects those grant recipients, we conclude that the court did not abuse its discretion here.

V.

Accordingly, the district court did not err in determining that the City established a likelihood of success on the merits of its contention that the Attorney General lacked the authority to impose the notice and access conditions on receipt of the Byrne JAG grants, and did not abuse its discretion in granting the nationwide preliminary injunction in this case. The decision of the district court is AFFIRMED.

MANION, *Circuit Judge*, concurring in the judgment in part and dissenting in part. Unless done for a purpose "unrelated to the enforcement of a civil immigration law," the City of Chicago forbids its agencies or agents to

> (A) permit ICE [Immigration and Customs Enforcement] agents access to a person being detained by, or in the custody of, the agency or agent; (B) permit ICE agents use of agency facilities for investigative interviews or other investigative purpose; or (C) while on duty, expend their time responding to ICE inquiries or communicating with ICE regarding a person's custody status or release date.

Chicago, Ill., Muni. Code § 2-173-042(b)(1). This ordinance's proscription on cooperation does not apply if the subject of the investigation falls within at least one of four excepted classes of persons: those with outstanding criminal warrants, felons, those with a felony charge pending, and known gang members. *Id.* at § 2-173-042(c). For Chicago, this ordinance barring collaboration with federal immigration authorities is important to maintaining its image as a "Welcoming City," open to aliens both documented and undocumented. It considers it an expression of its independent sovereignty that it can choose not to assist the federal government in enforcing the nation's immigration laws. For the Attorney General, the ordinance is an obstacle to effective law enforcement. His interest is in getting deportable criminal aliens off the streets, and he believes Chicago's policies endanger the community.

This debate casts a long shadow over this appeal, but ultimately these broad questions touching on immigration policy and federal/local cooperation in law enforcement are not

at issue in this case. Instead, this is a case about federal funds and who gets to decide the terms by which those funds are distributed.

Since 2006, the federal government has given money to local governments for law enforcement purposes through the Byrne JAG program. For Fiscal Year 2017, the Attorney General wants to impose immigration-related conditions on the receipt of those funds. Specifically, the Attorney General wants Byrne JAG recipients to provide federal immigration agents with notice of the release dates of certain aliens in their custody (the "Notice" condition); provide immigration agents with access to facilities to conduct interviews with certain detainees (the "Access" condition); and provide a certification of compliance with 8 U.S.C. § 1373, which bars governments from prohibiting their officials "from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual" (the "Compliance" condition).

Because of its commitment to being a "Welcoming City,"[1] Chicago does not want to comply with these conditions. But it still wants to receive its Byrne JAG allotment, so it filed this lawsuit against the Attorney General seeking to prevent

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[1] As the court notes, Chicago uses the term "Welcoming City," but its policies place it in the same camp as other so-called "sanctuary cities." Maj. Op. at 10–11. The court calls this a misnomer: those cities do not "interfere in any way with the federal government's lawful pursuit of its civil immigration activities." *Id.* at 11. Whether and to what extent such "sanctuary" policies constitute passive non-cooperation or active interference is the subject of other litigation. *See United States v. California*, No. 18-264 (E.D. Cal. filed Mar. 6, 2018).

him from enforcing these conditions. The case is before us on appeal from a grant of a preliminary injunction forbidding the Attorney General from enforcing the Notice and Access conditions. The Compliance condition is not at issue in this appeal.

To get a preliminary injunction, a plaintiff like Chicago must show "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The district court decided a preliminary injunction was appropriate. It concluded that Chicago was likely to succeed on the merits because the Attorney General lacks the authority to impose the Notice and Access conditions and that Chicago would suffer irreparable harm without an injunction. The court determined that the balance of the equities and the public interest "favor neither party." *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017).

On appeal, the Attorney General only challenges one aspect of the district court's reasoning for entering an injunction: he argues he does have the authority to impose the Notice and Access conditions.[2] The court today says he does

[2] Surprisingly, the Attorney General does not challenge any other detail of the district court's reasoning, even though the district court appears to have misapplied *Winter*. The district court treated the four requirements of the *Winter* test as factors to be weighed rather than elements to be met. Thus, even though the district court specifically concluded the balance of the equities and the public interest did not favor Chicago, it still entered an injunction. Because Chicago did not meet all four elements as laid out in *Winter*, it seems the district court should not have entered an injunction. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d

not, and I agree. As that is all the Attorney General challenges about the district court's reasoning, I concur in the court's judgment that the decision to enter an injunction protecting Chicago was not an abuse of discretion.

However, the court today also concludes that it was within the district court's discretion to impose that injunction nationwide. Because I believe the entry of the nationwide injunction constituted an overstep of the district court's authority, I dissent from that portion of the court's decision.

I.

The Notice and Access conditions, viewed in isolation, are perfectly reasonable. No one should find it surprising that the federal government would require cooperation with its law enforcement efforts in exchange for the receipt of federal law enforcement funds. Indeed, the Attorney General's obvious frustration at applicants for Byrne JAG funds who "insist on their entitlement to federal law enforcement grants even as they refuse to provide the most basic cooperation in immigration enforcement" is eminently understandable. Appellant's Brief at 17. But the reasonableness and soundness of the conditions are not at issue here. Courts do not (or at least should not) decide legal issues based on the courts' impression of the propriety of particular policies. Conse-

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342, 347 (4th Cir. 2009) ("*Winter* articulates four requirements, each of which must be satisfied as articulated…."), *judgment vacated on other grounds by* 559 U.S. 1089 (2010). Nevertheless, because the Attorney General has not challenged this aspect of the district court's order, he has waived it as a grounds for reversal. *See Hojnacki v. Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002) ("A party waives any argument that it does not raise before the district court or, if raised in the district court, it fails to develop on appeal.").

quently, the debates over how much the states should be involved in enforcing immigration policy should not distract from the issues within the court's purview to resolve.

Because this case deals with the awarding of a federal grant, it necessarily concerns the spending of federal money. The Constitution places the power to spend federal money in the legislative branch. *See* U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power…to pay the Debts and provide for the…general Welfare of the United States…."); *see also Nat'l Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) ("We have long recognized that Congress may use [the Spending Clause] power to grant federal funds to the states and determining priority purposes for formula grants."). With this power comes the ancillary authority to place conditions on the receipt of federal funds. *Nat'l Federation of Indep. Bus.*, 567 U.S. at 576. Accordingly, there is no inherent executive authority to place conditions on the receipt of federal funds—any such authority must be given to the executive by the legislature. *See generally La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act…unless and until Congress confers power upon it.").

Recognizing this, the Attorney General directs us to 34 U.S.C. § 10102(a)(6), which states that the Assistant Attorney General for the Office of Justice Programs, which oversees the Byrne JAG program, shall "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, *including placing special conditions on all grants*…." 34 U.S.C. § 10102(a)(6) (emphasis added). The Attorney General argues this is a broad-sweeping grant of au-

thority to impose any conditions on any grants, the only limit being the Constitution itself. I agree with the court that this is not so.

Therefore, because I agree that the Attorney General does not have the authority to impose the Notice and Access conditions, and because that is all the Attorney General challenges concerning the propriety of an injunction, I concur in the judgment of the court affirming the entry of a preliminary injunction prohibiting the Attorney General from imposing those conditions on Chicago.[3]

II.

But a simple preliminary injunction protecting Chicago (the only plaintiff in this suit) is not all the district court entered. Instead, the district court announced as follows: "This injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney

[3] The Attorney General does not have authority to force Chicago to cooperate with federal immigration-enforcement efforts as a condition to receiving Byrne JAG funds. But that does not mean that such cooperation is not allowed. Indeed, based on the exceptions in Chicago's ordinance, Chicago itself has concluded that cooperation with the federal government concerning certain classes of alien is to its benefit. I assume and expect that, for example, when Chicago finds itself with custody over a deportable alien who was convicted of a felony, members of various law enforcement agencies in Chicago are free to work with ICE and provide notice of release and access to that alien. The Attorney General cannot force that cooperation as a condition of receiving funds, but it is likely there are a number of Chicago police officers and other officials who are ready, willing, and able to work with ICE agents in such situations, and they are free to do so.

General would differ in another jurisdiction." *City of Chicago*, 264 F. Supp. 3d at 951.

This was a gratuitous application of an extreme remedy. This court now upholds the district court's overreach because "[t]he case presents essentially a facial challenge to a policy applied nationwide, the balance of equities favors nationwide relief, and the format of the Byrne JAG grant itself renders individual relief ineffective to provide full relief." Maj. Op. at 30. In doing so, the court bypasses Supreme Court precedent, disregards what the district court actually concluded concerning the equities in this case, and misreads the effect of providing relief to Chicago only.

A. *United States v. Mendoza*

First, the court says a nationwide injunction was appropriate in this case because it "presents purely a narrow issue of law… [that] will not vary from one locality to another." Maj. Op. at 30. This reasoning is contrary to Supreme Court precedent.

A nationwide injunction is similar in effect to nonmutual offensive collateral estoppel, which "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court held that "nonmutual offensive collateral estoppel…does not apply against the Government in such a way as to preclude relitigation of issues." *Id.* at 162. The Court did so primarily because "allowing nonmutual collateral estoppel against the Government…would substantially thwart the development of im-

portant questions of law by freezing the first final decision rendered on a particular legal issue." *Id.* at 160. Additionally, it noted that "[a]llowing only one final adjudication would deprive [the] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari." *Id.* As the Fourth and Ninth Circuits have both recognized, these concerns are just as present in the context of nationwide injunctions. *See L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544 (4th Cir. 2012).

Though the court does not cite *Mendoza* in its opinion today, it implicitly attempts to distinguish that decision. It says that this case "does not present the situation in which courts will benefit from allowing the issue to percolate through additional courts and wind its way through the system in multiple independent court actions." Maj. Op. at 31. It claims this case is different from ones involving issues "for which the context of different factual scenarios will better inform the legal principle." *Id.* But if a lack of factual differentiation is all that is needed to distinguish *Mendoza*, then a nationwide injunction is appropriate in every statutory-interpretation case. That cannot be the law. If anything, the opposite is true. Different parties litigating the same issues in different forums will likely engage different arguments, leading to diverse analyses and enhancing the likelihood of the strongest arguments coming to the fore. Courts faced with difficult statutory questions are the ones who benefit the most from the existence of multiple well-reasoned decisions from which to draw.

Virginia Society for Human Life is illustrative. In that case, the Fourth Circuit was faced with deciding the constitutionality of a federal regulation, "a 'purely legal' issue [for which] further factual development will not assist…in [the] resolution." *Va. Society for Human Life, Inc.*, 263 F.3d at 390 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Nevertheless, the Fourth Circuit concluded that a nationwide injunction would have "the effect of precluding other circuits from ruling on the constitutionality of" the regulation, thus "conflict[ing] with the principle that a federal court of appeals's decision is only binding within its circuit." *Id.* at 393. The court recognized that to uphold the injunction would be to impose its "view of the law on all the other circuits." *Id.* at 394. That the underlying issue was purely legal did not alter that fact.

The district court's order in this case, and this court's decision to affirm it, directly conflict with these principles. We are not the Supreme Court, and we should not presume to decide legal issues for the whole country, even if they are purely facial challenges involving statutory interpretation. While we may be convinced that the statute says one thing, we should not discount the fact that our honorable colleagues in other districts and other circuits may view things differently. Just as we can disagree with them, they can disagree with us. *See, e.g.*, *Atchison, Topeka and Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 443 (7th Cir. 1994) (en banc) ("[W]hile we carefully consider the opinions of our sister circuits, we certainly do not defer to them.").

B. Equities

The court's opinion also says the balance of the equities weighs in favor of a nationwide injunction. Essentially, the court concludes it would have no serious impact on the Attorney General to distribute the money absent these conditions. But if the conditions are imposed, jurisdictions like Chicago who do not want to comply will be denied their federal funds or will be forced to sacrifice the trust of their (undocumented) immigrant communities.

On this point, there is no basis to second-guess the reasoning of the district court, which expressly determined that the balance of the equities and the public interest "favor neither party." *City of Chicago*, 264 F. Supp. 3d at 951. The district court acknowledged Chicago's purported interest in "the benefits that flow from immigrant communities freely reporting crimes and acting as witnesses," but it also recognized the Attorney General's "need to enforce federal immigration law." *Id.* The district court explained that "[b]oth sides can claim that concerns of public safety justify their positions" and that "[b]oth parties have strong public policy arguments, the wisdom of which is not for the Court to decide." *Id.* So equity weighs on both sides, and it certainly does not justify the entry of a nationwide injunction. Indeed, as alluded to in note 2, *supra*, a court in the Fourth Circuit would likely not even have entered a more limited injunction when the equities were so evenly balanced. *See Real Truth About Obama, Inc.*, 575 F.3d at 347. If an injunction is going to be nationwide, it should at least be one that could have been entered anywhere in the nation.

The court also suggests that avoiding "widespread, duplicative litigation in the absence of" a nationwide injunction

is in the public interest. Maj. Op. at 33. But a nationwide injunction is not the only way, nor even the best way, to avoid this problem. Chicago could have filed a class action pursuant to Rule 23(b)(2) seeking declaratory and injunctive relief on behalf of all jurisdictions that do not want to comply with the conditions. *See* Fed. R. Civ. P. 23(b) ("A class action may be maintained if Rule 23(a) is satisfied and if:…(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate respecting the class as a whole…."). Requiring a class action has the benefit of dealing with the one-way-ratchet nature of the nationwide injunction. A nationwide injunction ties the Attorney General's hands when he loses, but if Chicago had lost here, then some other municipality could have filed suit against the Attorney General in some other jurisdiction, and that process could in theory continue until a plaintiff finally prevailed. With a class action, a decision would bind those other municipalities just as it would bind the Attorney General, and they could not run off to the 93 other districts for more bites at the apple.

C. The Byrne JAG Statute

The court's final reason for upholding the nationwide injunction is that the nature of the Byrne JAG program requires it. Byrne JAG is a formula grant, meaning "allocations of money to states or their subdivisions are in accordance with a scheme prescribed by law or by administrative regulation." Federal Grant Practice § 16:5 (2017 ed.). The Byrne JAG formula provides that of the money appropriated by Congress, 50% goes to the states based on population and 50% goes to the states based on violent crime statistics. 34

U.S.C. § 10156(a)(1). Of the amount allotted to each state, 40% goes to local governments. *Id.* at (b)(2). If a jurisdiction fails to comply with certain statutory requirements, the funds can be withheld and redistributed. *See* 34 U.S.C. §§ 20927, 30307. The court notes that these and other considerations suggest that "an impact to one recipient can have a ripple effect on others." Maj. Op. at 34.

This argument is not sufficient to justify a nationwide injunction. It is axiomatic that the extraordinary relief of an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This means that broad relief, even relief that benefits non-parties, is sometimes necessary to provide complete relief to the actual plaintiffs. The classic examples of such scenarios are desegregation cases. *See, e.g.*, *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963). In those cases, the plaintiffs did "not seek the right to use those parts of segregated facilities that have been set aside for use by 'whites only.'" *Id.* Rather, "they [sought] the right to use facilities which have been desegregated…." *Id.* Accordingly, "[t]he very nature of the rights [the plaintiffs] [sought] to vindicate require[d] that the decree run to the benefit not only of [the plaintiffs] but also for all persons similarly situated." *Id.* In the same vein, cases suggesting ubiquitous harm, such as federal violations of the Establishment Clause, could also justify a nationwide injunction, because an establishment of religion by the federal government would harm the plaintiffs wherever it was taking place. *See generally Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980). In those cases, the relief to non-parties could be called a side-effect of the relief given to the plaintiffs.

This was the case in *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). There, the Fourth Circuit upheld a nationwide injunction on the President's "travel ban" because the plaintiffs were "dispersed throughout the United States," there was an interest in ensuring uniform application of immigration laws, and the court concluded the ban "likely violates the Establishment Clause." *Id.* at 605; *see also Hawaii v. Trump*, 859 F.3d 741, 787–88 (9th Cir. 2017). Without directly addressing the merits of why the injunction should be nationwide, the Supreme Court declined to completely stay the injunction. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017).

The same need to protect third parties to provide complete relief is not present here. The structure of the Byrne JAG program does not require granting relief to non-parties. While the statute does provide situations in which money would be withheld and redistributed, there are no provisions for redistribution of funds withheld for failing to abide by the Attorney General's "special conditions."[4] The formula provides for the calculation of allotments, and then those allotments are claimed by grantees submitting applications. Apart from instructing that money withheld from a state should be redistributed to its local governments, 34 U.S.C. § 10156(f), the statute is completely silent on what happens if a potential grantee is denied or if it simply fails to submit an application. Chicago has not shown how that situation would resolve itself, and it has certainly not shown how an

[4] This may be further indication the Attorney General does not have the broad conditioning authority he claims he does, and underscores the need for Congress to intervene to fill in any blanks the Attorney General, or any other litigant, deems necessary.

injunction preventing the Attorney General from enforcing the conditions at all is necessary to protect its own interest in collecting its allotment. If money were withheld and redistributed from other jurisdictions, Chicago would *benefit* by getting more money. Finally, this case is tangentially related to immigration law and policy, but it is ultimately a funding case, and it does not come close to implicating the nationwide uniformity concerns raised in other cases. The nationwide injunction is simply unnecessary here.

III.

Given the conclusion that Chicago has a likelihood to prevail on the merits in this case, and the fact that the Attorney General has not challenged any other aspect of the district court's preliminary-injunction analysis, I join the court's judgment affirming the entry of the injunction. I do so, however, only for an injunction that protects Chicago. Other jurisdictions that do not want to comply with the Notice and Access conditions were not parties to this suit, and there is no need to protect them in order to protect Chicago. An injunction, particularly a preliminary injunction, is an extreme remedy. A nationwide preliminary injunction is more extreme still. One should only be issued where it is absolutely necessary, and it is far from absolutely necessary here. Consequently, I would remand with instructions to the district court to modify the injunction so as to prevent the Attorney General from enforcing the conditions only concerning Chicago's application for funds.

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

THE CITY OF CHICAGO, **Plaintiff,** **v.** **JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States,** **Defendant.**	**Case No. 17 C 5720** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

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

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

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

I. FACTUAL BACKGROUND

A. The Edward Byrne Memorial Justice Assistance Grant Program

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

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

B. New Conditions on the Byrne JAG Grant

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

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

> (1) A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that, when a State (or State-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and -- as early as practicable -- provide the requested notice to DHS.
>
> (2) A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given to access any State (or State-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States.
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> (3) The applicant local government must submit the required 'Certification of Compliance with 8 U.S.C. 1373' (executed by the chief legal officer of the local government).

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

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

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

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

(c) Obligation to Respond to Inquiries

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

C. The City's Welcoming Ordinance

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

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

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

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

1. arrest, detain or continue to detain a person solely on the belief that the person is not present legally in the United States, or that the person has committed a civil immigration violation;

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

3. detain, or continue to detain, a person based upon an immigration detainer, when such immigration detainer is based solely on a violation of a civil immigration law.

b.

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

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

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

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

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

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

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

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

II. ANALYSIS

A. Legal Standard

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

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

B. Likelihood of Success on the Merits

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

1. Executive Authority under the Byrne JAG Statute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, even if there were a basis for importing § 10102(a) into the Byrne JAG statute, it is suspect to ground the Attorney General's authority to impose the challenged conditions via the power Congress conferred on the *Assistant* Attorney General. *See*, 34 U.S.C. § 10102(a)(6); *Whitman*, 531 U.S. at 468 ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Furthermore, § 10102(a)(6) provides that the Assistant Attorney General shall exercise "such other powers and functions as *may* be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General." 34 U.S.C. § 10102(a)(6) (emphasis added). The language of the statute,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Constitutionality of Section 1373

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Irreparable Harm

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

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

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

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

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

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

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

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

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

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

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

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

D. Balancing of Equities and the Public Interest

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

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

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

III. CONCLUSION

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

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

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

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: September 15, 2017

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

THE CITY OF CHICAGO, **Plaintiff,** **v.** **JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States,** **Defendant.**	**Case No. 17 C 5720** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

The Attorney General moves to stay the nationwide application of this Court's preliminary injunction against imposition of certain conditions on the 2017 Byrne JAG grant pending resolution of the Attorney General's appeal to the Seventh Circuit Court of Appeals. For the reasons stated herein, Defendant's Motion to Stay Nationwide Application of Preliminary Injunction [ECF No. 80] is denied.

I. BACKGROUND

The Court assumes familiarity with the underlying facts of this case as recited in its opinion granting in part the City of Chicago's motion for a preliminary injunction. *See, generally*, *City of Chicago v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sep. 15, 2017). In support of the instant motion, the Attorney General has pointed to additional

facts that merit discussion here. The Attorney General's office has received nearly a thousand applications for Byrne JAG funding for FY 2017, and nearly all those applications await award notifications from the Department of Justice (the "Department"). (*See*, ECF No. 82, Second Decl. of Alan R. Hanson, ¶ 4.) In prior years, the majority of Byrne JAG awards were already issued by this time of the year. (*Id.* ¶ 9.) The Attorney General argues that this Court's nationwide preliminary injunction prevents the Department from issuing the Byrne JAG award notifications because, even if the appeal is successful, the Attorney General will be unable to add the notice and access conditions after the award notifications issue. The Attorney General urges that a significant delay in the grant-making process past September of this year raises the prospect of imposing heavy burdens on localities with relatively small budgets (*id.* ¶ 11), disrupting state grant-making processes under which states issue sub-awards of Byrne JAG funds (*id.* ¶ 12), and undermining recovery efforts in jurisdictions that have recently suffered natural disasters (*id.* ¶ 13). To avoid this delay and the attendant burdens, the Attorney General requests a stay of the preliminary injunction.

II. LEGAL STANDARD

The analysis for "granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). In determining whether to grant a stay, the court should consider "the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *Ibid.* Whether the movant can demonstrate the first two factors is a threshold issue. *See, In re Forty-Eight Insulations*, 115 F.3d 1294, 1300 (7th Cir. 1997). "If the movant can make these threshold showings, the court then moves on to balance the relative harms considering all four factors using a 'sliding scale' approach." *Id.* at 1300-01. A stay pending appeal is intended "to minimize the costs of error" and "to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits." *In re A & F Enters.*, 742 F.3d at 766. As the Supreme Court recently stated, "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l*

Refugee Assistance Project ("IRAP"), 137 S.Ct. 2080, 2087 (2017) (citations omitted).

III. ANALYSIS

The Attorney General argues that the City of Chicago (the "City") lacks Article III standing for any remedy that goes beyond its alleged injury-in-fact. (The Court notes that this argument may be mooted by the U.S. Conference of Mayors' pending Motion to Intervene, but in this Opinion does not consider the effect of such an intervention.) There is no dispute that the City has standing vis-à-vis the notice and access conditions. Nonetheless, the Attorney General contends that the City's standing is cut off at its jurisdictional boundaries, preventing the Court from fashioning a remedy any broader in scope than that required to redress the City's injury. The Court disagrees. Once a constitutional violation has been shown, "the nature of the remedy must be determined by the nature and the scope of the constitutional violation." *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir. 1997); *see also, Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) ("The nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.") (quotation omitted). The City has demonstrated a likely constitutional violation. It is the "nature and scope of the constitutional violation" that defines the remedy for this

violation, not the particular plaintiff. *Ibid.* Here, the constitutional transgression is national in scope because the notice and access conditions, shown to be likely unconstitutional, were imposed nationwide. Thus, a preliminary injunction may "bind" the "part[y]" before the Court, in this case the Attorney General, to prevent the constitutional violations at issue regardless of where they may occur. FED. R. CIV. P. 65(d). "[O]nce a constitutional violation is demonstrated, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). The Constitution vests a district court with "the judicial Power of the United States." U.S. Const. art. III, § 1. This power is not limited to the jurisdiction in which the district court sits: "[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. U.S.*, 809 F.3d 134, 188 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by equally divided court*, 136 S.Ct. 2271 (2016).

The circumstances here are appropriate. Because the Attorney General's authority, or lack thereof, will not vary by jurisdiction, the cases cited in support of a stay are

inapposite. In *Lewis v. Casey*, 518 U.S. 343 (1996), the evidence failed to show systemic violations necessary to justify a state-wide injunction in Arizona's prison libraries, as the challenged conduct could have been present in some prisons but not others. *Id.* at 359-60. This case, on the other hand, implicates a facial challenge to a federal statute; the Attorney General's authority to impose Byrne JAG conditions on the City will not differ from his authority to do so elsewhere. No additional evidence is needed to justify the nationwide scope of the injunction because the Attorney General's authority does not vary state by state like the conditions of access to legal libraries may vary prison to prison. *See, id. Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1648-49 (2017), is also unavailing. There, the Court analyzed whether an intervenor as a matter of right has standing to claim a remedy *separate* from that sought by the plaintiff. This Court has found no case extending *Town of Chester*'s rationale to the proposition advanced by the Attorney General - that, regardless of the likely constitutional violation shown, a party with standing is barred from injunctive relief broader than that which directly impacts it.

Next, the Attorney General argues that equitable principles require that the injunction be no more burdensome than necessary

to resolve a plaintiff's injury. While true that an injunction should be "no more burdensome than necessary to provide complete relief," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 778 (1994), a nationwide injunction is necessary to provide complete relief from the likely constitutional violation at issue here. *See, McBride*, 124 F.3d at 873; *see also, Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) ("The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated."). As the City's cited authority indicates, nationwide injunctions have been upheld numerous times where the remedy provided relief to non-parties as well as the plaintiff. *See, e.g., Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980); *Texas v. U.S.*, 809 F.3d at 187-88 n. 211 (upholding nationwide scope of preliminary injunction and collecting cases).

Most significantly, a recent Supreme Court decision validates the nationwide application of the preliminary injunction here. In *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated as moot*, 583 U.S. __ (2017), the Fourth Circuit upheld the nationwide scope of a preliminary injunction enjoining, *inter alia*, portions of the President's executive order barring certain foreign nationals

from entering the United States. The government appealed and, while the appeal was pending, moved for a stay of the injunction. *See, Trump v. IRAP*, 137 S.Ct. 2080, 2083 (2017). The Supreme Court granted in part and denied in part the motion to stay the nationwide injunction. *Id.* at 2089. Although the Supreme Court narrowed the categories of persons to whom the injunction applied, the nationwide application of the injunction was upheld "with respect to parties similarly situated to [the plaintiffs]." *Id.* at 2088. Consistent with the Supreme Court's analysis, the scope of the nationwide preliminary injunction at issue here includes similarly situated states and local governments. In fact, the dissenting Justices made the exact argument the Attorney General advances here, specifically criticizing the majority for upholding the scope of the injunction for other similarly situated persons and ignoring that "a court's role is to provide relief only to claimants." *Id.* at 2090 (Thomas, J., dissenting) (quotations and alterations omitted) ("But the Court takes the additional step of keeping the injunctions in place with regard to an unidentified, unnamed group of foreign nationals abroad."). The Attorney General's argument to stay the injunction parallels that adopted by the dissent but clearly rejected by the majority of the Supreme

Court. *See, id.* at 2088. Thus, the Court is duty-bound to reject it here as well.

Similarly, the Seventh Circuit has upheld a nationwide injunction where the evidence before the court primarily involved one jurisdiction. In *Decker*, the appellant argued that the district court erred by entering a nationwide injunction where the fact-finding had focused on Milwaukee County. *See, Decker*, 661 F.2d at 617-18. The court affirmed the nationwide scope of the preliminary injunction, reasoning that the court's "analysis . . . relied primarily on the statute and regulation and ha[d] used the evidence on funding in Milwaukee County merely as illustration." *Id.* at 618.

The Attorney General's authority for cabining injunctive relief to only the plaintiff's injury is distinguishable. In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), the Supreme Court reviewed a permanent injunction based on a violation of the National Environmental Policy Act where a federal agency failed to complete an environmental impact statement prior to deregulating alfalfa. The Supreme Court overturned the injunction, emphasizing that the agency could lawfully approve a partial deregulation of alfalfa before completing the new environmental impact statement without harming the plaintiffs. *Id.* at 165-66. Because the district

court had enjoined the agency from approving not just a complete but also a partial deregulation, the injunction was overbroad. *Ibid.* *Monsanto* does not apply here. In *Monsanto,* the injunction prevented the agency from using its *lawful* authority to impose a partial deregulation that had not been shown to harm the plaintiffs. *See, ibid.* Here, the Attorney General likely has *no* lawful authority to impose the notice and access conditions. An injunction is not overbroad where it merely inhibits the Attorney General from acting beyond his likely statutory authority. *Madsen v. Women's Health Center,* 512 U.S. 753 (1994), is also inapplicable. Because the injunction there restricted the defendants' First Amendment rights, *Madsen* applied a different standard. *See, id.* at 765. There, the Court assessed "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Ibid.* No similar First Amendment concern is present here.

With respect to equitable considerations, the Attorney General argues that staying the nationwide sweep of the injunction would allow the Department to include the notice and access conditions in award notifications while a decision on the merits is reached, thus preventing burdens on localities that might attend a significant delay in Byrne JAG funding. The

difficulty with this proposition is that, in essence, the proposed "fix" would allow the Attorney General to impose what this Court has ruled are likely unconstitutional conditions across a number of jurisdictions prior to a decision on the merits. This is not an equitable result, particularly where the Court's preliminary injunction merely preserves the status quo to await a final decision. *See,* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 65.20 (2017); *see also, Am. Med. Ass'n v. Weinberger,* 522 F.2d 921, 926 (7th Cir. 1975) (upholding preliminary injunction that preserved status quo for resolution on the merits).

Finally, the Attorney General argues that applicants who contest the conditions may file their own lawsuits while jurisdictions that do not contest the conditions may receive immediate funding by acceding to the notice and access conditions while the appeal is pending. Considering that thirty-seven cities and counties have signed on as *amicus curiae* in support of the City, judicial economy counsels against requiring all these jurisdictions (and potentially others) to file their own lawsuits to decide the same legal question before this Court. (*See, generally,* ECF No. 51, Brief of Amici Curiae County of Santa Clara, 36 Additional Cities, Counties and Municipal Agencies, the U.S. Conference of Mayors, the National

League of Cities, the National Association of Counties, the International Municipal Lawyers Association, and the International City/County Management Association ("Amicus Brief of Counties, Cities, and Others").) Furthermore, all jurisdictions remain free to adopt the substance of the notice and access conditions if they wish to do so. The injunction only prevents the Attorney General from imposing them as conditions on the Byrne JAG funds. If, however, the Attorney General wishes to reserve his right to tether the notice and access conditions to eligibility for these funds, he must await a decision that upholds his authority to do so.

Although not specifically raised by the Attorney General, there are reasons to be cautious when imposing a nationwide injunction. Recent legal scholarship has identified significant concerns related to the use of nationwide injunctions at the district court and circuit court levels. *See, generally,* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction* (February 9, 2017) (forthcoming publication), available at SSRN: https://ssrn.com/abstract=2864175; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J.L. & Pub. Pol'y 487 (2016); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-*

Class Litigation, 36 Cardozo L. Rev. 2017 (2015). Nationwide injunctions may increase forum shopping, lead to conflicting injunctions, and stymie the development of the law within the Circuits prior to Supreme Court review. These concerns are not insignificant but fail to overcome the benefits of a nationwide injunction in this specific instance. First and foremost, there has been no evidence of forum shopping here and neither party has argued as such. Second, as explained above, judicial economy favors avoiding "a flood of duplicative litigation" from other Byrne JAG applicants who want the same protections as the City of Chicago. *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Certainly, it would at least include the thirty-seven cities and counties that filed briefs in support of the City of Chicago as amici. *See*, ECF No. 51, Amicus Brief of Counties, Cities, and Others; *see also, A-1 Cigarette Vending, Inc. v. U.S.*, 49 Fed. Cl. 345, 358 (2001) ("It would be senseless to require the relitigation of the validity of a regulation in all federal district courts").

Nevertheless, issuing a nationwide injunction should not be a default approach. It is an extraordinary remedy that should be limited by the nature of the constitutional violation and subject to prudent use by the courts. *See, Califano v. Yamaski*, 442 U.S. 682, 702 (1979) (noting that injunctive relief is

limited to the "extent of the violation established"). In this case, the Court finds it an appropriate remedy based on the need for federal uniformity and the unfairness resulting from disparate applications.

The rule of law is undermined where a court holds that the Attorney General is likely engaging in legally unauthorized conduct, but nevertheless allows that conduct in other jurisdictions across the country. The Courts have a "well-recognized interest in ensuring that federal courts interpret federal law in a uniform way." *Williams v. Taylor*, 529 U.S. 362, 389–90 (2000). Further, the public interest and perception of the law supports "having congressional enactments properly interpreted and applied. . . . As it is principally the protection of the public interest with which [the court is] concerned, no artificial restrictions of the court's power to grant equitable relief in the furtherance of that interest can be acknowledged." *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534-35 (D.C. Cir. 1963) (internal quotations and citations omitted). All similarly-situated persons are entitled to similar outcomes under the law, and as a corollary, an injunction that results in unequal treatment of litigants appears arbitrary. *See, id.* at 534 ("[Where] a lower court . . . has spoken, that court would ordinarily give the same relief to any individual who comes to

it with an essentially similar cause of action. . . . The rule of law requires no less."); *see also, Sandford v. R. L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978) ("[T]he settled rule is that whether plaintiff proceeds as an individual or on a class suit basis, the requested injunctive relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.") (internal quotations and alterations omitted). An injunction more restricted in scope would leave the Attorney General free to continue enforcing the likely invalid conditions against all other Byrne JAG applicants. This state of affairs flies in the face of the rule of law and the role of the courts to ensure the rule of law is enforced.

This is especially true considering the judiciary has an important role to play in enforcing the separation of powers. *See, NLRB v. Canning*, 134 S.Ct. 2550, 2559-60 (2014) ("[T]he separation of powers . . . serve[s] to safeguard individual liberty, and . . . it is the duty of the judicial department — in a separation-of-powers case as in any other — to say what the law is.") (internal quotations and citations omitted). "When the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself." *Zamecnik v. Indian Prairie Sch. Dist. # 204*, 636

F.3d 874, 879 (7th Cir. 2011) (Posner, J.) (quotations omitted). District courts are given broad authority to determine the appropriate scope of an injunction. *See, United States v. Capitol Serv., Inc.*, 756 F.2d 502, 507 (7th Cir. 1985) ("Geographical limitations regarding the issues at trial do not alter the court's broad remedial powers."); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201-02 (7th Cir. 1971) (affirming the "district court's power to consider extending relief beyond the named plaintiff" "where justice requires such action"). If this Court is incorrect, the appellate process is the vehicle to correct the error.

The Court is sympathetic to the Attorney General's quandary and agrees that, ideally, a final decision on the merits would be reached before practical constraints force a surrender of his policy position (at least for FY 2017). However, this concern is better dealt with through expedited proceedings than a stay that would likely result in imposition of unconstitutional conditions on Byrne JAG applicants. The Court notes that the Attorney General opposed the City's Motion for Expedited Briefing that would have resulted in an earlier decision on the City's Motion for a Preliminary Injunction. (*See*, ECF No. 28, Def.'s Opp. to Pl.'s Mot. to Expedite Briefing Schedule.)

Applicants for a stay have a threshold burden to demonstrate both a likelihood of success on the merits and that irreparable harm will result if the stay is denied. *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d at 1300–01. Where the applicant "does not make the requisite showings on either of [the threshold] factors, the court's inquiry into the balance of harms is unnecessary, and the stay should be denied without further analysis." *Id.* at 1301. Because the Attorney General is not able to meet its threshold burden of showing some likelihood of success on its motion to stay nationwide application of the preliminary injunction, no further analysis is necessary. *See, ibid.*

IV. CONCLUSION

For the reasons stated herein, the Attorney General's Motion to Stay Nationwide Application of Preliminary Injunction [ECF No. 80] is denied.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: October 13, 2017

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

October 20, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-2991	CITY OF CHICAGO, Plaintiff - Appellee v. JEFFERSON B. SESSIONS III, Attorney General of the United States, Defendant - Appellant
Originating Case Information:	
District Court No: 1:17-cv-05720 Northern District of Illinois, Eastern Division District Judge Harry D. Leinenweber	

The following are before the court:

1. **MOTION TO SUSPEND BRIEFING ON AND CONSIDERATION OF DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY PENDING APPEAL**, filed on October 16, 2017, by counsel for the appellee.

2. **DEFENDANT-APPELLANT'S OPPOSITION TO PLAINTIFF-APPELLEE'S MOTION TO STAY BRIEFING ON AND CONSIDERATION OF DEFENDANT-APPELLANT'S MOTION FOR A PARTIAL STAY PENDING APPEAL**, filed on October 18, 2017, by counsel for the appellee.

On September 15, 2017, the district court entered an order granting in part and denying in part the City of Chicago's request for a preliminary injunction. The order enjoined imposition of notice and access conditions on the Edward Byrne Memorial Justice Assistance Grant program and applied the injunction nationwide. The Attorney General appealed on September 26 and asked this court to stay the nationwide application of the district court's order. On October 13 the City asked the district court to partially reconsider its preliminary injunction order and enjoin the imposition of a third grant condition requiring it to certify compliance with 8 U.S.C. § 1373. The City then asked us to suspend proceedings in this court, arguing that its motion to reconsider deprives this court of jurisdiction over the Attorney General's appeal.

Federal Rule of Appellate Procedure 4(a)(4)(B)(i) says, "If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." The list in Rule 4(a)(4)(A) includes a motion to alter or amend the judgment under Rule 59. The City of Chicago filed its motion to reconsider within 28 days after entry of the district court's preliminary injunction order, making it a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 403 (1982), the Supreme Court said that "a premature notice of appeal 'shall have no effect' . . . In short it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs* quoted an earlier version of Rule 4(a)(4) that required dismissal of a premature appeal; under the current version of the rule a court of appeals may stay an appeal until the motion to reconsider is decided, but the appellate court lacks jurisdiction until the notice of appeal becomes effective. *See Katerinos v. U.S. Dep't of Treasury*, 368 F.3d 733, 738 (7th Cir. 2004).

The Attorney General concedes that the City's motion to reconsider is one filed under Rule 59(e), but argues that this court retains jurisdiction because the motion to reconsider does not pertain to the grant of injunctive relief that is the subject of his appeal. The Attorney General argues that the district court's ruling on the City's motion to reconsider the denial of injunctive relief on the § 1373 condition will have no effect on this court's review of the portion of the district court's order granting injunctive relief on the notice and access conditions. But a "judgment" as defined in Federal Rule of Civil Procedure 54(a) includes "any order from which an appeal lies." The City of Chicago has filed a motion to alter or amend the same judgment that the Attorney General seeks to appeal. To prevent two courts from having power to modify the same judgment, Rule 4(a)(4)(B)(i) renders a notice of appeal ineffective until the motion to reconsider the judgment is resolved. *See Square D Co. v. Fastrak Softworks, Inc.*, 107 F.3d 448, 450 (7th Cir. 1997) (dismissing appeal from grant of preliminary injunction as premature because motion to reconsider pending in district court); *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 739 F.2d 284, 284 (7th Cir. 1984) (per curiam) (dismissing appeal where motion to

reconsider addressed copyright claim and notice of appeal addressed different parts of judgment). The Attorney General also argues that it is significant that the motion to reconsider was filed by the party that prevailed on its request for injunctive relief rather than the party that appealed. But Rule 4(a)(4)(A) says that the filing of a designated motion extends "the time for appeal for *all* parties" (emphasis added) and thus the notice of appeal has no effect even if not filed by the appealing party. *See Haas v. Tulsa Police Dept. ex rel. City of Tulsa*, 58 Fed. Appx. 429 (10th Cir. 2003).

Under the clear language of Rule 4(a)(4)(B)(i), the Attorney General's appeal does not take effect until the motion to reconsider is resolved. Accordingly, **IT IS ORDERED** that the City of Chicago's motion is **GRANTED** and proceedings in this court are **SUSPENDED** until the district court resolves the City's motion for reconsideration. The parties shall file a status report with this court within two days after the district court resolves the City's motion to reconsider.

form name: **c7_Order_3J**(form ID: **177**)

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

THE CITY OF CHICAGO,

Plaintiff,

v.

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

Defendant.

Case No. 17 C 5720

Judge Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

Two Motions are before the Court. The first is the City of Chicago's ("Chicago") Motion for Partial Reconsideration of this Court's September 15, 2017 Opinion granting in part and denying in part Chicago's Motion for a Preliminary Injunction against certain conditions on the 2017 Byrne JAG grant. The second is the United States Conference of Mayors' Motion to Intervene as of right and, alternatively, permissively. For the reasons stated herein, Chicago's Motion for Partial Reconsideration [ECF No. 99] and the Conference's Motion to Intervene [ECF No. 91] are denied.

I. BACKGROUND

The Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG grant") is an annual federal grant that provides financial assistance for state and local law enforcement

efforts. *See*, 34 U.S.C. § 10152. The Attorney General has attached three conditions to the 2017 Byrne JAG grant that are contested in this lawsuit, referred to as the notice, access, and compliance conditions, respectively. *See, City of Chi. v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847, at *4-9 (N.D. Ill. Sep. 15, 2017). The Court assumes familiarity with the underlying facts of this case as recited in its previous opinion granting in part and denying in part Chicago's motion for a preliminary injunction, *see, generally, id.*, and will engage in only a procedural summary here.

On August 10, 2017, Chicago moved for a nationwide preliminary injunction, arguing that all three conditions imposed on the 2017 Byrne JAG grant were unlawful and unconstitutional. *Sessions*, 2017 U.S. Dist. LEXIS 149847 at *4. On September 15, 2017, the Court granted a preliminary injunction as to the notice and access conditions, but denied the preliminary injunction as to the compliance condition. *Id.* at *44. On September 26, 2017, the Attorney General filed a notice of appeal and moved to stay the nationwide scope of the injunction pending appeal. (*See*, Notice of Appeal, Sept. 26, 2017, ECF No. 79; Motion to Stay Nationwide Application of Preliminary Injunction, Sept. 26, 2017, ECF No. 80.) The Attorney General argued to this Court that Chicago, as the only

plaintiff, lacked standing to pursue an injunction nationwide in scope. The United States Conference of Mayors (the "Conference") then moved to intervene on October 6, 2017. (*See,* Conference's Mot. to Intervene, Oct. 6, 2017, ECF No. 91.)

On October 13, 2017, this Court denied the Attorney General's Motion to Stay the nationwide scope of the injunction. *City of Chi. v. Sessions,* No. 17 C 5720, 2017 U.S. Dist. LEXIS 169518, at *19 (N.D. Ill. Oct. 13, 2017). On that same day, the Attorney General petitioned the Seventh Circuit to stay the nationwide injunction, and Chicago moved for partial reconsideration of the denial of the preliminary injunction as to the third condition, the compliance condition. (*See,* Defendant-Appellant's Mot. for Partial Stay of Prelim. Inj. Pending Appeal, No. 17-2991, Oct. 13, 2017, Dkt. 8; Chicago's Mot. for Partial Recons., Oct. 13, 2017, ECF No. 99.) On October 16, 2017, Chicago moved to suspend briefing and consideration of the partial stay in the Seventh Circuit due to the motion for partial reconsideration pending before this Court. (*See,* Mot. to Suspend Consideration of Mot. for Partial Stay, No. 17-2991, Oct. 16, 2017, Dkt. 10.) On October 20, 2017, the Seventh Circuit granted Chicago's Motion to suspend proceedings on appeal pending this Court's resolution of Chicago's motion for partial reconsideration. (*See,* Order, *City*

of Chi. v. Sessions, Case No. 17-2991, Dkt. 27 (7th Cir. Oct. 20, 2017).)

This Court now takes the two pending motions in turn.

II. ANALYSIS

A. The City of Chicago's Motion for Partial Reconsideration

Chicago asks the Court to reconsider its denial of the preliminary injunction as to the compliance condition on the Byrne JAG grant. As explored thoroughly in the Court's September 15, 2017 Opinion, the compliance condition requires a grant applicant to certify its compliance with 8 U.S.C. § 1373, a federal law that prohibits certain restrictions on communication between federal immigration agents and state and local government officials regarding an individual's immigration status. *See*, 8 U.S.C. § 1373. Chicago bases its Motion on a letter to Eddie T. Johnson, Chicago Superintendent of Police, from Alan Hanson, Acting Assistant Attorney General, dated October 11, 2017. (*See*, Oct. 11, 2017 Letter, Ex. A to Decl. of Ari Holtzblatt, ECF No. 103 ("DOJ Letter").) The letter states that the Department of Justice (the "DOJ") has determined that Chicago is in violation of Section 1373 based on its preliminary review of Chicago's laws and policies, and is therefore ineligible for Byrne JAG funding. (*Ibid.*) According to the

letter, the DOJ found that at least one section of Chicago's Welcoming City Ordinance violates Section 1373 (and potentially several other sections as well, depending on Chicago's interpretation of the ordinance). (*Ibid.*) The letter concludes by inviting a response and/or additional documentation from Chicago based on the DOJ's preliminary assessment, noting that the letter does not constitute final agency action. (*Ibid.*)

The Federal Rules of Civil Procedure do not expressly provide for motions for reconsideration. However, these motions are common and understood to fall under either Rule 59(e) (to amend or alter a judgment) or Rule 60(b) (for relief from a judgment or order). *See,* FED. R. CIV. P. 59, 60. Although Chicago does not explicitly state the Federal Rule it is moving under, the Seventh Circuit construed Chicago's motion for reconsideration under Rule 59(e) in its decision to suspend proceedings on appeal, and the parties reference Rule 59 in their briefs. (*See,* Order, *City of Chi. v. Sessions,* Case No. 17-2991, Dkt. 27 (7th Cir. Oct. 20, 2017); Chicago's Mot. for Partial Recons., ¶ 5; Opp'n to Pl.'s Mot. for Partial Recons., at 2, Oct. 23, 2017, ECF No. 110.) As such, the Court construes the motion for reconsideration under Rule 59(e).

Rule 59(e) allows a court to alter or amend a judgment if the movant clearly establishes: (1) that the court committed a

manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment. *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013). "It does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Ibid.* (quoting *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000)). Chicago moves this Court to reconsider based on the second option: newly discovered evidence. To succeed on a motion under Rule 59 by invoking newly discovered evidence, a party must show that: "(1) it has evidence that was discovered post-trial [or judgment]; (2) it had exercised due diligence to discover the new evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that [it] would probably produce a new result." *Id.* at 955 (quoting *Envtl. Barrier Co., LLC v. Slurry Sys., Inc.*, 540 F.3d 598, 608 (7th Cir. 2008)) (citation omitted). Motions for reconsideration "should only be granted in rare circumstances," and district courts enjoy wide discretion in determining whether to grant them. *Anderson v. Holy See*, 934 F.Supp.2d 954, 958 (N.D. Ill. 2013), *aff'd sub nom. Anderson v. Catholic Bishop of*

Chicago, 759 F.3d 645 (7th Cir. 2014); *see also*, *Harrington v. City of Chi.*, 433 F.3d 542, 546 (7th Cir. 2006) (noting that motions to reconsider are discretionary).

In support of its motion to reconsider, Chicago points to this Court's holding that "only affirmative demands on states constitute a violation of the Tenth Amendment" and "Section 1373 imposes no affirmative obligation on local governments." *City of Chi. v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847, at *37-38 (N.D. Ill. Sep. 15, 2017). It argues that the DOJ Letter interprets Section 1373 to impose affirmative obligations in contravention of this Court's ruling, making reconsideration proper. *See, ibid.*

The Court disagrees. Nothing in the DOJ Letter contravenes the Court's prior ruling, which did not rest on either the DOJ or Chicago's interpretation of Section 1373's requirements but, instead, rests solely on the text of Section 1373. *See, Sessions*, 2017 U.S. Dist. LEXIS 149487 at *35-38. The Court ruled on the constitutionality of Section 1373 as a facial challenge. *See, ibid.* Both parties not only agreed with that construction during the preliminary injunction hearing, but framed the central legal issue in facial terms and argued for such an approach. In response to the Court's question about what Section 1373 allows, Mr. Readler on behalf of the Attorney

General stated: "Let me say we're also here on a facial challenge, so [Chicago] [has] not – [Chicago is] not asking for a preliminary injunction today to declare that [Chicago's] law is in compliance with 1373. That issue would probably require some discovery in terms of how it's executed." (Prelim. Inj. Hr'g at 53:3-8.) Similarly, in response to the Court's question about whether Chicago was requesting an injunction limited to Chicago, Mr. Safer on behalf of Chicago answered, "No, your Honor. We're asking for a nationwide injunction because this is a facial challenge to a . . . provision that is applied across the country." (*Id.* at 62:9-14.) The Court asked a follow-up question about whether Chicago's Welcoming City Ordinance distinguished it from other jurisdictions, to which Mr. Safer responded that he "agree[d] with the Attorney General . . . that this is a facial challenge, and . . . [that] it is a matter of saying that these conditions are unconstitutional, ultra vires, without authority, and that applies throughout the country." (*Id.* at 62:7-63:5.) The DOJ Letter advancing a different interpretation of Section 1373 would not change the Court's *facial* analysis of the Tenth Amendment challenge. Accordingly, the DOJ Letter does not meet two of the requirements for reconsideration based on newly discovered evidence: it is not

"material" to the Court's facial analysis, and its consideration would not "produce a new result." *Beyrer*, 722 F.3d at 955.

Furthermore, Chicago's Motion for Partial Reconsideration brings up issues that were never previously before the Court. Chicago did not request a declaration of compliance with Section 1373 in its Motion for a Preliminary Injunction, making its Motion for Reconsideration an improper vehicle for injecting this issue into the case. *See, Beyrer*, 722 F.3d at 954 (quoting *Bordelon*, 233 F.3d at 529) ("[Reconsideration] certainly does not allow a party to . . . advance arguments that could . . . have been presented to the district court prior to the judgment."). In addition, a denial of Chicago's Motion for Reconsideration will not prevent it from seeking this relief. Included in Chicago's seven-count Complaint is Count V, which seeks a declaratory judgment that Chicago complies with Section 1373. The argument that Chicago makes in support of its Motion for Reconsideration is a distinct issue and more appropriately ruled upon separately, rather than inserting an as-applied challenge into what was previously unanimously formulated and subsequently ruled on as a facial challenge.

Moreover, addressing an as-applied challenge to Section 1373 based on the DOJ Letter is premature. The DOJ Letter specifically disclaims final agency action and invites

Chicago to respond before a final determination is made. If the DOJ makes a final determination that Chicago is eligible for 2017 Byrne JAG funds, then no harm accrues to Chicago. Although Chicago argues that the DOJ letter "staked out a final view" on Section 1373, this does not change the fact that the DOJ has yet to make a determination about Chicago's eligibility for funds. (*See*, Reply in Supp. of Pl.'s Mot. for Partial Recons., ECF No. 114, Oct. 30, 2017, at 3.) Litigating a policy position based on a preliminary assessment is premature, and this Court will not do so.

Accordingly, the Court denies Chicago's Motion for Reconsideration because the DOJ letter is not "material" to the Court's facial analysis and its consideration would not "produce a new result." *Beyrer*, 722 F.3d at 955. Further, reconsideration is improper because the question whether Chicago complies with Section 1373 was not before the Court in its prior ruling. *See*, *id.* at 954.

B. The U.S. Conference of Mayors' Motion to Intervene

The Conference moves to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure and, alternatively, permissively under Rule 24(b). *See*, FED. R. CIV. P. 24. The Seventh Circuit has cautioned district courts to keep the two inquiries — the inquiry under Rule 24(a) and the

inquiry under Rule 24(b) — distinct. *City of Chi. v. FEMA*, 660 F.3d 980, 987 (7th Cir. 2011).

The Conference is the official non-partisan organization of U.S. cities with populations of 30,000 or more. (*See*, Mot. to Intervene, ¶ 2.) The Conference's role includes "ensur[ing] that federal policy meets urban needs" and promoting "coordinat[ion] on shared policy goals." (*See*, Intervenor's Compl., Ex. 1 to Mot. to Intervene, ECF No. 91, Oct. 6, 2017, ¶¶ 17-19.) The Conference alleges that its members adopt policy positions that collectively represent the views of the nation's mayors. (*See*, Mot. to Intervene, ¶ 2.) In this specific instance, the Conference has adopted a policy opposing punitive sanctuary city practices, including the three conditions challenged in this litigation. (*Ibid.*)

1. Standing

Before we proceed to determine if the Conference meets the requirements of intervention under either Rule, we must first analyze whether it has standing. The U.S. Supreme Court recently held that "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017). The parties dispute whether the Conference is seeking relief

"different" from that Chicago seeks. Regardless, in this Circuit an intervenor as of right must demonstrate Article III standing. *See, Flying J, Inc. v. Van Hollen,* 578 F.3d 569, 571 (7th Cir. 2009) ("No one can maintain an action in a federal court … unless he has standing to sue, in the sense required by Article III of the Constitution . . . ."); *see also, FEMA,* 660 F.3d at 985 (noting that "more than Article III standing must be required" for intervention).

Article III of the Constitution limits the exercise of the judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "'The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.'" *Town of Chester,* 137 S.Ct. at 1650 (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408 (2013)). "Standing exists when the plaintiff suffers an actual or impending injury, no matter how small; the injury is caused by the defendant's acts; and a judicial decision in the plaintiff's favor would redress the injury." *Bauer v. Shepard,* 620 F.3d 704, 708 (7th Cir. 2010) (citations omitted).

"It has long been settled that even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Int'l Union v. Brock,* 477 U.S.

274, 281 (1986) (internal quotations and citations omitted). An association has standing to bring a suit on behalf of its members where: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Because its constituents have standing to bring the same challenge that Chicago has brought and the Conference has adopted a policy at odds with the Attorney General's Byrne JAG conditions, the Conference asserts that it has associational standing.

The Attorney General disputes standing. First, the Attorney General argues that the Conference cannot represent the cities (who have individual standing) because it is composed of mayors rather than the cities themselves. The Conference responds that it is comprised of cities but represented by their respective mayors. In evaluating a potential intervenor's motion to intervene, the Court must accept all factual allegations as true. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). Accordingly, we accept the factual assertions of the Conference at this stage. Second, the

Attorney General argues that the Conference is not authorized to litigate on behalf of the cities, but offers no authority for the proposition that litigation must be specifically authorized by members. Indeed, the Court can find no authority for this proposition outside the context of inter-member conflicts of interest. *See, Retired Chi. Police Ass'n v. City of Chi.*, 76 F.3d 856, 865 (7th Cir. 1996).

Finally, the Attorney General contends that the Conference does not have standing to bring claims on behalf of the approximately 1,400 cities that it represents because the Conference itself is ineligible for Byrne JAG funds and it cannot represent the members because the member cities would not be bound by the judgment. The Seventh Circuit has rejected this argument:

> The defendants argue that the association should not be accorded standing because a judgment against it might not be binding upon its members. We see little likelihood that the defendants will suffer the burden of relitigating the claims raised in this case. The Stare decisis effect of our decision provides the defendants with substantial protection against further litigation.

Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278, 281 n. 3 (7th Cir. 1978). Additionally, although members may not individually be bound in cases based on associational

standing, the U.S. Supreme Court has nonetheless recognized associational standing. *See, Hunt*, 432 U.S. at 343.

Turning to the requirements for associational standing, first, the member cities have the ability to sue on their own behalf, just as Chicago does. Second, the Conference's interest in protecting local policy decisions in immigration enforcement is germane to the organizational purpose as it involves the power of city government. (*See*, Intervenor's Compl., Ex. 1 to Mot. to Intervene, ¶¶ 17-22.) Additionally, the Conference adopted three official resolutions regarding federal sanctuary policies. (*Id.* ¶¶ 58-70.) Each resolution passed by a wide majority of its voting members. (*Id.* at ¶ 70.) Third, the relief sought is of a sort – declaratory and injunctive – that is amenable to associational standing. For example, the Supreme Court has upheld a union's associational standing where neither the "claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved [union] member" and "[t]he suit raise[d] a pure question of law." *Brock*, 477 U.S. at 288; *see also, Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (holding that the Democratic Party had standing to assert the rights of members prevented from voting by imposition of a new photo ID law). Here, the Conference seeks to intervene

to support the nationwide scope of relief and intends to raise only raises legal questions that are not contingent on evidence from a specific city. (*See*, Intervenor's Compl., Ex. 1 to Mot. to Intervene, ¶¶ 91-154.) Furthermore, the Conference reassures the Court that its intervention will not require individualized proof or other additional evidence. (*See*, Reply in Supp. of Pl.'s Mot. for Partial Recons., at 11.) As its complaint reflects questions of law, the Conference has established associational standing and therefore can represent the interests of its members who may suffer an impending injury caused by the defendant's acts, which injury may be remedied by a favorable judicial decision. *See*, *Hunt*, 432 U.S. at 343; *Bauer*, 620 F.3d at 708. This is sufficient to demonstrate standing. *See*, *ibid.*

2. Intervention as of Right

a. Legal Standard

In order to intervene as of right, the U.S. Conference of Mayors must satisfy four requirements: (1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action. *Reich*, 64 F.3d at 321 (quotation omitted). "The burden is on the party seeking to intervene of right to show

that all four criteria are met." *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002) (citing *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)). Failure to satisfy any one factor mandates denial of the petition. *United States v. City of Chicago*, 908 F.2d 197, 199 (7th Cir.1990), *cert. denied*, 498 U.S. 1067 (1991). The Court analyzes the four factors, although it does so out of sequence for reasons that will become apparent.

b. Timeliness

Turning to the first requirement, "[t]imeliness is to be determined from all the circumstances." *Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 366 (1973). Such a determination is committed to the sound discretion of the district judge. *Ibid.* The Seventh Circuit has characterized the test as "essentially one of reasonableness," stating that "potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly." *Reich*, 64 F.3d at 321 (quotation omitted). Although the assessment of timeliness is made under the totality of the circumstances, the Court should consider four factors: "(1) the length of time the intervenor knew or should have known of his or her interest in this case; (2) the prejudice to the original

party caused by the delay; (3) the resulting prejudice to the intervenor if the motion is denied, and (4) any unusual circumstances." *Ragsdale,* 941 F.2d 501, 504 (7th Cir. 1991) (citing *South v. Rowe,* 759 F.2d 610, 612 (7th Cir. 1985)). "In making this determination, we must also consider the prejudice to the original parties if intervention is permitted and the prejudice to the intervenor if his motion is denied." *Reich,* 64 F.3d at 321 (citation omitted).

The Conference argues that its Motion to Intervene is timely because it did not recognize a need to intervene, nor could it reasonably have been expected to, until September 26, 2017, when the Attorney General filed a motion to stay arguing that Chicago did not have standing to sustain the nationwide injunction. The Conference appeared before the Court two days later and, after securing leave, filed its motion to intervene eight days later. (*See,* Mot. to Intervene, ¶ 19.) The Attorney General argues that the Conference knew or should have known that its putative interests were at stake in this litigation from the filing date of this lawsuit, August 7, 2017, and thus was required to intervene from the beginning (or at least much earlier).

The Court finds the Conference's Motion timely. Timeliness is not determined from "the moment the suit is filed or even at

the time they learn of its existence," but from "the time the potential intervenors learn that their interest might be impaired." *Reich*, 64 F.3d at 321 (citing *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989); *Rowe*, 759 F.2d at 612); *but see, United States v. City of Chicago*, 908 F.2d 197, 199 n.1 (7th Cir. 1990) (noting that courts should still consider the length of time the intervenor knew or should have known of his interest in the case). Here, the Conference persuasively argues that the Attorney General's motion to stay was its first indication of potential impairment to its members' interests. Indeed, an earlier intervention attempt would likely have been dead on arrival, as it would have been difficult to argue that Chicago was an inadequate representative of the Conference's members' interests. *See, Flying J*, 578 F.3d at 572 (holding that intervention was timely even after judgment where state attorney general decided not to pursue appeal because "[h]ad the association sought to intervene earlier, its motion would doubtless (and properly) have been denied on the ground that the state's attorney general was defending the statute . . . ."); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (when "the prospective intervenor and the named party have the same goal, a presumption exists that representation is adequate") (alterations and quotation

omitted). In the same vein, the Seventh Circuit in *Reich* found intervention timely where the intervenors moved to intervene as soon as they discovered the other party was inadequate, reasoning that "we do not expect a party to petition for intervention in instances in which the potential intervenor has no reason to believe its interests are not being properly represented; we went so far as to suggest that the potential intervenor would be laughed out of court." *Reich*, 64 F.3d at 322. Nevertheless, even using the time from filing to intervention as the lodestar, the approximately three-month interim is reasonably timely under the circumstances, especially in view of the untimely intervention cases cited by the Attorney General involving intervention attempts many years after the action was filed. *See, CE Design Ltd. v. King Supply Co.*, 791 F.3d 722, 726 (7th Cir. 2015); *Larson v. JP Morgan Chase & Co.*, 530 F.3d 578, 583-84 (7th Cir. 2008); *Sokaogon Chippewa Community. v. Babbitt*, 214 F.3d 941, 945 (7th Cir. 2000); *United States v. City of Chicago*, 908 F.2d 197, 197-200 (7th Cir. 1990).

The Attorney General also contends that the motion to intervene is untimely because the Conference chose to participate as an *amicus* at the beginning of the litigation and cannot now alter that decision after a favorable ruling. The

Attorney General implies that the Conference held back on intervention due to gamesmanship – that the Conference waited to see how the Court would rule on Chicago's motion for a preliminary injunction before moving to intervene because it did not want to be bound by any unfavorable judgment. However, it is doubtful that this was the motivation for the Conference's later intervention, as the individual member cities may not be bound by an unfavorable decision regardless. (*See*, Section II.B.1, *supra.*) Secondly, the Conference's asserted reason for waiting – its belief that Chicago was adequately representing its members' interests – are colorable. Indeed, other cases have found intervention later in the litigation appropriate where a specific event revealed the need to intervene. For example, in *United Airlines, Inc. v. McDonald*, the Supreme Court held that intervention was timely on the rationale that "[a]s soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests." *United Airlines*, 432 U.S. 385, 394 (1977).

In determining timeliness, "the Court must assess the possible prejudice to the parties." *Zurich Capital Mkts., Inc. v. Coglianese*, 236 F.R.D. 379, 384 (N.D. Ill. 2006) (citing

Reich, 64 F.3d at 322). Intervention at this time in the proceeding does not significantly prejudice the Attorney General. Although the Court has made substantive rulings, the litigation is not at an advanced stage, and the Attorney General has yet to answer the Complaint. *See, ibid* (granting intervention, noting that "any prejudice to ZCM that would result from the Liquidator's intervention would result simply by virtue of the Liquidator's involvement in the case, not from the Liquidator's delay in moving to intervene"). Any prejudice caused by delay is further diminished by the Conference's assertion that it will not seek to add any new legal issues into the case nor adduce substantial evidence from individual members. (*See*, Reply in Supp. of Pl.'s Mot. for Partial Recons., at 11.) "[I]n the absence of any indication of prejudice . . . , the motion cannot be adjudged untimely as a matter of law. We don't want a rule that would require a potential intervenor to intervene at the drop of a hat; that would just clog the district courts with motions to intervene." *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006). On the other hand, there is little prejudice to the Conference if intervention is denied as it could bring its own litigation. The Court does not find any significant unusual

circumstances present to either support or deny intervention. Thus, on balance, the Court finds timeliness satisfied.

c. Lack of Adequate Representation

Next, an intervenor must demonstrate a lack of adequate representation. This requirement is met "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972) (citation omitted). "However, when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith." *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (citations omitted).

The Conference argues that the Attorney General's motion for a stay of the nationwide injunction specifically challenges Chicago's ability to represent the Conference and its members' interests. The law requires a high threshold showing of inadequacy where a governmental body, like Chicago, is a party to the litigation. However, that high threshold only applies where the "governmental body or officer [is] charged by law with representing the interests of the proposed intervenor." *Keith*,

764 F.2d at 1270 (citations omitted). Here, the high threshold is inapplicable because Chicago as a governmental entity is not charged by law with representing the interests of other Conference member cities. Since the high threshold is inapplicable, the burden is "minimal" and has been met here. The Attorney General's challenge to Chicago's ability to pursue a nationwide injunction for member cities of the Conference is sufficient to meet this minimal burden. *See, Trbovich,* 404 U.S. at 538 n. 10.

d. Interest Relating to the Subject Matter of the Action

The Court next analyzes whether the Conference has a sufficient interest in the subject matter of the action. Although "[t]he 'interest' required by Rule 24(a)(2) has never been defined with particular precision," it must be "a direct, significant legally protectable interest." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.,* 69 F.3d 1377, 1380 (7th Cir. 1995); *Am. Nat. Bank & Tr. Co. of Chi. v. City of Chi.,* 865 F.2d 144, 146 (7th Cir. 1989) (quotation omitted). The necessary interest is "something more than a mere 'betting' interest, but less than a property right." *Schipporeit,* 69 F.3d at 1380–81 (internal citations omitted). The central inquiry considers "the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues." *Reich,*

64 F.3d at 322 (citations omitted). "Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Schipporeit*, 69 F.3d at 1381 (citations omitted).

The Conference contends that it and its members have an interest in protecting their local law enforcement decisions and priorities from being compromised by the three conditions the Attorney General seeks to impose on the 2017 Byrne JAG grant. (*See*, Mot. to Intervene, ¶ 15.) The Conference attached to their complaint a list of their "2017 elected and appointed leadership," including information on whether a particular member is slated to receive a Byrne JAG grant allocation. (*See*, Ex. A to Intervenor's Compl.) Of the 81 cities listed, 70 cities anticipate receiving a 2017 Byrne JAG grant allocation. (*Ibid.*) The Attorney General does not argue the interest factor for intervention. Based on each individual city member's ability to bring its own lawsuit asserting the same interest as Chicago and the Conference's adoption of the sanctuary city resolutions, the Court finds the interest requirement met.

e. Potential Impairment of the Conference's Interest

Finally, the Court must analyze whether the Conference would face "potential impairment, as a practical matter, of that

interest by the disposition of the action." *Reich*, 64 F.3d at 321 (quotation omitted). "The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (citation omitted).

The Conference argues that it and its members' ability to protect their interests would be impaired without intervention because they would potentially have to file over a thousand additional lawsuits to vindicate the same rights at issue here. (*See*, Mot. to Intervene, ¶ 16.) However, the Attorney General correctly points out that under the Conference's theory, it should only need to file one additional lawsuit – its own – in order to support a nationwide injunction to protect these interests.

The Attorney General contends that the Conference cannot demonstrate impairment because its rights will not be prejudiced by a judgment in the DOJ's favor. As the Conference will not be bound by the judgment of this Court, it will be free — if Chicago loses on appeal – to bring litigation challenging the notice and access conditions and seeking a nationwide injunction. However, the fact that the Conference may bring its

own lawsuit is not determinative. "[T]he possibility that the would-be intervenor if refused intervention might have an opportunity in the future to litigate his claim has been held not to be an automatic bar to intervention." *FEMA*, 660 F.3d at 985 (citation omitted).

"Impairment under the meaning of Rule 24(a)(2) depends on whether a ruling on a legal question would as a practical matter foreclose the intervenor's rights in a subsequent proceeding. Such foreclosure is measured by the general standards of stare decisis." *Revelis v. Napolitano*, 844 F.Supp.2d 915, 925 (N.D. Ill. 2012) (internal citation omitted). A decision of a district court is not sufficient to establish impairment based on stare decisis. *See, Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532 (7th Cir. 1988) ("[T]he opinion of a single district judge rarely yields an effect broader than the force its reasoning carries. Such an influence is not reason enough to complicate litigation by adding [] parties. . . ."). What is more, intervention based on stare decisis should be granted infrequently:

> When should the prospect of an appellate decision cutting off further litigation in the circuit (or the nation as a whole, if the Supreme Court decides the case) be enough to support intervention? "Infrequently" is one response, an essential one if cases are to remain manageable. Trade associations, labor unions, consumers, and many others may be

> affected by (and hence colloquially "interested" in) the rules of law established by appellate courts. To allow them to intervene as of right would turn the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or have the court resolve it expeditiously). Participation as *amicus curiae* will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option.

Id. at 532–33. Accordingly, the Conference's involvement as *amicus curiae* is "strongly preferred," especially considering that any delay here is uniquely harmful given the timeline of the Byrne JAG awards. *See, ibid.* The nationwide injunction currently in force is sufficient to protect the interests of the Conference's members and, regardless, a Seventh Circuit decision overturning the nationwide injunction would not suffice to show the potential impairment necessary for intervention as of right. An appellate judgment in the DOJ's favor that Chicago lacks standing for a nationwide injunction will not preclude or impair the Conference's ability to bring a subsequent action for a nationwide injunction enjoining the three conditions at issue. *See, ibid.* The standing issue present for Chicago is not present for the Conference and, thus, this is not a case where the "parties are free to relitigate but are unlikely to get anywhere." *Ibid.* (citing *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1122–24 (7th Cir.1987)). As to the Seventh Circuit's

ruling on appeal of the notice and access conditions, the Conference's participation as *amicus curiae* is adequate to make its legal arguments. The Court finds that the Conference cannot show that a Seventh Circuit ruling will impair or impede its ability to bring an action for a nationwide injunction on behalf of its members. Accordingly, the Court finds the Conference unable to demonstrate potential impairment to its (or its members') interests at this time.

* * *

Because the Conference is unable to demonstrate impairment to its interests, we deny the Conference's Motion to Intervene as of right. *See, United States v. City of Chi.*, 908 F.2d 197, 199 (7th Cir.1990), *cert. denied,* 498 U.S. 1067 (1991).

3. Permissive Intervention

The Conference moves in the alternative for this Court to allow it to intervene permissively. The court may permit anyone to intervene who, "[o]n timely motion," "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). Permissive intervention is a practical inquiry. In Justice Posner's estimation, assuming its

prerequisites have been met, "Rule 24(b) [is] just about economy in litigation." *FEMA*, 660 F.3d at 987.

The timeliness of the Conference's Motion to Intervene has been established. (*See*, Section II.B.2.b, *supra*.) Further, the Court concludes that there exists a common question of law upon which to base intervention, because the Conference's claims involve the same legal questions as Chicago's claims. *See*, FED. R. CIV. P. 24(b)(1). Accordingly, the prerequisites for permissive intervention are met.

The Conference argues that permissive intervention is proper here because it intends to advance the exact same claims that Chicago has already advanced, such that intervention will cause no delay or prejudice. It further argues that permissive intervention supports judicial economy by obviating the need for other member cities to bring lawsuits to adjudicate the exact same issues before the Court. Additionally, the Conference urges that intervention would resolve the legal question of standing, obviating the need for the parties and the Seventh Circuit to expend resources addressing it.

Permissive intervention is discretionary and the Court finds it inappropriate in this case. Intervention here is premature: The interests of the Conference's member cities are currently protected via the nationwide injunction, and its

members' interests have so far been given a voice via the *amicus curiae* device. Unless and until the status of the nationwide injunction changes, there is no reason to permit an intervention that will further complicate this litigation. The addition into the case of the Conference and its member cities, while it will not significantly augment the legal or evidentiary issues so as to prejudice the Attorney General, does pose the prospect of needlessly complicating a case that has already engendered significant motions practice.

Accordingly, the Court denies the Conference's Motion for Permissive Intervention.

III. CONCLUSION

For the reasons stated herein, Chicago's Motion for Partial Reconsideration [ECF No. 99] is denied. The Conference's Motion to Intervene [ECF No. 91] is denied.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: November 16, 2017

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

November 21, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-2991	CITY OF CHICAGO, Plaintiff - Appellee v. JEFFERSON B. SESSIONS III, Attorney General of the United States, Defendant - Appellant
Originating Case Information:	
District Court No: 1:17-cv-05720 Northern District of Illinois, Eastern Division District Judge Harry D. Leinenweber	

The following are before the court:

1. **DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL**, filed on October 13, 2017, by counsel for the appellant.

2. **OPPOSITION TO DEFENDANT'S MOTION TO STAY NATIONWIDE APPLICATION OF PRELIMINARY INJUNCTION**, filed on October 18, 2017, by counsel for the appellee.

3. **DEFENDANT-APPELLANT'S STATUS REPORT**, filed on November 17, 2017, by counsel for the appellant.

4. **REPLY IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL**, filed on November 17, 2017, by counsel for the appellant.

5. **PLAINTIFF-APPELLEE'S STATUS REPORT**, filed on November 20, 2017, by counsel for the appellee.

6. **BRIEF OF STATES OF CALIFORNIA AND ILLINOIS AS AMICI CURIAE IN SUPPORT OF CITY OF CHICAGO'S RESPONSE TO DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL AND AGAINST THE STAY**, filed on November 21, 2017, by counsel.

IT IS ORDERED that the motion for partial stay of the preliminary injunction is **DENIED**.

IT IS FURTHER ORDERED that briefing in this appeal shall proceed as follows:

1. The brief and required short appendix of the appellant are due by November 28, 2017.

2. The brief of the appellee is due by December 28, 2017.

3. The reply brief of the appellant, if any, is due by January 11, 2018.

Important Scheduling Notice !

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORDER

April 24, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-2991	CITY OF CHICAGO, Plaintiff - Appellee v. JEFFERSON B. SESSIONS III, Attorney General of the United States, Defendant - Appellant
Originating Case Information:	
District Court No: 1:17-cv-05720 Northern District of Illinois, Eastern Division District Judge Harry D. Leinenweber	

Upon consideration of the **DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING A PETITION FOR REHEARING EN BANC AND, IF NECESSARY, A PETITION FOR A WRIT OF CERTIORARI**, filed on April 23, 2018, by counsel for the appellant,

IT IS ORDERED that the motion for partial stay is **DENIED** without prejudice to renewal. To the extent that Attorney General Jefferson Sessions is asking for reconsideration of this court's order denying his motion for partial stay, issued on November 21, 2017, the request is **DENIED**. No member of the panel has requested that the motion be considered by the court en banc. See Seventh Circuit Operating Procedure 1(a)(2).

If Attorney General Sessions files a petition for rehearing en banc, he may ask this court for a partial stay with his petition or after any decision by this court to rehear this case en banc. It is more appropriate for the full court to consider a request for stay after Attorney General Sessions has presented his arguments for why en banc rehearing of this appeal is warranted.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REQUEST TO FILE AN ANSWER TO PETITION FOR REHEARING EN BANC

April 30, 2018

No. 17-2991	CITY OF CHICAGO, Plaintiff - Appellee v. JEFFERSON B. SESSIONS III, Attorney General of the United States, Defendant - Appellant
Originating Case Information:	
District Court No: 1:17-cv-05720 Northern District of Illinois, Eastern Division District Judge Harry D. Leinenweber	

A Petition for Rehearing and Petition for Rehearing En Banc was filed by counsel for appellant on April 27, 2018.

Counsel for appellee is requested to file an answer to the petition by May 14, 2018. Counsel shall file thirty (30) copies of the answer, which shall not exceed fifteen (15) pages. *Fed. R. App. P. 40(b)*. The cover of the answer, if used, must be white. *Fed. R. App. P. 32(c)(2)(A)*.

form name: **c7_AnswerToEnbancRehearingRequest**(form ID: **199**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 30, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-2991

CITY OF CHICAGO,
Plaintiff-Appellee.

v.

JEFFERSON B. SESSIONS III, *Attorney General of the United States*,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cv-05720

Harry D. Leinenweber, *Judge*.

Upon consideration of the **DEFENDANT-APPELLANT'S MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING REHEARING EN BANC AND, IF NECESSARY, A PETITION FOR WRIT OF CERTIORARI**, filed on April 27, 2018, by counsel for the appellant,

IT IS ORDERED that the motion is **DENIED**.[1]

[1] Judge Manion dissents. He would have granted the motion for the reasons given in his partial dissent to the April 19, 2018, opinion.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

May 2, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-2991	CITY OF CHICAGO, Plaintiff - Appellee v. JEFFERSON B. SESSIONS III, Attorney General of the United States, Defendant - Appellant
Originating Case Information:	
District Court No: 1:17-cv-05720 Northern District of Illinois, Eastern Division District Judge Harry D. Leinenweber	

The following is before the court: **MOTION FOR EN BANC CONSIDERATION OF THE REQUEST FOR PARTIAL STAY PENDING EN BANC REVIEW UNDER IOP 1(a)(2),** filed on May 2, 2018, by counsel for the appellant.

The motion is taken under advisement for consideration by the full court should rehearing en banc be granted.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 14, 2018

By the Court:

No. 17-2991

CITY OF CHICAGO,
Plaintiff-Appellee,
v.

JEFFERSON B. SESSIONS III, Attorney General of the United States,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 5720

Harry D. Leinenweber,
Judge.

O R D E R

A letter sent today, June 14, 2018, on behalf of the Attorney General of the United States requests a ruling on his motion of April 27, 2018, reiterated on May 2, to stay the nationwide impact of the injunction issued against him in this case. The letter further states that if the court declines to do so by the close of business on Monday, June 18, it is the Attorney General's intention to seek a stay from the Supreme Court. We **CONSTRUE** this letter as a motion for an immediate ruling on the motions for a stay.

On June 5, 2018, the court granted the Attorney General's petition for a rehearing *en banc*, restricted to the question of the nationwide scope of the injunction. The court recognized that this left unresolved the question whether to grant the Attorney General's motion for a partial stay. Rather than rule today on the April 27 and May 2 motions for a stay, the court has decided to await the Supreme Court's resolution of *Trump v. Hawaii* (2018) (No. 17-965), which we anticipate will occur in the coming weeks. Because that case raises similar issues, we expect that the Court's opinion may facilitate our disposition of the pending motions. We therefore **DENY** the Attorney General's request for an immediate ruling.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 4, 2018

WILLIAM J. BAUER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-2991

CITY OF CHICAGO,
Plaintiff-Appellee,

v.

JEFFERSON B. SESSIONS III,
Attorney General of the United States,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cv-05720

Harry D. Leinenweber,
Judge.

O R D E R

The Attorney General has requested en banc review in this case limited to only one issue. He does not seek full court review of our decision that the district court properly preliminarily enjoined the imposition of the notice and access conditions on the Byrne JAG Grant because those conditions are likely to be unconstitutional. He seeks en banc review only as to the narrow issue of whether the preliminary injunction was properly applied beyond the City of Chicago to encompass jurisdictions nationwide.

A majority of the judges in active service having voted to partially rehear the case en banc only as to the geographic scope of the preliminary injunction entered by the district court, the Petition for Rehearing En Banc is GRANTED to that extent. Part IV

of the panel's opinion of April 19, 2018 in this matter is VACATED and the panel's judgment of the same date is likewise VACATED insofar as it sustained the district court's decision to extend preliminary relief nationwide. By separate order, the court will set a date for oral argument en banc.

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

THE CITY OF CHICAGO, ***Plaintiff,*** ***v.*** **JEFF SESSIONS, Attorney General of the United States,** ***Defendant.***	**Civil Action No. 1:17-cv-05720** **Hon. Harry D. Leinenweber**

SECOND DECLARATION OF ALAN R. HANSON

Pursuant to 28 U.S.C. § 1746, I, Alan R. Hanson, declare as follows:

1. I am the Acting Assistant Attorney General for the Office of Justice Programs ("OJP") at the U.S. Department of Justice. I have held this position since January 30, 2017. As Acting Assistant Attorney General, I am the head of OJP.

2. OJP administers the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") program.

3. Applications under the FY 2017 Byrne JAG - Local Solicitation[1] were generally due by September 5, 2017 (with some exceptions relating to jurisdictions affected by Hurricane Harvey). Applications under the FY 2017 Byrne JAG - State Solicitation[2] were due by August 25, 2017.

4. OJP received more than 900 applications under the FY 2017 Byrne JAG - Local Solicitation. OJP received 56 applications under the FY 2017 Byrne JAG - State Solicitation. In total, nearly one thousand FY 2017 Byrne JAG applications were received.

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1 This document is available at https://www.bja.gov/Funding/JAGLocal17.pdf.

2 This document is available at https://www.bja.gov/Funding/JAGState17.pdf.

5. In the FY 2017 Byrne JAG cycle, OJP has issued two award notifications—to the County of Greenville, South Carolina and the City of Binghamton, New York—both on August 23, 2017. (Dkt. No. 32-1 ¶¶ 3-4.) All other FY 2017 Byrne JAG applications presently remain outstanding.

6. The FY 2017 Byrne JAG - Local Solicitation states an estimated total amount available to be awarded of $83 million for the FY 2017 grant cycle. The FY 2017 Byrne JAG - State Solicitation states an estimated total amount available to be awarded of up to $174.4 million for the FY 2017 grant cycle.

7. Prior to the entry of a nationwide preliminary injunction in this case, OJP had aimed to issue FY 2017 Byrne JAG awards by September 30, 2017. This is stated in the FY 2017 Byrne JAG - Local Solicitation, the FY 2017 Byrne JAG - State Solicitation, and a filing by the Defendant in this case (Dkt. No. 28 ¶ 4). That target is not a mandatory deadline, but reflects OJP's prudential goal for effective administration of the Byrne JAG program.

8. The ordinary federal 2017 fiscal year runs from October 1, 2016 to September 30, 2017. The September 30 target for issuing FY 2017 Byrne JAG awards is thus the end of the relevant federal fiscal year.

9. Historically speaking, never have virtually all Byrne JAG applications remained outstanding for the issuance of award documents at this advanced juncture (*i.e.*, late September) in the grant-making cycle. In other years, most Byrne JAG award notifications have been issued to prospective grant recipients well before September 30. As an example, FY 2016 Byrne JAG award documents were transmitted to the City of Chicago on September 7, 2016. (Dkt. No. 32-1 ¶ 7.) In years prior to that, Byrne JAG

award documents were transmitted to the City of Chicago on September 1, 2015; August 26, 2014; August 22, 2013; August 1, 2012; September 2, 2011; August 18, 2010; August 28, 2009; August 15, 2008; September 4, 2007; and May 4, 2006.

10. OJP is concerned by the disruption to the Byrne JAG program that would be associated with a significant delay (past September 30, 2017) in the issuance of FY 2017 Byrne JAG award notifications in response to the nearly 1,000 outstanding State and local applications. Such a delay would hinder the reasonably timely and reliable flow of funding under this important grant program that supports the law-enforcement activity of jurisdictions around the country. In many instances, the State or local fiscal year starts on July 1; thus, prospective FY 2017 Byrne JAG recipients may already be in "arrears" in waiting for anticipated federal funds.

11. The impact of a delay in the Byrne JAG grant-making cycle would likely tend to fall especially heavily on localities. That is because localities, which generally-speaking may have relatively small budgets, may receive Byrne JAG funding both through applications under the Local Solicitation, and additionally through sub-awards from State Administering Agencies that apply under the State Solicitation.

12. State Administering Agencies typically have strict timelines, set by each State based on the State's fiscal year (which, I understand, often runs from July 1 to June 30), for reviewing sub-recipient applications and making sub-awards. A significant delay in OJP's FY 2017 Byrne JAG grant-making process could disrupt the timelines under which States process their Byrne JAG sub-awards and maintain that sub-award cycle within the confines of their State fiscal years.

13. A common (though by no means exclusive) use of Byrne JAG funds is to cover State and local law enforcement overtime and equipment expenses. This year, funding for such expenses may at present be particularly critical to various State and local jurisdictions facing extraordinary law enforcement needs based on recent states of emergency caused by hurricane activity in Texas, Florida, Puerto Rico, and the U.S. Virgin Islands. A significant delay in securing and coordinating FY 2017 Byrne JAG funding for such jurisdictions presently facing emergency challenges would be counter-productive to federal attempts to assist with recovery efforts in disaster areas.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 26, 2017

Alan R. Hanson