No. 20-___

# In the Supreme Court of the United States

CITY OF NEW YORK,

*Petitioner*,

*v.*

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

*Respondents*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## APPENDIX

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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STATE OF NEW YORK, STATE OF CONNECTICUT,
STATE OF NEW JERSEY, STATE OF WASHINGTON,
COMMONWEALTH OF MASSACHUSETTS,
COMMONWEALTH OF VIRGINIA,
STATE OF RHODE ISLAND, CITY OF NEW YORK,

*Plaintiffs-Appellees*,

*v.*

UNITED STATES DEPARTMENT OF JUSTICE,
WILLIAM P. BARR, in his official capacity as
Attorney General of the United States,

*Defendants-Appellants*.

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

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AUGUST TERM 2018

ARGUED: JUNE 18, 2019
DECIDED: FEBRUARY 26, 2020

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Before: WINTER, CABRANES, and RAGGI, *Circuit Judges.*

On appeal from a judgment entered in the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge),* which (1) mandates

that defendants release withheld 2017 Byrne Program Criminal Justice Assistance funds to plaintiffs, and (2) enjoins defendants from imposing certain immigration-related conditions on such grants, defendants argue that the district court erred in holding that the challenged conditions violate the Administrative Procedure Act and the United States Constitution.

REVERSED AND REMANDED.

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BRAD HINSHELWOOD (Mark B. Stern, Daniel Tenny, *on the brief*) *for* JOSEPH H. HUNT, ASSISTANT ATTORNEY GENERAL, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., *for Defendants-Appellants.*

ANISHA S. DASGUPTA, *for* LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, New York, New York (Barbara D. Underwood, Eric R. Haren, Linda Fang, New York State Office of the Attorney General, New York, New York; Mark Francis Kohler, Michael Skold, *for* William Tong, Attorney General of the State of Connecticut, Hartford, Connecticut; Jeremy Feigenbaum, *for* Gurbir S. Grewal, Attorney General of the State of New Jersey, Trenton, New Jersey; Luke Alexander Eaton, *for* Robert W. Ferguson, Attorney General of the State of Washington, Olympia, Washington; David Urena *for* Maura Healey, Attorney General of the Commonwealth of Massachusetts, Boston, Massachusetts; Victoria Pearson, *for* Mark R. Herring, Attorney General of the Commonwealth of Virginia, Richmond, Virginia; Michael W. Field, *for* Peter F. Neronha, Attorney General of the State of Rhode Island, Providence, Rhode Island, *on the brief*) *for Plaintiffs-Appellees* the States of New York,

Connecticut, New Jersey, Washington, Rhode Island, and the Commonwealths of Massachusetts and Virginia.

Jamison Davies, Richard Dearing, Devin Slack, *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, New York *for Plaintiff-Appellee* the City of New York.

Adam Lurie, Caitlin Potratz Metcalf, Linklaters LLP, Washington, D.C., Counsel *for Amicus Curiae* American Jewish Committee.

SPENCER E. AMDUR, Lee Gelernt, Omar C. Jadwat, American Civil Liberties Union Foundation, New York, New York; Christopher Dunn, New York Civil Liberties Union, New York, New York; Mark Fleming, Heartland Alliance, Chicago, Illinois; Cody H. Wofsy, American Civil Liberties Union of California Immigrants' Rights Project, San Francisco, California; Counsel *for Amici Curiae* American Civil Liberties Union, New York Civil Liberties Union, National Immigrant Justice Center, National Immigration Law Center, Immigrant Legal Resource Center, Asian Americans Advancing Justice — Asian Law Caucus, Washington Defender Association, and the New Orleans Workers' Center for Racial Justice.

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REENA RAGGI, *Circuit Judge:*

## INTRODUCTION

The principal legal question presented in this appeal is whether the federal government may deny grants of money to State and local governments that would be eligible for such awards but for their refusal to comply with three immigration-related conditions imposed by the Attorney General of the United States. Those conditions require grant applicants to certify that they will (1) comply with federal law prohibiting

any restrictions on the communication of citizenship and alien status information with federal immigration authorities, *see* 8 U.S.C. § 1373; (2) provide federal authorities, upon request, with the release dates of incarcerated illegal aliens; and (3) afford federal immigration officers access to incarcerated illegal aliens.

The case implicates several of the most divisive issues confronting our country and, consequently, filling daily news headlines: national immigration policy, the enforcement of immigration laws, the status of illegal aliens in this country, and the ability of States and localities to adopt policies on such matters contrary to, or at odds with, those of the federal government.

Intertwined with these issues is a foundational legal question: how, if at all, should federal, State, and local governments coordinate in carrying out the nation's immigration policy? There is also a corollary question: to what extent may States and localities seeking federal grant money to facilitate the enforcement of their own laws adopt policies to extricate themselves from, hinder, or even frustrate the enforcement of federal immigration laws?

At its core, this appeal presents questions of statutory construction. In proceedings below, the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge)* determined that the Attorney General was not statutorily authorized to impose the challenged conditions and, therefore, enjoined their application. *See New York v. Dep't of Justice,* 343 F. Supp. 3d 213 (S.D.N.Y. 2018). The thoughtful opinion of the district court requires us to examine the authorization question in detail. For reasons explained in this opinion, we conclude that the plain language of the relevant statutes authorizes the Attorney General to impose the challenged conditions.

In concluding otherwise, the district court relied on, among other things, an opinion of the Seventh Circuit in *City of Chicago v. Sessions,* 888 F.3d 272 (7th Cir. 2018). While mindful of the respect owed to our sister circuits, we cannot agree that the federal government must be enjoined from imposing the challenged conditions on the federal grants here at issue. These conditions help the federal government enforce national immigration laws and policies supported by successive Democratic and Republican administrations. But more to the authorization point, they ensure that applicants satisfy particular statutory grant requirements imposed by Congress and subject to Attorney General oversight.

Nor can we agree with the district court that the challenged conditions impermissibly intrude on powers reserved to the States. See U.S. CONST. Amend. X. As the Supreme Court has repeatedly observed, in the realm of immigration policy, it is the federal government that maintains "broad," *Arizona v. United States,* 567 U.S. 387, 394 (2012), and "preeminent," power, *Toll v. Moreno,* 458 U.S. 1, 10 (1982), which is codified in an "extensive and complex" statutory scheme, *Arizona v. United States,* 567 U.S. at 395. Thus, at the same time that the Supreme Court has acknowledged States' "understandable frustrations with the problems caused by illegal immigration," it has made clear that a "State may not pursue policies that undermine federal law." *Id.* at 416. As Chief Justice John Marshall wrote over 200 years ago, "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland,* 17 U.S. 316, 436 (1819). This fundamental principle, a bedrock of our federalism, is no less applicable today.

Indeed, it pertains with particular force when, as here, Congress acts pursuant to its power under the Spending Clause. *See* U.S. CONST. art. I, § 8.

## BACKGROUND

Invoking this court's interlocutory jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), defendants the United States Department of Justice and the Attorney General of the United States (hereinafter, collectively, "DOJ") appeal from an award of partial summary judgment entered on November 30, 2018. *See New York v. Dep't of Justice,* 343 F. Supp. 3d 213 (S.D.N.Y. 2018). That judgment grants plaintiffs, the States of New York, Connecticut, New Jersey, Rhode Island, and Washington, the Commonwealths of Massachusetts and Virginia (hereinafter, collectively, the "States"), and the City of New York (the "City"), injunctive relief from three immigration-related conditions imposed by DOJ on the receipt of 2017 Byrne Program Criminal Justice Assistance grants ("Byrne grants"). Those conditions required 2017 Byrne grant applicants (1) to certify their willingness to comply with 8 U.S.C. § 1373, which law precludes government entities and officials from prohibiting or restricting the sharing of citizenship or alien-status information with federal immigration authorities (the "Certification Condition"); (2) to provide assurance that, upon written request of federal immigration authorities, grant recipients would provide notice of an incarcerated alien's scheduled release date (the "Notice Condition"); and (3) to certify that grant recipients would afford federal authorities access to State-incarcerated suspected aliens in order for those authorities to determine the aliens' right to remain

in the United States (the "Access Condition").[1] The district court's judgment not only enjoins DOJ from enforcing these three requirements as to any of plaintiffs' 2017 Byrne grants (which DOJ has otherwise awarded), but also mandates that DOJ release the withheld 2017 funds to plaintiffs without regard to the challenged conditions. *See id.* at 245–46; App. at 45 (modifying mandate).

Three of our sister circuits have now upheld injunctions precluding enforcement of some or all of the challenged conditions as to other jurisdictions applying for Byrne grants. *See City of Los Angeles v. Barr,* 941 F.3d 931 (9th Cir. 2019) (ruling as to Notice and Access Conditions); *City of Philadelphia v. Attorney Gen.,* 916 F.3d 276 (3d Cir. 2019) (ruling as to all three conditions); *City of Chicago v. Sessions,* 888 F.3d 272 (7th Cir. 2018) (ruling as to Notice and Access Conditions), *reh'g en banc granted in part, opinion vacated in part,* No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018) (vacating nation-wide injunction), *reh'g grant vacated,* No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). The district court relied on the Seventh Circuit decision in entering the challenged judgment, *see New York v. Dept of Justice,* 343 F. Supp. 3d at 226–45; the later Third and Ninth Circuit decisions were not then available to it.

In urging reversal, DOJ argues that the district court erred in holding that the challenged conditions violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.,* and the Constitution. As to the

[1] Defendants have imposed still further conditions on 2018 Byrne grants, which plaintiffs also challenge before the district court. Because no judgment has yet been entered on that part of plaintiffs' case, we do not address plaintiffs' challenge to those conditions on this appeal.

APA, DOJ faults the district court for holding that (1) the Attorney General (and his designee, the Assistant Attorney General ("AAG")) lacked the requisite statutory authority to impose the challenged conditions; and (2) the conditions are, in any event, arbitrary and capricious because DOJ failed to consider their negative ramifications for applicants. As to the Constitution, DOJ argues that (1) the district court having found the conditions invalid under the APA, there was no need for it to consider their constitutionality; and (2) the challenged conditions do not raise either the separation-of-powers or Tenth Amendment concerns identified by the district court.

For reasons explained herein, we conclude that the challenged conditions do not violate either the APA or the Constitution. We therefore reverse the challenged judgment in favor of plaintiffs and remand the case to the district court for further proceedings consistent with this opinion.

## I. The Byrne Justice Assistance Grant Program

The Edward Byrne Memorial Justice Assistance Grant Program ("Byrne Program"), codified at 34 U.S.C. §§ 10151–10158, is the vehicle through which Congress annually provides more than $250 million in federal funding for State and local criminal justice efforts.[2]

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[2] The Byrne Program is named for New York City Police Officer Edward Byrne who, at age 22, was shot to death while guarding the home of a Guyanese immigrant cooperating with authorities investigating drug trafficking. The case is well known in this circuit, where five persons were convicted in the Eastern District of New York for their roles in Byrne's murder. Among these was Howard "Pappy" Mason, a drug dealer who, from his New York State prison cell, ordered subordinates to kill a police officer in retaliation for Mason's own incarceration. *See* Joseph P. Fried, *Officer Guarding Drug Witness Is Slain,* N.Y. Times, Feb.

The Byrne Program was created in 2006 as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006). That Act amended provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. I, 82 Stat. 197, which itself had provided federal funding for State and local law enforcement initiatives.

The Byrne Program is a formula grant program, *i.e.,* Congress appropriates a fixed amount of funding for the program and specifies "how the funds will be allocated among the eligible recipients, as well as the method by which an applicant must demonstrate its eligibility for that funding." Office of Justice Programs, *Grant Process Overview*.[3] The Byrne Program's statutory formula awards the States 50% of allocated funds based on their relative populations, *see* 34 U.S.C. § 10156(a)(1)(A), and the other 50% based on their relative rates of violent crime, *see id.* § 10156(a)(1)(B). The formula further provides that, of total Byrne funds awarded to a State, the State itself keeps 60%, with the remaining 40% percent allocated to local governments within the State. *See id.* § 10156(b).

Congress affords States and localities wide discretion in using Byrne grants. While awarded funds cannot substitute for a state's own expenditures, *see id.* § 10153(a)(1), Byrne grants may be used to support such diverse needs as "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems," pertaining to a broad range of criminal justice initiatives:

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27, 1988, at Al, 34; Leonard Buder, *Trial Is By a Defendant In Police Slaying,* N.Y. Times, Nov. 29, 1989, at B5.

[3] *Available at* http://go.usa.gov/xPmkA (last visited Feb. 24, 2020).

> (A) Law enforcement programs. (B) Prosecution and court programs. (C) Prevention and education programs. (D) Corrections and community corrections programs. (E) Drug treatment and enforcement programs. (F) Planning, evaluation, and technology improvement programs. (G) Crime victim and witness programs (other than compensation). (H) Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams,

*id.* § 10152(a). As Congress has explained, its intent was thus to afford States and localities the "flexibility to spend money for programs that work for them rather than to impose a 'one-size fits all' solution." H.R. REP. No. 109-233, at 89 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 1636, 1640.

Plaintiffs have received Byrne grants each year since that program's inception. They have used these grants for a variety of purposes, including, but not limited to, supporting various investigative task forces, funding both prosecutors' and public defenders' offices, paying 911 operators, improving their criminal records systems and forensic laboratories, identifying and mentoring criminally at-risk youth and young adults, operating drug courts and diversion programs for nonviolent felony offenders, mitigating gang violence in prison, and funding prisoner re-entry services.

While the Byrne fund-distribution formula is statutorily mandated, and while Byrne applicants can use such funds for almost any law-enforcement-related purpose, no State or locality is automatically entitled to receive a Byrne grant. Rather, a jurisdiction seeking Byrne funding must submit an application satisfying a host of statutory requirements. For example, a

jurisdiction is statutorily required to make its Byrne Program application public and to afford an opportunity for public comment before submitting its final application to the Attorney General. *See* 34 U.S.C. § 10153(a)(3)(A)–(B). Also, a Byrne grant application must include a "comprehensive Statewide plan" detailing, as specified in § 10153(a)(6)(A)–(E), how awarded grants will be used to improve the jurisdiction's criminal justice system. A Byrne grant applicant must satisfy these, and all other statutory requirements, "in such form as the Attorney General may require," *id.* § 10153(a), and subject to such "rules" as the Attorney General "shall issue" to carry out the program, *id.* § 10155.[4]

Three statutory requirements for Byrne grants are particularly relevant to this appeal. *First,* an applicant must certify that it "will comply with all provisions of this part [*i.e.,* part of chapter pertaining to Byrne Program] and all other applicable Federal laws." *Id.* § 10153(a)(5)(D). *Second,* an applicant must provide assurance that it "shall maintain and report such data, records, and information (programmatic

[4] The APA defines the term "rule" broadly to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4); *see Safari Club Int'l v. Zinke,* 878 F.3d 316, 332 (D.C. Cir. 2017) (recognizing that APA defines "rule" "very broadly" (internal quotation marks omitted)). At the same time, the APA exempts rules pertaining to grants from the notice-and-comment procedures generally attending federal rule-making. *See* 5 U.S.C. § 553(a)(2); *City of Los Angeles v. McLaughlin,* 865 F.2d 1084, 1087 (9th Cir. 1989); *cf.* Richard B. Cappalli, *Rights and Remedies Under Federal Grants* 247 (1979) (observing that "a significant number of formula [grant] programs contain no mention of Due Process rights").

and financial) as the Attorney General may reasonably require." *Id.* § 10153(a)(4). *Third,* an applicant must certify that "there has been appropriate coordination with affected agencies." *Id.* § 10153(a)(5)(C).

The Attorney General's authority to disapprove Byrne applications not satisfying the program's statutory requirements is implicit in the statutory provision tempering that authority with a required opportunity for correction: the Attorney General "shall not finally disapprove" a deficient application "without first affording the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration." *Id.* § 10154. The authority to deny funds is further evident in Congress's instruction as to how appropriated funds are to be distributed if the Attorney General determines "that a State will be unable to qualify or receive [Byrne Program] funds": that State's allocation under the statutory formula "shall be awarded by the Attorney General to units of local government, or combinations thereof, within such State," giving priority to those with the highest reported number of violent crimes. *Id.* § 10156(f). Such denial authority is, moreover, consistent with the discretion Congress has afforded the Attorney General to waive certain statutory program requirements, *see id.* § 10152(c)(2), and to develop "guidelines" for the statutorily required "program assessment component" of every Byrne grant that is awarded, *id.* § 10152(c)(1).

The Attorney General is statutorily authorized to delegate the "powers and functions" thus vested in him by Title 34 to the AAG responsible for DOJ's Office of Justice Programs, which office now administers the Byrne Program. *Id.* § 10102(a)(6). Congress has made plain that the powers and functions that may be so delegated "includ[e] placing special conditions

on all grants, and determining priority purposes for formula grants." *Id.*

II. The Challenged Immigration-Related Conditions

In soliciting 2017 applications for Byrne Program grants, then-Attorney General Jefferson B. Sessions III, on July 25, 2017, announced the three immigration-related conditions at issue in this case.

*First,* the *Certification Condition* requires a Byrne grant applicant to execute a "Certification of Compliance with 8 U.S.C. § 1373." App. at 288, ¶¶ 52–53. That statute, which the Attorney General identified as an "applicable Federal law" for purposes of the certification requirement of 34 U.S.C. § 10153(a)(5)(D), *see supra* at 12, states, in pertinent part, as follows:

> 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[5] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

18 U.S.C. § 1373(a). The Certification Condition thus requires that,

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[5] The Immigration and Naturalization Service, which had been a part of DOJ, *see* 8 U.S.C. § 1101(a)(34), was disbanded in 2002, *see* 6 U.S.C. § 291, and its duties divided among three services operating within the new cabinet-level Department of Homeland Security: the United States Citizenship and Immigration Service, the Immigration and Customs Enforcement Service, and the Customs and Border Protection Service, *see id.* §§ 111, 211, 251–52, 271.

> with respect to the "program or activity" funded in whole or part under this award (including any such "program or activity" of any sub-recipient at any tier), throughout the period of performance for the award, no State or local government entity, -agency, or -official may prohibit or in any way restrict — (1) any government entity or -official from sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. § 1373(a); or (2) a government entity or -agency from sending, requesting or receiving, maintaining, or exchanging information regarding immigration status as described in 8 U.S.C. § 1373(b).

App. at 288–89, ¶¶ 52–53.

*Second,* the *Notice Condition* requires Byrne grant recipients to have in place throughout the grant period a law, rule, or policy for informing federal authorities, upon request, of the scheduled release date of an alien in the recipient's custody. It states that,

> as of the date the recipient accepts [a Byrne] award, and throughout the remainder of the period of performance for the award —
>
> . . .
>
> 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.

*Id.* at 291, ¶ 55(1)(B).

*Finally,* the *Access Condition* requires grant recipients to have a law, rule, or policy in place allowing federal authorities to meet with incarcerated aliens in order to inquire about their rights to remain in the United States. It states that,

> as of the date the recipient accepts [a Byrne] award, and throughout the remainder of the period of performance for the award —
>
> . . .
>
> 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 . . . are given . . . access [to] 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' rights to be or remain in the United States.

*Id.* at 291, ¶ 55(1)(A).

In announcing these conditions, Attorney General Sessions stated an intent to "increase information sharing between federal, state, and local law enforcement, ensuring that federal immigration authorities have the information they need to enforce immigration laws and keep our communities safe." Press Release, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial

Justice Assistance Programs (July 25, 2017).[6] The Attorney General was specifically critical of "[s]o-called 'sanctuary' policies [that] make all of us less safe because they intentionally undermine our laws and protect illegal aliens who have committed crimes." *Id.* He stated that DOJ needed to "encourage these 'sanctuary' jurisdictions to change their policies and partner with federal law enforcement to remove [alien] criminals." Thus, "[f]rom now on," DOJ would "only provide Byrne JAG grants to cities and states that comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours[']' notice before they release an illegal alien wanted by federal authorities." *Id.*[7]

III. Title 8 U.S.C. § 1373

Because an understanding of how 8 U.S.C. § 1373 became the focus of the Certification Condition is useful to a consideration of plaintiffs' challenge to that condition, we set forth that history here.

Section 1373 was enacted in 1996, when Congress took notice that certain states and localities were restricting their officials' cooperation with federal immigration authorities. *See generally* H.R. REP. No. 104-725, at 391 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 2649, 2779 (noting that various

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[6] *Available at* https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[7] As indicated in the text quoted *supra* at 15–16, the actual Notice Condition sets no firm 48-hour deadline but, rather, requires notification "as early as practicable."

state statutes and local laws prevent disclosure of individuals' immigration status to federal officials).[8]

Members of the Senate Judiciary Committee voiced particular concern with granting federal funds to "State and local governments passing ordinances and rules which prohibit State and local agencies from cooperating or communicating with INS." *See The Impact of Immigration on the United States and Proposals to Reform U.S. Immigration Laws: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the Comm. on the Judiciary,* 103d Cong. 45 (1994) [hereinafter *Immigration Reform Hearings]* (statement of Sen. Simpson, R. Wyo. ("I believe cooperation has to be [a] condition[] for any Federal reimbursement. In other words, you are not going to get bucks from the Federal Government if the local governments can't communicate with the INS about illegal immigration and those who are involved in it.")); *see also id.* at 26 (statement of Sen. Feinstein, D. Cal. (signaling that she would not support providing

[8] This conference report specifically pertains to 8 U.S.C. § 1644, a provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104-193), which states that, "notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." As this court has recognized, § 1373, enacted a month after § 1644 as part of the Immigration Reform Act, "expands" on the earlier statute insofar as it provides generally that no Federal, State, or local government entity may restrict another government entity from sending to, or receiving from INS, any immigration status information. *See City of New York v. United States,* 179 F.3d 29, 32 (2d Cir. 1999) (rejecting constitutional challenge to both laws). Thus, the conference report pertaining to § 1644 is relevant to § 1373.

immigration "impact aid" to "States and local governments that declined to cooperate in enforcement of [federal immigration] laws"));[9] *id.* (statement of Committee Chairman Sen. Kennedy, D. Mass. (acknowledging concerns of some mayors that cooperation with federal immigration authorities could be counterproductive to local law enforcement efforts, and observing that federal aid had to be provided "in ways that are going to get the[ir immigration] cooperation but also, . . . [allow them] to deal with . . . violence and gangs and drug problems and the rest. We are looking for balance . . . .")).

In its report accompanying the proposed legislation that would become § 1373, the Senate Judiciary Committee expressly recognized that the "acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving

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[9] Senator Feinstein's comment was made in signaling agreement with a recommendation of the Commission on Immigration Reform, a body created by Congress in 1990 to "evaluate the impact of" changes in federal immigration law. The relevant exchange is as follows:

> Commissioner Teitelbaum: There is a further condition [on recommended immigration impact aid] that was unanimously supported by the Commission . . . [and] it should be highlighted, and that is a requirement for cooperation by State and local governments with Federal authorities to enforce the immigration laws of the United States. I don't think the Commission would support the notion of impact aid for States and local governments that declined to cooperate in enforcement of such laws.
>
> Senator Feinstein: Nor would I, sir, so I agree with you.

*Immigration Reform Hearings,* 103d Cong. at 26.

of the purposes and objectives of the Immigration and Nationality Act." S. REP. No. 104-249, at 19-20 (1996) (quoted in *City of New York v. United States,* 179 F.3d at 32–33). Thus, in enacting § 1373, as in enacting § 1644, Congress sought "to give State and local officials the authority to communicate with [federal immigration authorities] regarding the presence, whereabouts, or activities of illegal aliens," notwithstanding any local laws to the contrary. H.R. REP. No. 104-725, at 383 (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. at 2771 (quoted in *City of New York v. United States,* 179 F.3d at 32).

In the twenty years that followed, political debates over federal immigration policies grew more contentious, and the number of State and local jurisdictions limiting official cooperation with federal immigration authorities increased. In February 2016, Representative John Culberson (R. Tex.), then the Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, forwarded to Attorney General Loretta E. Lynch a report by the Center for Immigration Studies, which concluded that "over 300 'sanctuary' jurisdictions [were] refus[ing] to comply with [federal immigration] detainers or [were] otherwise imped[ing] information sharing with federal immigration officials." App. at 134.[10] Representative

[10] An immigration detainer is the instrument by which federal authorities formally "advise another law enforcement agency that [they] seek[] custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). Supported by an administrative warrant issued on a showing of probable cause, the detainer generally requests the agency then having custody of the alien to provide federal authorities with advance notice of the alien's intended release date or to detain the alien for a brief time to allow federal authorities to assume custody. *See* U.S. Immigration and Customs

Culberson asked the Attorney General to investigate whether DOJ "grant recipients were complying with federal law, *particularly . . . § 1373*." *Id.* (emphasis added).

The ensuing investigation was conducted by DOJ's Inspector General ("IG") who, in May 2016, reported a significant, decade-long decline in state and local cooperation with federal immigration authorities. He reported that a 2007 congressionally mandated IG audit of seven jurisdictions then receiving federal funds pursuant to the State Criminal Alien Assistance Program ("SCAAP") revealed that all but one (San Francisco) were accepting federal detainers and providing federal authorities with timely notice of aliens' release dates. *See* App. at 134–35 n.1. By contrast, the IG's 2016 examination of ten jurisdictions receiving a combined 63% of relevant DOJ grants,[11] revealed that "all . . . had ordinances or policies that placed limits on cooperation" with federal immigration authorities. *Id.; see id.* at 137, 145–49 (detailing limitations found).[12]

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Enf't, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report* 7–8 (2017); *see also Hernandez v. United States,* 939 F.3d 191, 200 (2d Cir. 2019).

[11] The IG reviewed ten jurisdictions receiving federal grants administered by the DOJ's Office of Justice Programs (*e.g.,* Byrne Program grants) and/or the DOJ's Office of Violence Against Women: "the States of Connecticut and California; City of Chicago, Illinois; Clark County, Nevada; Cook County, Illinois; Miami-Dade County, Florida; Milwaukee County, Wisconsin; Orleans Parish, Louisiana; New York, New York; and Philadelphia, Pennsylvania." App. at 136.

[12] To illustrate with some examples, the IG reported that Cook County, Illinois (Chicago), prohibited its on-duty employees from communicating with federal immigration authorities "regarding individuals' incarceration status or release dates." *Id.* at 140 (internal quotation marks omitted). Similarly, Orleans Parish,

Louisiana (New Orleans) prohibited its officials from "provid[ing] information on an inmate's release date" to federal authorities. *Id.* By executive order, Philadelphia employees were prohibited from providing federal authorities with release date information about the subject of an immigration detainer unless that person was incarcerated "for a first or second degree felony involving violence and the detainer is supported by a judicial warrant," and not merely an administrative one. *Id.* at 141 (internal quotation marks omitted).

New York City appears to have placed restrictions on its employees' cooperation with federal immigration authorities as early as 1989. *See City of New York v. United States,* 179 F.3d at 31 (discussing 1989 executive order prohibiting city officials or employees from communicating individual's immigration status to federal authorities unless (1) required to do so by law, (2) expressly authorized to do so by alien, or (3) alien is suspected of criminal behavior). Then, in a 2003 Executive Order, the City established a "General Confidentiality Policy" summarized by the district court as follows:

> City employees may not disclose an individual's immigration status, except in limited circumstances, such as when the disclosure is authorized by the individual, is required by law, is to another City employee as necessary to fulfill a governmental purpose, pertains to an individual suspected of illegal activity (other than mere status as an undocumented immigrant), or is necessary to investigate or apprehend persons suspected of terrorist or illegal activity (other than mere documented status). Additionally, police officers may not inquire about a person's immigration status unless investigating illegal activity other than mere undocumented status, and may not inquire about the immigration status of crime victims or witnesses at all. Other city employees may not inquire about any person's immigration status unless the inquiry is required by law or is necessary to determine eligibility for or to provide government services.

*New York v. Dep't of Justice,* 343 F. Supp. 3d at 223 (citations omitted). The IG reported that by law enacted in November 2014, New York City further prohibited its Corrections personnel from

The IG observed that insofar as these limitations "may be causing local officials to believe and apply the[se] policies in a manner that prohibits or restricts cooperation with [federal immigration officials] in all respects," that would be "inconsistent with and prohibited by Section 1373." *Id.* at 141. Thus, "to the extent [DOJ]'s focus is on ensuring that grant applicants comply with Section 1373," the IG stated that it could consider taking "several steps," including (1) clarifying that § 1373 "is an 'applicable federal law' that DOJ grant recipients "would be expected to comply with in order to satisfy relevant grant rules and regulations"; and (2) "[r]equir[ing] grant applicants to provide certifications specifying the applicants' compliance with Section 1373, along with documentation sufficient to support the certification." *Id.* at 142.

Following this IG report, in July 2016, DOJ, then still headed by Attorney General Lynch, specifically identified § 1373 as "an applicable federal law" for purposes of both Byrne and SCAAP grants and began providing applicants and recipients with guidance as to the requirements of that statute. That guidance explained that § 1373 imposed no affirmative obligation on States and localities but, rather, prohibited such entities from taking actions to restrict the exchange of immigration information with federal authorities.[13]

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communicating inmate release dates to federal immigration authorities unless the inmate is subject to a detainer supported by a judicial warrant. *See* App. at 141.

[13] In that respect, DOJ stated,

> Section 1373 does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their immigration status, nor does it require that states and localities take specific actions upon obtaining such information. Rather, the

For some jurisdictions identified by the IG, notably plaintiff New York City, DOJ conditioned the continuance of their 2016 Byrne grants on the submission of documentation validating their compliance with § 1373.[14]

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> statute prohibits government entities and officials from taking action to prohibit or in any way restrict the maintenance or intergovernmental exchange of such information, including through written or unwritten policies or practices.

App. at 151 (internal quotation marks omitted).

[14] The validation requirement imposed by DOJ on New York City's 2016 Byrne grant stated as follows:

> The recipient agrees to undertake a review to validate its compliance with 8 U.S.C. § 1373. If the recipient determines that it is in compliance with 8 U.S.C. § 1373 at the time of review, then it must submit documentation that contains a validation to that effect and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. If the recipient determines that it is not in compliance with 8 U.S.C. § 1373 at the time of review, then it must take sufficient and effective steps to bring it into compliance therewith and thereafter submit documentation that details the steps taken, contains a validation that the recipient has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. Documentation must be submitted . . . by June 30, 2017. Failure to comply with this condition could result in the withholding of grant funds, suspension or termination of the grant, ineligibility for future [grants], or other administrative, civil, or criminal penalties as appropriate.

App. at 170, ¶ 53. By letter dated June 27, 2017, the City stated that "[n]otwithstanding [its] position that § 1373 is not an applicable federal law . . . the City certifies that its laws and policies comply with and operate within the constitutional bounds of

In October 2016, DOJ published further guidance stating that henceforth, "all" Byrne grant applicants "must certify compliance with all applicable federal laws, including Section 1373." App. at 182. Grant applicants were advised "to examine their policies and procedures to ensure they will be able to submit the required assurances" in their 2017 applications. *Id.* at 183.

Thus, when in July 2017, a new Attorney General, serving a new, Republican administration, announced that applicants for 2017 Byrne grants would have to certify their compliance with § 1373, he was putting into effect the same condition earlier announced by DOJ under the preceding, Democratic administration.

IV. Plaintiffs' 2017 Byrne Grant Awards

On June 26, 2018, DOJ applied the Byrne Program formula to award the plaintiff States Byrne grants totaling $25 million—subject to their acceptance of the three immigration-related conditions at issue. As to New York City, DOJ reiterated, in both October 2017 and January 2018, the concerns it had first expressed in 2016, *i.e.,* that certain of the City's laws or policies appeared to violate § 1373, which could render it ineligible for Byrne grants. *See supra* at n.14.

In response to these DOJ actions, the plaintiff States and City filed the instant related actions, challenging, *inter alia,* the Certification, Notice, and Access Conditions for 2017 Byrne grants as violative of both the APA and the Constitution.

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§ 1373." 2016 Compliance Validation at 2, *New York v. Dep't of Justice,* 343 F. Supp. 3d 213 (No. 18-cv-6474), ECF No. 41-1.

V. The Award of Summary Judgment to Plaintiffs

On the parties' cross motions for summary judgment, the district court granted partial judgment to plaintiffs, enjoining the enforcement of the challenged conditions as to them and mandating the release of 2017 Byrne grant funds to plaintiffs.

In so ruling, the district court held that the challenged conditions violated the APA in two respects: (1) the Attorney General lacked the statutory authority to impose the conditions, *see New York v. Dep't of Justice,* 343 F. Supp. 3d at 227–31; and (2) defendants' failure to consider the conditions' potential negative ramifications for plaintiffs' law enforcement efforts rendered the conditions arbitrary and capricious, *see id.* at 238-41.

While the district court could have stopped there, it proceeded also to rule on certain of plaintiffs' constitutional challenges. As to § 1373 in particular, the district court ruled that DOJ could not identify it as an "applicable law" requiring compliance certification under 34 U.S.C. § 10153(a)(5)(D) because, on its face, § 1373 violates the anticommandeering principle of the Tenth Amendment to the Constitution. *See id.* at 231–37. Further, the district court concluded that, in the absence of statutory authority for the Attorney General to impose the challenged conditions, all three violated the separation of legislative and executive powers mandated by Articles I and II of the Constitution. *See id.* at 238.

Defendants timely appealed.

## DISCUSSION

We review an award of summary judgment *de novo,* construing the record in the light most favorable to the non-moving party. *See, e.g., Bentley v. Autozoners,* 935 F.3d 76, 85 (2d Cir. 2019). We will uphold such an award only if there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. *See id.*

### I. Statutory Authorization To Impose the Challenged Conditions

Except when acting pursuant to powers expressly conferred on the Executive Branch by the Constitution—which are not asserted here—an executive department or agency "literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986). Thus, the APA requires that executive action taken in the absence of statutory authority be declared invalid. *See* 5 U.S.C. § 706(2)(C).[15] When the challenged action is not only unauthorized but also intrusive on power constitutionally committed to a coordinate branch, the action may violate the Constitution, specifically, its

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[15] The relevant statutory text states as follows:

> [t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

5 U.S.C. § 706(2)(C).

mandate for the separation of legislative from executive powers.[16]

DOJ maintains that the Attorney General was statutorily authorized to impose each of the challenged conditions. Whether Congress conferred such authority depends on statutory text, which we construe *de novo*. *See Kidd v. Thomson Reuters Corp.,* 925 F.3d 99, 103 (2d Cir. 2019); *United States v. Shyne,* 617 F.3d 103, 106 (2d Cir. 2010).[17]

### A. Title 34 U.S.C. § 10102(a)(6) Does Not Itself Authorize the Challenged Conditions

Because DOJ devotes considerable energy on this appeal, as it did in the district court, to arguing that the challenged conditions are authorized by 34 U.S.C. § 10102(a)(6), we explain at the outset why that argu-

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[16] *See generally New York v. United States,* 505 U.S. 144, 182 (1992) ("[S]eparation of powers . . . is violated where one branch invades the territory of another."). *But see Dalton v. Specter,* 511 U.S. 462, 472 (1994) (explaining that not every action "in excess of . . . statutory authority is *ipso facto* in violation of the Constitution," and distinguishing between "claims of constitutional violations and claims that an official has acted in excess of his statutory authority").

[17] Defendants have not claimed *Chevron* deference for their own interpretation of the authority conferred by statutes pertaining to Byrne grants and, thus, on this appeal, we do not consider whether any such deference might be warranted. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 845 (1984); *compare Neustar, Inc. v. FCC,* 857 F.3d 886, 894 (D.C. Cir. 2017) (holding *Chevron* deference "forfeited" where not claimed on appeal), *with Sierra Club v. United States Dep't of the Interior,* 899 F.3d 260, 286 (4th Cir. 2018) (explaining in case where parties assumed *Chevron* deference that parties "cannot waive the proper standard of review by failing to argue it" (internal quotation marks omitted)). Rather, we conclude on *de novo* review that the challenged conditions are statutorily authorized.

ment does not persuade. We will then discuss sections of Title 34 that do authorize the conditions at issue.

At the conclusion of a list of criminal-justice-related duties assigned to the AAG, § 10102(a)(6) authorizes the AAG,

> [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.*

34 U.S.C. § 10102(a)(6) (emphasis added). Focusing on the highlighted language, DOJ argues that § 10102(a)(6) does not merely authorize the Attorney General to delegate powers and functions to the AAG, but also grants "addition[al]" authority, which supports the three challenged conditions. Appellant Br. at 22; *see* Reply Br. at 4–5.

In rejecting this argument, the district court held that the highlighted text is not a "'stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants.' *New York v. Dep't of Justice,* 343 F. Supp. 3d at 228 (quoting *City of Chicago v. Sessions,* 888 F.3d at 285). Rather, the introductory word "including" signals that the ensuing phrase is necessarily cabined by what went before it.

> Thus, the Assistant Attorney General can only place special conditions or determine priority purposes to the extent that power already "may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General[,]" . . .

> who may only delegate it to the extent that he has such power himself.

*Id.* (quoting 34 U.S.C. § 10102(a)(6)).

This conclusion finds support not only in *City of Chicago v. Sessions,* the Seventh Circuit decision quoted by the district court, but also in subsequent decisions of the Third and Ninth Circuits. *See City of Los Angeles v. Barr,* 941 F.3d at 938–39; *City of Philadelphia v. Attorney Gen.,* 916 F.3d at 287–89. We agree with that much of these courts' decisions.

Depending on context, the word "including" can be either illustrative or enlarging. *Compare Federal Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941) (construing word as illustrative of preceding section), *with American Sur. Co. of N.Y. v. Marotta,* 287 U.S. 513, 517 (1933) (observing that, "[i]n definitive provisions of statutes," word frequently signifies extension rather than limitation), *and Adams v. Dole,* 927 F.2d 771, 776–77 (4th Cir. 1991) (noting dual meaning of word). The context here signals illustration rather than enlargement. It is the "other powers and functions" that may be vested in or delegated to the AAG that can "include" the authority to impose special conditions and to set priority purposes for Byrne Program grants. Thus, § 10102(a)(6) does not itself confer authority on the Attorney General (or AAG) to impose the conditions here at issue. The authority must originate in other provisions of law. That is the case here.

B. Statutory Provisions Authorizing the Attorney General To Impose the Challenged Conditions

1. Other Circuits Identify No Such Authority

In looking to whether the Attorney General is otherwise authorized to impose the challenged conditions, we are mindful that three sister circuits have considered that question before us and concluded that he is not. Their reasons for so holding have not been uniform.

The Seventh Circuit so ruled with respect to the Notice and Access Conditions, reasoning that no provision of law outside § 10102(a)(6) specifically mentions "special conditions" or "priority purposes" for Byrne grants. *See City of Chicago v. Sessions,* 888 F.3d at 285.

The Ninth Circuit did not think that omission determinative. Reasoning that Congress could not have enacted § 10102(a)(6) "for the purpose of expressly authorizing the Assistant AG to exercise powers that do not exist," that court construed § 10102(a)(6) as effectively "confirming" what had been implicit in the overall statutory scheme, *i.e.,* that the Attorney General has the authority to impose special conditions on, and to identify priority purposes for, Byrne grants, which authority he can delegate to the AAG. *City of Los Angeles v. Barr,* 941 F.3d at 939. We agree with that much of the Ninth Circuit's reasoning. The court goes on, however, to construe the terms "special conditions" and "priority purposes" narrowly and, from that, concludes that the Attorney General is not statutorily authorized to impose the challenged Notice and Access Conditions. *See id.* at 939–41 (construing "special conditions" as used in § 10102(a)(6) to reference only "tailored requirements" necessary to particular circumstance "such as when a grantee is [at] 'high-risk'" of violating a grant's terms, not general conditions applicable to

all grants); *id.* at 941–42 (limiting "priority purposes" for Byrne awards to purposes set out in § 10152(a)).

We cannot adopt the Seventh or Ninth Circuit's conclusions because we do not think the Attorney General's authority to impose the three challenged conditions here derives from the words "special conditions" or "priority purposes." Rather, we locate that authority in other provisions of law, specifically, those requiring Byrne grant applicants to satisfy the program's statutory requirements in such "form" and according to such "rules" as the Attorney General prescribes. *See* 34 U.S.C. §§ 10153(a), 10153(a)(5), 10155. Considering that form- and rule-making authority in light of three particular statutory requirements—(1) for certification of willingness to comply with "applicable Federal laws," *id.* § 10153(a)(5)(D); (2) for assurance that required information will be maintained and reported, *see id.* § 10153(a)(4); and (3) for coordination with affected agencies, *see id.* § 10153(a)(5)(C)—we conclude that the Attorney General is statutorily authorized to impose the challenged conditions.

Before explaining that conclusion, we acknowledge that the Third Circuit, considering these same three statutory requirements, held that none supports the challenged conditions. *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 285-91. The Third Circuit, however, viewed the Attorney General's statutory authority respecting Byrne Program grants as "exceptionally limited." *Id.* at 284–85. We do not.

The Third Circuit emphasized that the Byrne Program awards formula grants. *See id.* at 290. We agree that the Attorney General's authority to depart from that formula when awarding grants to *qualified* applicants is extremely limited. But before there can be an award, there must be a demonstrated showing

of qualification. Repeatedly and throughout its pronouncement of Byrne Program statutory requirements, Congress makes clear that a grant applicant demonstrates qualification by satisfying statutory requirements in such form and according to such rules as the Attorney General establishes. This confers considerable authority on the Attorney General.[18]

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[18] The following statutory sections confer on, or confirm, the Attorney General's authority in this respect:

- 34 U.S.C. § 10152(c)(1) –Requiring every program funded with a Byrne grant to have a "program assessment component, developed pursuant to guidelines established by the Attorney General" together with the National Institute of Justice.
- *Id.* § 10152(d)(2) – Authorizing Attorney General to certify that extraordinary and exigent circumstances warrant using Byrne grant funds for generally prohibited expenditures.
- *Id.* § 10152(f) – Affording Attorney General discretion to extend Byrne grants beyond normal four-year period.
- *Id.* § 10153(a) – Requiring Byrne grant applicants to submit application to Attorney General "in such form as the Attorney General may require," including statutorily required certifications and assurances.
- *Id.* § 10153(a)(5)(C) – Requiring certification "in a form acceptable to the Attorney General" that "there has been appropriate coordination with affected agencies."
- *Id.* § 10153(a)(5)(D) –Requiring certification "in a form acceptable to the Attorney General" that "applicant will comply with all provisions of this part and all other applicable Federal laws."
- *Id.* § 10154 – Requiring Attorney General to afford applicant notice and opportunity to correct any application deficiencies before finally disapproving application.
- *Id.* § 10155 – Requiring Attorney General to "issue rules to carry out this part."

To be sure, the Attorney General's authority in identifying qualified Byrne applicants is not limitless but, rather, a function of the particular requirements prescribed by Congress. Not surprisingly, however, Congress has prescribed those requirements broadly, enlisting the Attorney General to delineate the rules and forms for them to be satisfied. *See generally United States v. Haggar Apparel Co.,* 526 U.S. 380, 392–93 (1999) (explaining that because "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect[,]" agency may issue rules so that statute "may be applied . . . in a manner consistent with Congress' general intent"). While the Attorney General certainly cannot exercise that authority arbitrarily or capriciously, *see infra* Point II, the authority itself cannot fairly be characterized as "exceptionally limited."

With that understanding, we proceed to consider each challenged condition and the statutory provisions supporting it.

2. The Certification Condition Is Statutorily Authorized by 34 U.S.C. § 10153(a)(5)(D)

a. The Statutory Text Requires Applicants To Certify a Willingness To Comply With "All . . . Applicable Federal Laws"

The Certification Condition requires a Byrne grant applicant to certify that, throughout the grant period, it will comply with 8 U.S.C. § 1373, the federal law prohibiting any government entity or official from restricting the receipt, maintenance, or exchange of information regarding citizenship or immigration status as specified in that statute. *See supra* at 15 (quoting condition). The Attorney General's statutory authority

to impose this condition derives from 34 U.S.C. § 10153(a)(5)(D). Therein, Congress specifically requires a Byrne grant applicant to include in its application "[a] certification, made in a form acceptable to the Attorney General" stating that "the applicant will comply with all provisions of this part *and all other applicable Federal laws.*" 34 U.S.C. § 10153(a)(5)(D) (emphasis added).

The conjunctive structure of § 10153(a)(5)(D) makes plain that a Byrne grant applicant must certify its willingness to comply with more than those provisions of law specifically pertaining to the Byrne Program ("this part"). It must also certify its willingness to comply with "all other applicable Federal laws." *Id.* At the same time that this phrase expands an applicant's certification obligation, the word "applicable," as used in the phrase, serves a limiting function. A Byrne applicant is not required to certify its willingness to comply with the United States Code in its entirety as well as all accompanying regulations. Rather, an applicant must certify its willingness to comply with those laws—beyond those expressly stated in Chapter 34—that can reasonably be deemed "applicable." This raises two questions: What is an "applicable" law? And who identifies it? We answer the second question first because it is not seriously disputed and, thus, requires only brief discussion.

1. The Attorney General Is Authorized To Identify "Other Applicable Federal Laws" Requiring § 10153(a)(5)(D) Compliance Certification

The statutory text signals that the Attorney General identifies the laws requiring § 10153(a)(5)(D) compliance certification. This is evident in the requirement that Byrne grant applicants provide certification in

a "form acceptable to the Attorney General." *Id.* § 10153(a)(5). A "form" is commonly understood to be a "document" for providing "required or requested specific information." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 892 (1986). By requiring that § 10153(a)(5)(D) certification be in a "form acceptable to the Attorney General," the statute makes clear that it is the Attorney General who has authority to "require[] or request[] specific information," to ensure a grant applicant's intended compliance with all other applicable federal laws. *See id.* Thus, § 10153(a)(5)(D) authorizes the Attorney General to decide not only the style *(e.g.,* format and typeface) for § 10153(a)(5)(D) certification, but also the specificity of its content, *i.e.,* whether certification is "acceptable" in a form that references "all other applicable Federal laws" generally, or whether such certification needs to be in a form that identifies specific applicable laws.[19]

That Congress would vest such authority in the Attorney General makes sense for several reasons. First, while Congress itself requires compliance certification as to "all other applicable Federal laws," the number of laws that could apply to States and localities seeking Byrne funding is large, variable, and not easily identified in a single statutory provision. Second, the Attorney General, as the nation's chief federal law enforcement official, is particularly suited to identify the federal laws applicable to persons and circumstances. Third, having the Attorney General identify specific laws requiring § 10153(a)(5)(D) certi-

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[19] While matters of "substance" are frequently distinguished from matters of "form," *see, e.g.*, *PPL Corp. v. Comm'r of Internal Revenue*, 569 U.S. 329, 340–41 (2013) (distinguishing between form and substance of a tax), a form serves to ensure the communication of required substance.

fication serves the salutary purpose of affording applicants clear notice of what is expected of them as Byrne grant recipients.[20]

2. "All Other Applicable Federal Laws" Encompasses Both Laws Applying To the Entity Seeking a Grant and Laws Applying To the Proposed Grant Program

The district court nevertheless concluded that the Attorney General was not authorized to identify § 1373 as an applicable law. It held that "'applicable Federal laws' for purposes of 34 U.S.C. § 10153(a)(5)(D) means federal laws applicable to the grant," not to the grant applicant. *New York v. Dep't of Justice,* 343 F. Supp. 3d at 230-31. Because it thought that § 1373 applies only to applicants in their capacities as State and local governments, not to their grants, the district court ruled that the statute could not be an "applicable" law requiring § 10153(a)(5)(D) certification. *Id.* at 231. The Third Circuit subsequently reached the same conclusion. *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 288-90. In so ruling, both courts acknowledged that it would be reasonable to construe the statutory text to mean laws applicable to a grant applicant as well as to a requested grant. *See id.* at 288; *New York v. Dep't of Justice,* 343 F. Supp. 3d at 230–31. Nevertheless, the Third Circuit concluded that a narrower construction was required by the canon against surplusage, the structure of the statute, the historical practice of DOJ, and the formula-grant nature of the program. *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 289–91. The district court relied on similar reasoning, as well as Congress's obligation "unambiguously" to impose conditions on

[20] We discuss this notice point further *infra* at 47–49.

grants of federal money, to justify its narrow reading of § 10153(a)(5)(D). *New York v. Dep't of Justice,* 343 F. Supp. 3d at 231 (internal quotation marks omitted). We cannot agree.

*First* and foremost, we do not think the statutory text admits such narrowing. *See generally Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992) (stating that "when the words of a statute are unambiguous . . . judicial inquiry is complete" (internal quotation marks omitted)); *accord Mei Xing Yu v. Hasaki Rest., Inc.,* 944 F.3d 395, 403 (2d Cir. 2019) (citing *Connecticut Nat'l Bank v. Germain).* The word "applicable," as used in § 10153(a)(5)(D), is not statutorily defined. Thus, it is properly construed according to its contemporary dictionary definition, *see Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566 (2012); *accord Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.,* 904 F.3d 208, 213 (2d Cir. 2018), which is "capable of being applied: having relevance," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105. Statutes are "capable of being applied," and can be relevant both to persons and to circumstances. A second dictionary definition for the word "applicable"—"fit, suitable, or right to be applied," *id.*—only reinforces that conclusion, in that a statute may be fit, suitable, or right to apply both to persons and to circumstances.[21] Thus, an "applicable Federal law" under § 10153(a)(5)(D) is one pertaining either to the State or locality seeking a Byrne grant or to the grant being sought.

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[21] *See Ransom v. FIA Card Servs., N.A.,* 562 U.S. 61, 69–70 (2011) (using both dictionary definitions in construing phrase "debtor's *applicable* monthly expense amounts" in provision of Bankruptcy Code (emphasis added) (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(I))).

To the extent the district court might be understood to have construed "all other applicable laws" to mean only laws applying to States and localities as recipients of federal grants, nothing in the statutory text suggests that Congress there used the word "applicable" only in that limited sense. To the contrary, Congress's use of the adjective "all" to introduce the phrase "*all* other applicable Federal laws" signals an intent to give the word "applicable" its full effect, not to narrow it. *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n,* 499 U.S. 117, 128–29 (1991) (explaining that phrase "all other law" is "clear, broad, and unqualified" and "indicates no limitation" (internal quotation marks omitted)).

*Second,* we cannot agree with the Third Circuit that a redundancy or surplusage problem arises if "all other applicable Federal laws" is construed to mean laws pertaining both to Byrne applicants and to the grants they seek. *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 289 (concluding that such construction effectively equates phrase with "other Federal laws," making word "applicable" mere surplusage). As explained *supra* at 36, the word "applicable" does serve a limiting function in the statutory text—even if not as limiting as plaintiffs might wish. Thus, to raise a redundancy concern, the Third Circuit must imply that *if* Congress had used the phrase "all other Federal laws" in § 10153(a)(5)(D), then courts would have to infer the word "applicable" because of the improbability of Congress requiring certification for the entirety of federal law. But Congress did *not* use that broader phrase in § 10153(a)(5)(D). And we do not think its use of a modifying word—"applicable"—to make explicit in actual statutory text what our sister circuit thinks would have to be implied in a hypothetical alternative

manifests surplusage. Rather, we think it demonstrates clear drafting.

*Third,* the formula nature of the Byrne Program does not warrant limiting the phrase "all other applicable Federal laws." While Congress's intent in appropriating funds for formula (as distinct from discretionary) grants is to have all the money distributed, even a formula grant applicant must satisfy the program's requirements before being entitled to receive funding. *Cf.* Richard B. Cappalli, *Rights and Remedies Under Federal Grants* 40 (1979) (remarking that states typically qualify for formula grants after submitting document statutorily described as "state plan," which serves as "vehicle by which the state commits itself to abide by the conditions which Congress attaches to the funds"). As to the Byrne Program, this is evident from the fact that Congress has expressly provided for alternative distributions of appropriated funds if "a State will be unable to qualify" for a Byrne grant—a matter Congress also leaves for "the Attorney General [to] determine[]." 34 U.S.C. § 10156(f); *see supra* at 13. Thus, Byrne Program formula funding can be denied to an applicant that fails to provide the required § 10153(a)(5)(D) certification as to any "applicable Federal law[]," whether that law pertains to the particular grant sought or to the applicant seeking it.[22]

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[22] The Third Circuit inferred from the fact that *qualifying* Byrne (and other federal) grant recipients could lose a specified (often small) percentage of their annual distribution if they fail to comply with certain other statutes, that the Attorney General was not statutorily authorized "to withhold *all* of a [Byrne] grantee's funds for any reason the Attorney General chooses." *City of Philadelphia v. Attorney Gen.,* 916 F.3d at 286 (emphases in original) (citing 34 U.S.C. § 20927(a) (providing mandatory 10%

Indeed, whether a grant is awarded by formula or by discretion, there is something disquieting in the idea of States and localities seeking federal funds to enforce their own laws while themselves hampering the enforcement of federal laws, or worse, violating those laws. One has only to imagine millions of dollars in Byrne funding being sought by a locality that is simultaneously engaged in persistent, serious violations of federal environmental laws. The formula nature of the Byrne Program does not dictate that such an applicant must be given federal money even as it continues to flout federal law. To the contrary, § 10153(a)(5)(D) authorizes the Attorney General to condition the locality's receipt of a Byrne grant on its certified willingness to comply with *all* federal laws

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penalty for failure to comply with Sex Offender Registration and Notification Act); *id.* § 30307(e)(2) (mandating 5% penalty for failure to comply with Prison Rape Elimination Act); *id.* § 40914(b) (withholding up to 4% of funding for failure to meet requirements of National Instant Criminal Background Check System)). That reasoning does not apply here, where the issue is not whether the Attorney General can withhold Byrne funding for any reason from qualifying applicants, but whether he can deny any such funding to an applicant that fails to demonstrate qualification under the Program's statutory requirements, indeed, fails to satisfy them in a "form acceptable to the Attorney General," as Congress has mandated. 34 U.S.C. § 10153(a)(5). To be sure, the form acceptable to the Attorney General must be grounded in the qualifying requirements it serves, but where that is the case, an applicant's failure—or refusal—to satisfy the statutory requirement in that form can result in denial of a Byrne grant. While the Attorney General cannot "finally disapprove" a deficient Byrne grant application "without first affording the applicant reasonable notice of any deficiencies . . . and opportunity for correction and reconsideration," *id.* § 10154, if those deficiencies persist after such notice and opportunity, then the Attorney General is authorized to deny the grant in its entirety and to reallocate funds as provided in § 10156(f).

*applicable* to that locality, which includes environmental laws.

The conclusion obtains with even more force here, where enactment of the law at issue, 8 U.S.C. § 1373, was informed by Congress's concern that States and localities receiving federal grants were hampering the enforcement of federal immigration laws. *See supra* at 17-20. Subsequent reports that increasing numbers of federal grant recipients were limiting cooperation with federal immigration authorities prompted a congressional request for DOJ investigation, the results of which led two successive Attorneys General serving different administrations to identify § 1373 as an "applicable Federal law" requiring compliance certification. *See supra* at 20–25.[23] We are satisfied that these identifications are authorized by the plain language of § 10153(a)(5)(D), and the formula nature of the Byrne Program requires no contrary conclusion.

*Fourth,* the Third Circuit observes that certain § 10153(a)(5) certification requirements appear, on their face, to pertain to the requested grant rather than to the grant applicant. *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 289 (citing § 10153(a)(5)(A) (requiring certification that "the programs to be funded by the grant meet all the requirements of this part"); § 10153(a)(5)(B) (requiring certification that

[23] The IG's findings, *see supra* at 21–23, might well be found to demonstrate the "high risk" identified by the Ninth Circuit for imposing "special conditions" on Byrne grants, *see City of Los Angeles v. Barr,* 941 F.3d at 940 (holding that "special conditions," as referenced in § 10102(a)(6), means "unusual" or "extraordinary" conditions for a "high-risk grantee," *i.e.,* a grantee with "a history of noncompliance with grant requirements, financial stability issues, or other factors that suggest[] a propensity toward violation of a grant's terms" (internal quotation marks omitted)).

"all the information contained in the application is correct"); and § 10153(a)(5)(C) (requiring certification that "there has been appropriate coordination with affected agencies")). That, however, is insufficient reason to impose a similar limitation on § 10153(a)(5)(D), when the plain language of that provision—"all other applicable Federal laws"—reaches more broadly. *See generally Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n,* 499 U.S. at 127, 129 (rejecting argument that exemption from "antitrust laws *and from all* other law" was limited to antitrust-related laws; *ejusdem generis* canon does not apply where neither statutory text nor context supports urged limitation (emphasis added) (internal quotation marks omitted)).

In urging otherwise, plaintiffs point to 34 U.S.C. § 10228, which states that "[n]othing in this chapter or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof." As the Fourth Circuit has observed in construing § 10228's predecessor statute, the provision is intended "to guard against any tendency towards federalization of local police and law enforcement agencies." *Ely v. Velde,* 451 F.2d 1130, 1136 (4th Cir. 1971) (construing statute to prohibit federal authorities from "[prescribing] the type of shoes and uniforms to be worn by local law enforcement officers, the type or brand of ammunition to be purchased and used by police departments and many other vital matters pertaining to the day-to-day operations of local law enforcement" (citation omitted)). Section 1373 raises no such federalization concern. It does not direct, control, or supervise the day-to-day operations of any State or local police force or law enforcement agency. It does not mandate that State

or local law enforcement authorities cooperate with federal immigration officers. It requires only that nothing be done to prohibit voluntary communication about citizenship or immigration status among such officials. *See supra* at 24. To hold that § 10228 places such a statutory requirement outside the scope of applicable laws requiring § 10153(a)(5)(D) compliance certification is to render that qualification condition a nullity, as compliance with every federal law necessarily places some limits on a grant applicant's actions. Indeed, that conclusion applies whether the law pertains to the applicant or the grant program. We decline to construe § 10228 so broadly as to render § 10153(a)(5)(D) inoperative. *Cf. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 250 (1985) (noting "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative" (internal quotation marks omitted)). *See generally Ely v. Velde,* 451 F.2d at 1136 (declining to construe predecessor provision "so broadly as unnecessarily to undercut solutions adopted by Congress to preserve and protect other societal values").[24]

*Fifth,* DOJ's own focus on laws pertaining to grants rather than applicants in its past identifications of "applicable" federal laws does not itself limit the word. Given the scope of local programs that can be funded with Byrne grants, it is not surprising that DOJ would most frequently identify laws applicable to a particular program in specifying the form of an acceptable § 10153(a)(5)(D) certification. *See generally City of Philadelphia v. Attorney Gen.,* 916 F.3d at 290 (observ-

[24] Insofar as plaintiffs rely not only on § 10228, but also on the Tenth Amendment to argue that § 1373 cannot be an "applicable" law requiring Compliance Certification, we discuss that constitutional point *infra* at 49–61.

ing that if requested grant was to be used for body armor purchases or human research, applicants were expected to certify willingness to comply with applicable federal regulations in those areas). Far fewer, one expects, will be the occasions when States and localities seeking Byrne grants are themselves violators of federal laws applicable to them. Nevertheless, in such circumstances, the violated laws fall within the plain meaning of the phrase "all other applicable Federal laws" as used in § 10153(a)(5)(D). To illustrate, while the Attorney General can—and has—required applicants proposing to use Byrne grants for construction or renovation projects to comply with federal environmental laws specifically applicable to such work, that hardly means he cannot also require an applicant that has a history of violating environmental laws generally from certifying its willingness going forward to comply with such laws. The laws are applicable in the former instance to the grant purpose; in the latter, to the grant applicant. In either case, the Attorney General is requiring compliance certification as to "applicable Federal laws."

*Sixth,* Congress's duty to speak unambiguously in imposing conditions on federal grant money also does not require "all other applicable Federal laws" to be construed to mean only laws pertaining to grants and not to grant applicants. *See New York v. Dep't of Justice,* 343 F. Supp. 3d at 231. The duty derives from *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981). The Supreme Court there analogized federal spending legislation to "a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17. It concluded therefrom that Congress must "speak with a clear voice" in placing conditions on federal grants because there "can . . . be no knowing acceptance [of the puta-

tive contract] if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.*

"Knowing acceptance" is no concern here. Section 10153(a)(5)(D) provided plaintiffs with clear notice that their Byrne grant applications had to include a certification, in a form acceptable to the Attorney General, of their willingness to comply not only with laws specifically applicable to the Byrne Program, but also with "all other applicable Federal laws." To the extent the quoted phrase fails to specify precisely which laws are "applicable," that uncertainty can pertain as much for laws applicable to requested grants as for those applicable to grant applicants. Thus, the district court's *Pennhurst* reasoning does not support its conclusion that "applicable Federal laws" can pertain only to requested Byrne grants, not to grant applicants.

But more to the point, no *Pennhurst* concern arises here because plaintiffs were given advance notice that their 2017 Byrne grant applications had to certify a willingness to comply with § 1373. Indeed, they were given such notice twice, first in 2016, and again in 2017. *See supra* at 23–25. To be sure, that notice was provided by DOJ rather than Congress. But the Supreme Court has recognized that, in establishing federal grant programs, Congress cannot always "prospectively resolve every possible ambiguity concerning particular applications of the [program's statutory] requirements." *Bennett v. Kentucky Dep't of Educ.,* 470 U.S. 656, 666, 669 (1985) (making point in context of federal education grant program). Thus, it has upheld an administering agency's clarifying interpretations, and even its violation determinations, as long they were grounded in "statutory provisions, regulations, and other guidelines provided by the Department" at the time of the grant. *Id.* at 670–71; *see also United*

*States v. O'Hagan,* 521 U.S. 642, 672–73 (1997) (recognizing agency authority to prescribe legislative rules consistent with statute). Plaintiffs here may disagree with the identification of § 1373 as an "applicable Federal law," but they can hardly complain of inadequate notice.

In a final argument in support of their APA challenge to the Attorney General's identification of § 1373 as an applicable federal law, plaintiffs point to Congress's rejection of various legislative proposals to impose immigration-related conditions on receipt of federal funds. As the Supreme Court has cautioned, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Pension Ben. Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650 (1990) (internal quotation marks omitted). Such legislative history "is a particularly dangerous ground" of construction where, as here, the "proposal[s] . . . do[] not become law." *Id.* Indeed, "several equally untenable inferences may be drawn from" congressional inaction, "including the inference that the existing legislation already incorporated the offered change." *Id.* (internal quotation marks omitted). Thus, this challenge to the Attorney General's § 10153(a)(5)(D) authority to identify § 1373 as an "applicable" law also fails.

In sum, we conclude that the plain language of § 10153(a)(5)(D), authorizes the Attorney General to require certification in a form that specifically references federal laws applicable either to the Byrne grant sought or to the State or locality seeking that grant. Because 8 U.S.C. § 1373 is a law applicable to all plaintiffs in this action, the Attorney General was authorized to impose the challenged Certification Condition and did not violate either the APA or separation of powers by doing so.

b. Tenth Amendment Challenge

(1) "As Applied" Review

The district court ruled not only that the Certification Condition *was not* statutorily authorized, but also that it *could not* be so authorized without violating the Constitution. Specifically, the district court held that 8 U.S.C. § 1373, the law for which the condition required certification, "is facially unconstitutional under the anticommandeering doctrine of the Tenth Amendment," and, as such, "drops out of the possible pool of 'applicable federal laws' requiring § 10153(a)(5)(D) certification. *New York v. Dep't of Justice,* 343 F. Supp. 3d at 237 (internal quotation marks omitted). The district court did not have to reach this constitutional question, having already found the Certification Condition to violate the APA. *See Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445 (1988) (noting that "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"); *accord Camreta v. Greene,* 563 U.S. 692, 705 (2011). This court, however, cannot avoid the issue in light of our ruling that the Certification Condition is statutorily authorized.

For reasons briefly explained herein, we think the district court's reasoning insufficient to support its declaration of facial unconstitutionality. We do not pursue the matter in detail, however, because § 1373's constitutionality is properly assessed here not on the face of the statute, but as applied to clarify a federal funding requirement.[25] In that context, § 1373 does not

[25] As the Supreme Court has long recognized, "as-applied challenges are the basic building blocks of constitutional adjudication," and it is not the court's "traditional institutional role

constitute commandeering in violation of the Tenth Amendment.

To the extent the district court thought that § 1373 had to be constitutional in all its applications to be identified as an "applicable Federal law[]" warranting § 10153(a)(5)(D) certification, it was mistaken. Even assuming *arguendo* that § 1373 can constitutionally be applied to States and localities only when they are seeking federal funding—a matter we do not here decide—the principle of severability would warrant upholding the statute as so narrowed. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 685 (1987) (discussing severability in addressing constitutional challenges to statutes); *accord National Fed'n of Indep. Bus. ("NFIB") v. Sibelius,* 567 U.S. 519, 586–88 (2012) (severing part of Affordable Care Act raising constitu-

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to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (internal quotation marks and alterations omitted); *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-95 (1982) (holding that courts should consider constitutional challenge to statute as applied to plaintiff before considering other applications); *Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co.,* 226 U.S. 217, 219–20 (1912) (upholding statute as applied to instant case without speculating as to how it might apply in other circumstances); *accord United States v. Holcombe,* 883 F.3d 12,17 (2d Cir. 2018) (explaining that where First Amendment rights are not implicated, court considers constitutional challenge "in light of the specific facts of the case at hand" (internal quotation marks omitted)). Section 1373 is not here challenged as constitutionally vague, much less constitutionally vague in a way implicating First Amendment rights, so as to warrant more than as-applied review. *See Farrell v. Burke,* 449 F.3d 470, 496 (2d Cir. 2006) ("The general rule disfavoring facial vagueness challenges does not apply in the First Amendment context."); *see also United States v. Davis,* 139 S. Ct. 2319, 2323 (2019) ("In our constitutional order, a vague law is no law at all.").

tional concerns and upholding remainder); *United States v. Booker,* 543 U.S. 220, 245 (2005) (remedying constitutional defect in Sentencing Guidelines by severing provision for mandatory application). There can be no question that Congress would have enacted the law, even as so narrowed. Legislative history indicates that § 1373's enactment was animated by reports that States and localities receiving federal funding were hindering cooperation with immigration authorities. *See supra* at 17–20. Nor is there any reason to think that the law would not operate as Congress intended as applied in the funding context. *See generally Alaska Airlines, Inc. v. Brock,* 480 U.S. at 684–85 (discussing two factors informing severability).

With this understanding, that, in the end, the proper scope of constitutional inquiry is "as applied," we briefly discuss concerns raised by the district court's facial assessment before explaining our conclusion that § 1373 does not violate the Tenth Amendment as applied here to States and localities seeking Byrne Program grants.

(2) The District Court's Identification of Facial Unconstitutionality

The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. From this text, the Supreme Court has derived an "anticommandeering principle," which prohibits the federal government from compelling the States to enact or administer a federal regulatory program. *See Printz v. United States,* 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their

political subdivisions, to administer or enforce a federal regulatory program.").

This court has already considered, and rejected, a facial commandeering challenge to § 1373. *See City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999). We reasoned that § 1373 does not "compel[] state and local governments to enact or administer any federal regulatory program." *Id.* at 35. Nor does it "affirmatively conscript[] states, localities, or their employees into the federal government's service." *Id.* Rather, the law prohibits state and local governments and officials "only from directly restricting the voluntary exchange of immigration information" with federal immigration authorities. *Id.*

The district court acknowledged this precedent, but concluded that it does not survive *Murphy v. National Collegiate Athletic Association,* 138 S. Ct. 1461 (2018).[26] The Supreme Court there held that federal legislation prohibiting States from authorizing sports gambling violates the Tenth Amendment's anticommandeering rule because it "unequivocally dictates what a state legislature may and may not do." *Id.* at 1478. The Court explained that it did not matter whether Congress issued such a dictate by commanding affirmative action or imposing a prohibition: "The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.* The district court concluded that *Murphy's* reasoning required it to hold § 1373 facially violative of the Tenth Amendment because the statute's proscriptions

[26] It has long been the rule in this circuit that a panel decision controls "unless and until . . . reversed *en banc* or by the Supreme Court." *In re Arab Bank, PLC Alien Tort Statute Litig.,* 808 F.3d 144, 154 (2d Cir. 2015) (internal quotation marks omitted).

prevent States from "adopting [immigration] policies contrary to those preferred by the federal government," or "extricating themselves from federal immigration enforcement." *New York v. Dep't of Justice,* 343 F. Supp. 3d at 235 (internal quotation marks and alterations omitted).

*Murphy* may well have clarified that prohibitions as well as mandates can manifest impermissible commandeering. But the conclusion that § 1373, on its face, violates the Tenth Amendment does not follow.

A commandeering challenge to a federal statute depends on there being pertinent authority "reserved to the States." In *Murphy,* there was no question that, but for the challenged federal law, the States' police power allowed them to decide whether to permit sports gambling within their borders. That conclusion is not so obvious in the immigration context where it is the federal government that holds "broad," *Arizona v. United States,* 567 U.S. at 394, and "preeminent" power, *Toll v. Moreno,* 458 U.S. at 10. Title 8 of the United States Code, commonly known as the Immigration and Nationality Act ("INA"), *see* 8 U.S.C. § 1101 *et seq.,* is Congress's "extensive and complex" codification of that power, *Arizona v. United States,* 567 U.S. at 395.

This does not mean that States can never enact any laws pertaining to aliens. *See id.* at 404 (observing that "[w]hen there was no comprehensive federal program regulating the employment of unauthorized aliens . . . State had authority to pass its own laws on the subject"). But courts must carefully identify the powers reserved to States in this area of extensive and complex federal legislation and the effect of their exercise on federal immigration laws and policies. It is doubtful that States have reserved power to adopt—in

the words of the district court—immigration policies "*contrary* to those preferred by the federal government." *New York v. Dep't of Justice,* 343 F. Supp. 3d at 235 (internal quotation marks omitted) (emphasis added). As Chief Justice Marshall famously pronounced, "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland*, 567 U.S. at 436. The Supreme Court recently made the same point in the immigration context. While acknowledging a State's "understandable frustrations with the problems caused by illegal immigration," the Court held that the "State may not pursue policies that undermine federal law." *Arizona v. United States,* 17 U.S. at 416.

Here, the district court declared § 1373 facially violative of the Tenth Amendment without identifying what reserved power States have to enact laws or policies seemingly foreclosed by 8 U.S.C. § 1373, *i.e.,* laws prohibiting their officials and agencies from engaging in even voluntary communications about citizenship and immigration status with federal authorities. A court undertaking that inquiry would have to recognize, as the Supreme Court has, that "[c]onsultation between federal and state officials is an important feature of the immigration system" established by the INA. *Id.* at 411. A court would then have to consider how various INA provisions establish that consultation feature. In *Arizona v. United States,* the Supreme Court discussed various INA provisions encouraging or prohibiting restrictions on federal-state sharing of immigration-status information before concluding that the "federal scheme thus leaves room for a [State] policy *requiring* state officials to contact [federal

immigration authorities] as a routine matter." *Id.* at 413 (emphasis added). The same conclusion may not be so easy to reach, however, with respect to a State policy *prohibiting* information sharing. Among the statutes cited in *Arizona v. United States* to illustrate the importance placed on federal-state consultation by the INA is 8 U.S.C. § 1644. *See* 567 U.S. at 412–13. As discussed *supra* at 17–20, § 1644, like § 1373, prohibits restricting State or local government entities from communicating with federal immigration authorities "'regarding the immigration status, lawful or unlawful, of an alien in the United States.'" *Id.* (quoting 8 U.S.C. § 1644). Further, even outside the immigration context, the Supreme Court has not decided whether a federal law imposing "purely ministerial reporting requirements" on the States violates the Tenth Amendment. *See Printz v. United States,* 521 U.S. at 936 (O'Connor, *J.,* concurring) (noting open question regarding statute's missing child reporting requirement).

While this authority casts doubt on the district court's identification of *facial* unconstitutionality, we do not ourselves pursue the point further because, even assuming some power reserved for the States to prohibit information sharing with federal immigration authorities, we conclude that § 1373 does not violate the Tenth Amendment *as applied* here to a federal funding requirement.[27]

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[27] For that same reason, we need not conclusively decide the preemptive effect of § 1373. We note only that, insofar as the district court concluded that the statute could claim no preemptive effect because it confers a "purported federal right to transmit information only on government entities and officials," not on private persons, its focus may have been too narrow. *New York v. Dep't of Justice,* 343 F. Supp. 3d at 235 (internal quotation marks and alterations omitted); *see Murphy v. Nat'l Collegiate Athletic*

(3) Section 1373 Raises No Commandeering Concerns as Applied to a Federal Funding Requirement

While Congress cannot regulate the States, its constitutional powers, notably under the Spending Clause, *see* U.S. CONST. art. I, § 8, cl. 1, do allow it to "fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. at 17. By setting such terms, Congress can "influenc[e] a State's policy choices," *New York v. United States,* 505 U.S. at 166, and even "implement federal policy it could not impose directly under its enumerated powers," *NFIB v. Sibelius,* 567 U.S. at 578; *see South Dakota v. Dole,* 483 U.S. 203, 207 (1987) (explaining that "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds" (internal quotation marks omitted)); *United States v. Butler,* 297 U.S. 1, 66 (1936) (holding that Congress's power to place conditions on disbursement of federal funds "is not limited by the direct grants of legislative power found in the Constitution"). Thus, where Congress places conditions on a State's receipt of federal funds—whether directly, or by delegation of clarifying authority to an executive agency—there is no commandeering of reserved State power so long as the State has "a legitimate choice whether to accept

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*Ass'n,* 138 S. Ct. at 1480 (observing that "Constitution . . . confers upon Congress the power to regulate individuals, not States" (internal quotation marks omitted)). As already noted, § 1373 is one provision of a larger statute, the INA, which certainly confers rights and places restrictions on large numbers of private persons.

the federal conditions in exchange for federal funds." *NFIB v. Sibelius,* 567 U.S. at 578.[28]

A State is deprived of "legitimate choice" only when the federal government imposes grant conditions that pass the point at which "pressure turns into compulsion." *Id.* at 577–78 (internal quotation marks omitted). On this point, even the *NFIB* dissenters agreed. *See id.* at 681 (Scalia, *J.,* with Kennedy, Thomas, and Alito, *JJ.,* dissenting) (observing that "courts should not conclude that legislation is unconstitutional . . . unless the coercive nature of an offer is unmistakably clear"). Pressure can turn into compulsion when the amount of funding that a State would lose by not acceding to the federal conditions is so significant to

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[28] The law further requires that federal grant conditions (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) reasonably relate "to the federal interest in particular national projects or programs," and not "induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole,* 483 U.S. at 207-08, 210 (internal quotation marks omitted). None of these requirements is at issue on this appeal. Section 10153(a)(5)(D)'s requirement that Byrne grant applicants certify their willingness to comply with "all . . . applicable Federal laws" promotes the respect for law necessary to the general welfare. *See, e.g., City of Los Angeles v. Barr,* 929 F.3d 1163, 1176 (9th Cir. 2019) ("[C]ooperation relating to enforcement of federal immigration law is in pursuit of the general welfare, and meets the low bar of being germane to the federal interest in providing the funding."). Such a certification condition reasonably relates to the Byrne Program, whose focus, after all, is law enforcement. For reasons discussed *supra* at 47-48, Congress avoids ambiguity by itself stating that § 10153(a)(5)(D) certification must be made as to *all* applicable Federal laws, and then authorizing the Attorney General to require certification in a form that references specifically identified applicable laws. Finally, nothing about § 10153(a)(5)(D) induces unconstitutional conduct by the State-applicants.

the States' overall operations as to leave it with no real choice but to agree.

Such was the case with the Medicaid expansion provision of the Affordable Care Act, which the Supreme Court held invalid in *NFIB v. Sebelius* because it threatened States rejecting expansion with the withholding of 100% of their Medicaid funding, which constituted 10% to 16% of most States' total budgets. The Supreme Court concluded that "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 581–82 (describing condition as "a gun to the head").

The funding loss associated with most grant conditions, however, does not raise such coercion concerns. *See id.* at 684–85 (Scalia, *J.,* with Kennedy, Thomas, and Alito, *JJ.,* dissenting) (observing that Medicaid expansion provision was "quite unlike anything that we have seen in a prior spending-power case" in that it "threatened to withhold 42.3% of all federal outlays to the States"). In *South Dakota v. Dole,* the Supreme Court described a threatened loss of 5% of federal highway funding—less than 0.5% of South Dakota's budget—if the state did not raise its legal drinking age to 21, as only "mild encouragement" and "a valid use of the spending power." 483 U.S. at 211–12.

This case is much more akin to *Dole* than to *NFIB.* While plaintiffs emphasize that a failure to provide § 10153(a)(5)(D) certification in a form acceptable to the Attorney General, *i.e.,* a form certifying a willingness to comply with 8 U.S.C. § 1373, can result in the denial of any Byrne funding for that year, plaintiffs do not—and cannot—claim that such a loss represents so significant a percentage of their annual

budgets as to cross the line from pressure to coercion. For example, New York's anticipated 2017 Byrne award is $8,879,161, a significant amount of money to be sure, but one representing less than 0.1% of the State's annual $152.3 billion budget, a smaller percentage loss even than that in *Dole*.[29] Massachusetts' anticipated 2017 Byrne award is $3,453,006, also representing less than 0.1% of its annual $38.92 billion budget.[30] Thus, however much the plaintiff States would prefer to receive Byrne awards without having to certify their willingness to comply with 8 U.S.C. § 1373, they cannot complain that the consequences for failing to do so are so severe as to leave them with no real choice in the matter. As the Supreme Court has observed in connection with the conditions attached to most federal funding programs: "The States are separate and independent sovereigns. Sometimes they have to act like it." *NFIB v. Sebelius,* 567 U.S. at 579.

In sum, the district court erred in holding 8 U.S.C. § 1373 unconstitutional because the statute does not violate the anticommandeering principle of the Tenth Amendment as applied here to a federal funding requirement.

In the absence of any such Tenth Amendment concern, and in light of our holding that the challenged Certification Condition is statutorily authorized by 34 U.S.C. § 10153(a)(5)(D), we conclude that the condition does not violate either the APA or the Constitution.

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[29] *See* NEW YORK DIVISION OF THE BUDGET, FY 2017 ENACTED BUDGET FINANCIAL PLAN 69 (May 2016), *available at* https://www.budget.ny.gov/pubs/archive/fy17archive/enactedfy17/FY2017FP.pdf.

[30] *See* Press Release, Governor Baker Signs Fiscal Year 2017 Budget (July 8, 2016), *available at* https://www.mass.gov/news/governor-baker-signs-fiscal-year-2017-budget.

Accordingly, we vacate the district court's injunction prohibiting application of the Certification Condition.

3. The Notice Condition Is Statutorily Authorized by 8 U.S.C. §§ 10153(a)(4), 10153(a)(5)(C), and 10155

The challenged Notice Condition requires States and localities accepting Byrne grants to have in effect during the grant period a "statute, or a state rule, -regulation, -policy, or -practice" for their criminal detention facilities to respond "as early as practicable" to written requests from federal immigration authorities for notice of identified aliens' scheduled release dates. *Supra* at 15–16 (quoting condition). The Attorney General's statutory authority to impose this condition derives from 34 U.S.C. §§ 10153(a)(4), 10153(a)(5)(C), and 10155.

Section 10153(a)(4) requires a State or locality seeking Byrne funding to include in its application, "in such form as the Attorney General may require," "[a]n assurance" that throughout the grant period, "the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." Section 10153(a)(5)(C) requires a Byrne grant applicant to provide "[a] certification, made in a form acceptable to the Attorney General," that "there has been appropriate coordination with affected agencies." Section 10155 authorizes the Attorney General to "issue rules to carry out" these requirements and any other parts of the Byrne Program.

The district court did not discuss these statutory conditions. It concluded simply that the Notice Condition was not authorized by § 10102(a)(6), as DOJ maintained. The Third Circuit, however, did consider §§ 10153(a)(4)

and 10153(a)(5)(C). It concluded that § 10153(a)(4) did not authorize the Notice Condition because "[its] data-reporting requirement is expressly limited to 'programmatic and financial' information—*i.e.,* information regarding the handling of federal funds and the programs to which those funds are directed. It does not cover Department priorities unrelated to the grant program." *City of Philadelphia v. Attorney Gen.,* 916 F.3d at 285. As for § 10153(a)(5)(C), the Third Circuit concluded that it did not authorize the Notice Condition because its "coordination requirement" operated only in the past tense, *i.e,* "to require certification that there *was* appropriate coordination in connection with the grantee's application. This does not serve as a basis to impose an *ongoing* requirement to coordinate on matters unrelated to the use of grant funds." *Id.* (emphases in original).

To explain why we conclude otherwise, we discuss each statutory requirement in turn.

a. Section 10153(a)(4)'s Reporting Requirement

The plain language of § 10153(a)(4) authorizes the Attorney General to decide both what data, records, and information a Byrne grant recipient must maintain and report and the form of an applicant's assurance that it will do so. This authority is cabined only by the parenthetical modifier "(programmatic and financial)," which serves to limit the referenced data, records, and information to those pertaining to the particular program being funded by a Byrne grant or to related financial matters. In this respect, at least, we agree with the Third Circuit. *See id.*

But unlike that court, we think the release information required by the Notice Condition is

"programmatic," at least for Byrne-funded programs that relate in any way to the criminal prosecution, incarceration, or release of persons, some of whom will inevitably be aliens subject to removal.[31] This includes most, if not all, of the programs for which plaintiffs seek Byrne funding, for example, (1) programs for task forces targeting certain crimes, the object of which is undoubtedly the arrest, prosecution, and eventual incarceration of perpetrators; (2) programs for prosecutors' offices, whose attorneys decide when to pursue (or forego) the prosecution and incarceration of criminal suspects; (3) programs for defenders' offices, whose attorneys work to secure persons' release from criminal detention and to avoid their conviction and incarceration; (4) diversion programs for persons who might otherwise remain in criminal custody; (5) programs for persons while incarcerated or for the facilities maintaining them; (6) programs for persons upon their release from incarceration. As to such programs, we conclude that the Attorney General is statutorily authorized by 8 U.S.C. § 10153(a)(4) to require Byrne grant recipients to report when identified aliens in their custody will be released.[32]

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[31] As this court observed in *Cuomo v. Barr,* 7 F.3d 17 (2d Cir. 1993), plaintiff "New York houses many illegal aliens in its prison system. As of March 1992, New York held approximately 60,000 prisoners in state correctional facilities, 8% of whom were known to be aliens and an additional 4% of whom were suspected to be aliens. Of this number, 6,096 had been convicted of aggravated felonies, making them subject to deportation." *Id.* at 18. While the record on appeal does not provide current statistics, there is no reason to suspect a marked decline in these percentages.

[32] Because plaintiffs have not sought to distinguish among their grant purposes in defending the challenged injunction and judgment, we have no occasion on this appeal to consider whether Byrne Program funding could be sought for a purpose so unrelated

Insofar as the Notice Condition specifically requires a grant applicant to have a statute, rule, regulation, policy, or practice in place for its criminal detention facilities to report identified aliens' release dates "as early as practicable" after receipt of a written federal request, we are satisfied that the requirement falls within the Attorney General's authority to determine the "form" of an acceptable Byrne grant application, which necessarily includes the form of an acceptable assurance. 34 U.S.C. § 10153(a). That conclusion is reinforced by the Attorney General's authority to "issue rules to carry out this part." *Id.* § 10155. *See generally Federal Election Campaign Comm'n v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981) ("[D]eference should be presumptively afforded" to agency authorized to make rules in administering statute.); *National Broad. Co. v. United States,* 319 U.S. 190, 215, 219 (1943) (explaining that statute delegating authority, *inter alia,* to "[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of this Act" gave agency "expansive powers" (internal quotation marks omitted)).

b. Section 10153(a)(5)(C)'s Coordination Requirement

Further statutory authority for the Notice Condition is supplied by § 10153(a)(5)(C)'s requirement for certification, in "a form acceptable to the Attorney General," that "there has been appropriate coordination with affected agencies." The Third Circuit observed that Congress's use of the past tense in the quoted text signals that "appropriate coordination" must have occurred by the time a State or locality formally files

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to prosecution, incarceration, or release that the Notice Condition would not be statutorily authorized in those circumstances.

its Byrne Program application. *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 285. While we agree with that construction, we do not think that means the required coordination need not continue into the future. *See id.* Rather, we think *appropriate* coordination frequently, perhaps invariably, must determine future conduct.

The plain meaning of "coordination" is "the functioning of parts in cooperation and normal sequence." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 502. "Coordination" strives to bring a "combination [of parts] in suitable relation for most effective or harmonious results." *Id.* The definition does not describe a static concept that ends as soon as the suitable relation of parts and sequence of their operation is determined. Rather, coordination contemplates that relation and sequence are agreed upon in order to establish how parts will operate going forward to achieve effective and harmonious results.

The "parts" pertinent to § 10153(a)(5)(C)'s coordination requirement are the grant applicant and the agencies that will be affected by that grant. Thus, the certification required by § 10153(a)(5)(C) demands that, in advance of any Byrne award, States and localities coordinate with affected agencies to determine their relationship and sequence of conduct as necessary throughout the grant period to ensure effective and harmonious results.

Put more concretely, if a State were to seek Byrne Program funding for its State police to pursue a law enforcement initiative involving undercover operations across several municipalities, "appropriate coordination" might well require the State to reach an understanding with the affected localities as to how notice will be given to them when those undercover activities

are occurring within their borders, thus ensuring that local authorities do not misidentify the State undercover officers as real criminals, with possibly tragic consequences for both sides. In sum, the parties reach an understanding about necessary coordination before the State files its formal Byrne grant application, and the parties' conduct during the funding period is coordinated as thus agreed upon.

Similarly, were a State or locality to seek a Byrne grant to modernize equipment used to track terrorist threats, "appropriate coordination" might require the applicant to consult with other state and federal agencies engaged in similar tracking and to reach agreement as to the type of compatible equipment to be acquired and how obtained information will be shared and secured. Such coordination *before* formal application then determines the parties' conduct *after* receipt of the grant.

So, here, when a State seeks Byrne funding for programs that relate to the prosecution, incarceration, or release of persons, some of whom will be removable aliens, there must be coordination with the affected federal agency, the Department of Homeland Security ("DHS"), before a formal application is filed, but what makes that coordination "appropriate" is that it will establish the parties' relationship and the sequence of their conduct throughout the grant period.

To explain what makes DHS an affected agency, we begin with the ordinary and clear meaning of "affect," which is to "produce a material influence upon." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35; *see* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "affect" to mean "to produce an effect on; to influence in some way"). The degree of influence need not be significant for the law to recognize that something has

been "affected" in a range of contexts. *See, e.g., Jones v. United States,* 529 U.S. 848, 854 (2000) (holding that "statutory term 'affecting . . . commerce,' . . . when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause"); *United States v. Wiant,* 314 F.3d 826, 830 (6th Cir. 2003) (holding, in context of "affected a financial institution" that "breadth of [its] definition indicates that" word "affect" "is intended to encompass even minimal impacts"); *United States v. SKW Metals & Alloys, Inc.,* 195 F.3d 83, 90 (2d Cir. 1999) ("The sum of what dictionaries say about the relevant meaning is that the verb 'to affect' expresses a broad and open-ended range of influences.").

When States use Byrne grants in ways related to the prosecution, incarceration, or release of aliens, the DHS Secretary's performance of numerous statutory responsibilities with respect to such aliens is affected. For example, the Secretary must "begin any removal proceeding" for an alien convicted of a deportable offense "as expeditiously as possible after the date of the conviction," 8 U.S.C. § 1229(d)(1); must effect the removal of such an alien "within . . . 90 days" after an order of removal becomes final, *see id.* § 1231(a)(1)(A)–(a)(1)(B)(i)–(ii); and must detain the alien during that 90-day period, *see id.* § 1231(a)(2).[33] The Secretary, however, "may not remove an alien who is sentenced to imprisonment"—whether by federal or State authorities—"until the alien is released." *Id.* § 1231(a)(4)(A). In that case, the 90-day removal period starts to run from the date of the alien's release from custody. *See id.*

[33] While these statutory sections refer to the Attorney General, the removal responsibilities stated therein and in other statutory provisions referenced in this part of the opinion have been transferred to the Secretary of DHS. *See* 6 U.S.C. §§ 251(2), 552(d).

§ 1231(a)(1)(B)(iii).[34] Moreover, in circumstances where a removable alien is released from custody before a final removal order has been obtained, the law authorizes the Secretary to issue a warrant for the alien's arrest and detention, *see id.* § 1226(a), and (with limited exceptions) requires the Secretary to do so if the alien has a certain criminal history or has engaged in terrorist activities, *see id.* § 1226(c)(1), (2).[35]

As even this brief review makes plain, a removable alien's State incarceration and release from incarceration will affect DHS's performance of its own statutory duties throughout the grant period. In these circumstances, "appropriate coordination" requires that, by the time a State or locality files its Byrne grant application, it have reached an agreement with DHS as to their mutual relationship and sequence of conduct throughout the grant period. Any less

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[34] States are under no obligation to incarcerate criminal aliens convicted of state felony crimes, but if they do so, they may then request that the federal government either (1) pay "compensation . . . as may be appropriate" to the State "with respect to the incarceration" of the alien, or (2) "take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien." 8 U.S.C. § 1231(i). It appears that, in 2017, plaintiff the State of New York received $13.9 million in such compensation pursuant to the SCAAP program referenced *supra* at 21. *See* Bureau of Justice Assistance, Fiscal Year 2017 SCAAP Award Details, *available at* https://bja.ojp.gov/program/state-criminal-alien-assistance-program-scaap/archives (last visited Feb. 24, 2020) (follow "FY 2017" hyperlink below "SCAAP Awards" subheading).

[35] In 1992, New York attempted to sue federal authorities for failing to comply with a predecessor statute requiring them to take into custody, upon release, aliens convicted of aggravated felonies under state as well as federal law. *See Cuomo v. Barr,* 812 F. Supp. 324 (N.D.N.Y. 1993), *appeal dismissed,* 7 F.3d 17 (2d Cir. 1993).

coordination would not be "appropriate"; indeed, it would be meaningless.

The Notice Condition serves to ensure such appropriate coordination. It advises States that, at the time they file a Byrne grant application, they must agree to respond as soon as practicable to a written DHS request for the release date of an identified State-incarcerated alien and to have a statute, rule, or policy in force throughout the grant period.

We conclude that the Attorney General is authorized to impose such a condition by § 10153(a)(5)(C), which empowers him to determine the acceptable form for certifying appropriate coordination. *See supra* at 37 (discussing dictionary definition of "form" as something requiring "specific information").[36] It is further supported by § 10155, which authorizes the Attorney General to issue rules for carrying out Byrne Program requirements. Of course, we recognize that plaintiffs would prefer not to coordinate *at all* with DHS, but that option is denied to them by § 10153(a)(5)(C) when the States seek Byrne grants for programs relating to prosecution, incarceration, or release that will affect DHS's performance of its own statutory duties.

In sum, we conclude that the Notice Condition is statutorily authorized by § 10153(a)(4)'s reporting

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[36] Where, as here, the affected agency is federal, the Attorney General can be expected to have particular insights into what coordination is appropriate to establish the relationship and sequence of conduct necessary for a grant applicant and the affected federal agency both to perform their respective duties in an effective and harmonious manner. But even where the affected agency is not federal, the Attorney General's form- and rule-authority may allow him to help parties resolve coordination disputes that surface after the application is made public but before it is approved. *See* 34 U.S.C. § 10153(a)(3)(B).

requirement, § 10153(a)(5)(C)'s coordination requirement, and § 10155's rule-making authority for Byrne Program applications relating to prosecution, incarceration, and release. That being the purpose for which plaintiffs have generally sought Byrne funding, we vacate the district court's injunction barring any application of the Notice Condition.

4. The Access Condition Is Statutorily Authorized by 34 U.S.C. §§ 10153(a)(5)(C) and 10155

Title 34 U.S.C. § 10153(a)(5)(C)'s coordination requirement and § 10155's rule-making provision also authorize the challenged Access Condition, and for much the same reason that they authorize the challenged Notice Condition. The Access Condition requires Byrne grant applicants to agree to have in place throughout the grant period a "statute, or a State rule, -regulation, -policy, or -practice" that ensures federal immigration officials "access" to State correctional facilities so that these officials can meet with detained aliens (or suspected aliens) to determine their legal status in this country. *See supra* at 16 (quoting condition).

As explained in discussing the Notice Condition, when States seek Byrne funding for programs related to the prosecution, incarceration, or release of persons, some of whom will inevitably be removable aliens, DHS is an "affected agency" for purposes of 34 U.S.C. § 10153(a)(5)(C). That is because a State's incarceration of an alien requires DHS to delay acting on its own statutory obligations to arrest, detain, and remove certain aliens until the State releases the alien. *See supra* at 67-69. In such circumstances, coordination between the State and DHS is not only appropriate, but necessary, to allow the federal agency effectively

to resume its obligations when the State has achieved its penal ones.

For DHS to be able to do so, it needs to ascertain not only when a removable alien will be released (the object of the Notice Condition), but also what aliens incarcerated by the State are removable. DHS does not ask the State to provide the latter information. Rather, it asks to be afforded access to State-incarcerated aliens (or suspected aliens) so that DHS can itself ascertain their potential removability before release. That is what the challenged Access Condition ensures.[37]

Affording such access constitutes "appropriate coordination" in that it allows both the State seeking a Byrne grant for purposes relating to prosecution, incarceration, or release and an affected agency, DHS, to carry out their respective duties with respect to incarcerated aliens in an orderly sequence. Thus, as with the Notice Condition, we conclude that the Attorney General is statutorily authorized to impose the Access Condition pursuant to § 10153(a)(5)(C), which empowers him to determine the acceptable form for certifying appropriate coordination, and § 10155, which authorizes him to issue rules to carry out the coordination requirement. Accordingly, we vacate the injunction prohibiting any application of the Access Condition.

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[37] What it does not ensure is that incarcerated aliens will then agree to talk with federal immigration authorities.

II. The Attorney General's Imposition of the Challenged Conditions Was Not Arbitrary and Capricious

Plaintiffs argue that, even if the Attorney General was statutorily authorized to impose the challenged conditions, the district court correctly concluded that it was arbitrary and capricious for him to do so here without considering the conditions' negative consequences, particularly in undermining relationships between immigrant communities and local law enforcement. *See New York v. Dep't of Justice,* 343 F. Supp. 3d at 240–41. The conclusion does not withstand *de novo* review. *See Karpova v. Snow,* 497 F.3d 262, 267 (2d Cir. 2007) (holding that appeals court reviewing summary judgment award on APA claim examines "administrative record *de novo* without according deference to the decision of the district court").

While agency action may be overturned as arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" at issue, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983), a court will not "lightly" reach that conclusion, *Islander East Pipeline Co., LLC v. McCarthy,* 525 F.3d 141, 151 (2d Cir. 2008) (citing approvingly to *Patterson v. Caterpillar, Inc.,* 70 F.3d 503, 505 (7th Cir. 1995) (stating that court "must be very confident that the decisionmaker overlooked something important")).

Here, DOJ did not overlook something important. As the district court acknowledged, DOJ was aware of the detrimental effects plaintiffs fear from the three challenged conditions. The court also acknowledged that the weight to be given these effects as compared to the conditions' perceived benefits was at least arguable. *See New York v. Dep't of Justice,* 343 F. Supp. 3d

at 241. The sole ground on which the district court concluded that DOJ arbitrarily and capriciously "ignored" these detrimental effects in imposing the challenged conditions was its failure to mention such effects in any proffered document. *See id.* (observing that documents "do not reflect that [DOJ] in any way considered whether jurisdictions' adherence to the conditions would undermine trust and cooperation between local communities and government").

In fact, there was no need for DOJ to discuss the relative detriments and benefits of the Certification Condition. That condition identifies a specific statute, 8 U.S.C. § 1373, as an "other applicable Federal law[]" for purposes of the statutory compliance certification requirement of 34 U.S.C. § 10153(a)(5)(D). Thus, the sole question for DOJ to decide was whether 8 U.S.C. § 1373 is an applicable law. Having made that decision—which we uphold, *see supra* at 35–61—nothing in the statute authorized DOJ to excuse a Byrne applicant from certifying its willingness to comply with an applicable federal law on a finding that the detrimental effects of compliance outweigh the benefits. Indeed, that would be particularly unwarranted here where the legislative history shows that Congress was itself aware of the very detrimental effects raised by plaintiffs when it enacted § 1373. *See supra* at 19 (quoting Senator Kennedy's acknowledgment of mayors' concerns that cooperating with immigration authorities could be counterproductive). Thus, DOJ's failure to discuss detrimental effects does not show that it arbitrarily or capriciously imposed the Certification Condition.

As for the Notice and Access Conditions, these apply only to persons in State custody, *i.e.,* persons found guilty beyond a reasonable doubt of charged crimes, or

persons for whom there is at least probable cause to think that they committed crimes. Such conditions do not put law-abiding undocumented aliens who have been crime victims or witnesses at risk of removal and, thus, should not dissuade such aliens from reporting crimes or cooperating in their investigation.[38] Thus, it was hardly arbitrary or capricious for DOJ to impose these conditions without discussing detrimental effects that they were unlikely to cause.

Nor are we persuaded by plaintiffs' further argument that the challenged conditions are arbitrary and capricious because DOJ failed to "display awareness that it [was] changing position" and did not show "good reasons for the new policy." *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2126 (2016) (internal quotation marks omitted). DOJ did not change its position; rather, the Attorney General exercised his

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[38] *See City of Philadelphia v. Attorney Gen.,* 916 F.3d at 282 (citing Philadelphia's rationale for policy limiting employee cooperation with federal immigration authorities: to "foster trust between the immigrant community and law enforcement," which is "critical to reassure law-abiding residents that contact with the City government will not lead to deportation" by federal authorities (internal quotation marks omitted)); *City of Chicago v. Sessions,* 888 F.3d at 279 (observing that "City recognized . . . maintenance of public order and safety required the cooperation of witnesses and victims, whether documented or not"); Michael R. Bloomberg, Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City Services For Immigrants (Sept. 17, 2003) (remarking in public speech that "[w]hen the parents of an immigrant child forego vaccination for fear of being reported to the federal immigration authorities, we all lose . . . . Likewise, we all suffer when an immigrant is afraid to tell the police that she has been the victim of a sexual assault or domestic violence"), *available at* https://www1.nyc.gov/office-of-the-mayor/news/262-03/mayor-michael-bloomberg-signs-executive-order-41-city-services-immigrants.

authority to have Byrne grant applicants satisfy the §§ 10153(a)(4), 10153(a)(5)(C), and 10153(a)(5)(D) requirements in a more specific form. Even if it was necessary to show "good reasons" for this decision, however, that is satisfied here by the 2016 IG Report's findings of a significant, decade-long decline in cooperation between local law enforcement officials and federal immigration authorities, some achieved through policies in tension with, if not actually violative of, 8 U.S.C. § 1373.

## CONCLUSION

To summarize, we conclude as follows:

(1) The Attorney General was statutorily authorized to impose all three challenged conditions on Byrne grant applications.

   a. The Certification Condition (1) is statutorily authorized by 34 U.S.C. § 10153(a)(5)(D)'s requirement that applicants comply with "all other applicable Federal laws," and (2) does not violate the Tenth Amendment's anti-commandeering principle;

   b. The Notice Condition is statutorily authorized by 34 U.S.C. § 10153(a)(4)'s reporting requirement, § 10153(a)(5)(C)'s coordination requirement, and § 10155's rule-making authority;

   c. The Access Condition is statutorily authorized by 34 U.S.C. § 10153(a)(5)(C)'s coordination requirement, and § 10155's rule-making authority.

(2) The Attorney General did not overlook important detrimental effects of the challenged

conditions so as to make their imposition arbitrary and capricious.

Accordingly,

(1) We REVERSE the district court's award of partial summary judgment to plaintiffs;

(2) We VACATE the district court's mandate ordering defendants to release withheld 2017 Byrne funds to plaintiffs, as well as its injunction barring defendants from imposing the three challenged immigration-related conditions on such grants; and

(3) We REMAND the case to the district court,

   a. with directions that it enter partial summary judgment in favor of defendants on plaintiffs' challenge to the three immigration-related conditions imposed on 2017 Byrne Program grants; and

   b. insofar as there remains pending in the district court plaintiffs' challenge to conditions imposed by defendants on 2018 Byrne Program grants, for further proceedings consistent with this opinion.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed July 13, 2020]

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No. 19-267-cv(L)

No. 19-275-cv(con)

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STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, STATE OF WASHINGTON, COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF VIRGINIA, STATE OF RHODE ISLAND, CITY OF NEW YORK,

*Plaintiffs-Appellees*,

v.

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

*Defendants-Appellants*.

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of July, two thousand twenty.

PRESENT:

ROBERT A. KATZMANN,
*Chief Judge*,

JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
RICHARD J. SULLIVAN,
JOSEPH F. BIANCO,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
*Circuit Judges*.

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For Plaintiffs-Appellees State of New York, Connecticut, New Jersey, Rhode Island, and Washington, and Commonwealths of Massachusetts and Virginia:

Barbara D. Underwood, Solicitor General, Anisha S. Dasgupta, Deputy Solicitor General, Linda Fang and Ari Savitzky, Assistant Solicitors General, *for* Letitia James, Attorney General of the State of New York, New York, NY.

For Plaintiff-Appellee City of New York:

Richard Dearing, Devin Slack, Jamison Davies, *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY.

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Following disposition of this appeal on February 26, 2020, Plaintiffs-Appellees filed petitions for rehearing *en banc* and an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petitions for rehearing *en banc* are hereby DENIED.

José A. Cabranes, *Circuit Judge*, joined by Debra Ann Livingston, Richard J. Sullivan, Joseph F. Bianco, William J. Nardini, and Steven J. Menashi, *Circuit Judges*, concurs by opinion in the denial of rehearing *en banc*.

Raymond J. Lohier, Jr., *Circuit Judge*, joined by Peter W. Hall, *Circuit Judge*, concurs by opinion in the denial of rehearing *en banc*.

Richard J. Sullivan, *Circuit Judge*, joined by José A. Cabranes, Debra Ann Livingston, and Joseph F. Bianco, *Circuit Judges*, concurs by opinion in the denial of rehearing *en banc*.

Robert A. Katzmann, *Chief Judge*, dissents by opinion from the denial of rehearing *en banc*.

Rosemary S. Pooler, *Circuit Judge*, joined by Denny Chin and Susan L. Carney, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

Michael H. Park, *Circuit Judge*, took no part in the consideration or decision of the petitions.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

[SEAL]

/s/ Catherine O'Hagan Wolfe

JOSÉ A. CABRANES, *Circuit Judge*, joined by DEBRA ANN LIVINGSTON, RICHARD J. SULLIVAN, JOSEPH F. BIANCO, WILLIAM J. NARDINI, and STEVEN J. MENASHI, *Circuit Judges*, concurring in the order denying rehearing *en banc*:

I concur in the order denying rehearing of this case *en banc*.

As a member of the unanimous panel in this case, I begin by observing that the panel opinion expressly underscored the importance of the issues involved in this appeal.[1] And yet, despite the controversy that this subject matter naturally engenders, the fact remains that the core questions on appeal are basic "questions of statutory construction."[2]

In her dissent from the Court's order denying rehearing *en banc*, Judge Pooler characterizes the outcome of this petition for rehearing *en banc* as "[a]stonishing[]"; asserts that she is "frankly, astounded," that the Court did not grant rehearing, particularly in light of the circuit split that now exists; and remarks that the contrary opinions of our sister circuits "call[] into serious question the correctness of our Court's rationale and conclusions."[3] Regardless of the differing opinions of those circuits, our Court's decision to deny rehearing—one made by an *en banc* court consisting of

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[1] *See New York v. Dep't of Justice ("DOJ")*, 951 F.3d 84, 90 (2d Cir. 2020) ("Th[is] case implicates several of the most divisive issues confronting our country . . . national immigration policy, the enforcement of immigration laws, the status of illegal aliens in this country, and the ability of States and localities to adopt policies on such matters contrary to, or at odds with, those of the federal government.").

[2] *Id*.

[3] *See post*, Pooler, *J*., dissenting from denial of rehearing *en banc*, at 1-3.

twelve of our Court's thirteen active Circuit Judges—evinces an unmistakable truth: that, in the circumstances presented, reasonable judicial minds can differ as to whether the relevant statutory text permits the Department of Justice to impose the challenged conditions on grants of money to state and municipal law enforcement. There is nothing "astonishing" here about a disagreement among sister circuits, much less anything deserving the castigation by another colleague who asserts that our panel's decision is "wrong, wrong, and wrong again."[4]

Despite the vigor and intensity of Judge Pooler's dissent, she sheds little new substantive light on the debate.[5] Instead, Judge Pooler primarily marshals the

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[4] *See post*, Lohier, *J.*, concurring in denial of rehearing *en banc*, at 3. As the only active judge on a panel that includes Senior Judges Ralph K. Winter and Reena Raggi, I offer a sidebar comment in the nature of a point of personal privilege. Judge Lohier's opinion regarding rehearing—a concurrence which is functionally a dissent—is oddly focused on scolding several of his colleagues, comparing their votes in this case to those on prior *en banc* polls. These criticisms, unfounded on the merits, are addressed in the measured concurring opinion of Judge Sullivan, which I join in full. *See post*, Sullivan, *J.*, concurring in denial of rehearing *en banc*, at 1-4.

[5] Of particular interest is Judge Pooler's silence on the panel opinion's note that Section 1373—the statute requiring cooperation between federal, state, and local law enforcement—need not be found constitutional in all applications in order to be upheld here in the narrow context of federal funding. *See New York v. DOJ*, 951 F.3d at 111-12. As recently reiterated by the Supreme Court, we are to afford a strong presumption "that an unconstitutional provision in a law is severable from the remainder of the law or statute." *Barr v. Am. Ass'n of Political Consultants, Inc.*, — S. Ct. —, 2020 WL 3633780, at *8 (2020) (citing *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)); *see also Seila Law LLC v. Consumer Financial Protection Bureau*, —S. Ct. —, 2020 WL 3492641 at *20 (2020) (noting that

arguments of the various opinions of the First, Third, Seventh, and Ninth Circuits upholding injunctions that preclude enforcement of the conditions.[6] All of these opinions, save that of the First Circuit, were available to the panel prior to its issuing its decision. The panel opinion thoroughly addressed all of the reasons relied on by our sister circuits in their decisions rejecting the Department of Justice's position, and explained why, with due respect, it found each of those reasons unpersuasive with respect to the Certification, Notice, and Access Conditions, as well as the claim of unconstitutional commandeering under the Tenth Amendment to the Constitution.[7]

In concurring in the denial of rehearing, I need not restate the host of reasons already explained by Judge Raggi in her comprehensive and careful opinion (in which Judge Winter and I joined in full) as to why, in our view, our sister circuits were in error.[8] It does

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"in the absence of a severability clause, the traditional rule is that the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted" (internal quotation marks omitted)).

[6] *See generally City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Philadelphia v. Attorney Gen.*, 916 F.3d 276 (3d Cir. 2019); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018).

[7] *See, e.g.*, *New York v. DOJ*, 951 F.3d at 103 ("We cannot adopt the Seventh or Ninth Circuit's conclusions because we do not think the Attorney General's authority to impose the three challenged conditions here derives from the words 'special conditions' or 'priority purposes.'"); *id.* ("The Third Circuit, however, viewed the Attorney General's statutory authority respecting Byrne Program grants as 'exceptionally limited.' . . . We do not.").

[8] Chief Judge Katzmann, in his opinion dissenting from denial of rehearing *en banc*, appears to fault the panel for relying on the phrase "form acceptable to the Attorney General" in Section 10153(a)(5)(D) to conclude that the Attorney General could

happen from time to time that our perspective differs from that of other Circuits. (The opinion of the First Circuit that was issued after our own and offered disparaging assessments of our panel's efforts deserves a personal "sidebar" comment, which I offer at the margin in note 9).[9]

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require compliance certification to be in a form that identifies specific statutes, such as Section 1373. *See post*, Katzmann, *C.J.*, dissenting from denial of rehearing *en banc*, at 4-6. This is perplexing. If the Government invokes a statute as the source of authority for a challenged action, the Court is obliged to construe that statute, regardless of whether the Government's urged construction persuades. *See United States v. Figueroa*, 165 F.3d 111, 114 (2d Cir. 1998) (Sotomayor, *J.*) ("We review issues of statutory construction de novo, and the language of a statute is our starting point in such inquiries." (internal citation omitted)). He also faults the panel for referring to the Attorney General's rulemaking authority, observing that DOJ did not rely on that authority in its brief to this Court, and specifically disavowed such reliance at oral argument in a related case before the Ninth Circuit. *See post*, Katzmann, *C.J.*, dissenting from denial of rehearing *en banc*, at 6-8. As a member of the panel, I offer two responses. First, Judge Raggi's opinion refers to the Attorney General's rulemaking authority in order to reinforce conclusions already reached on other grounds. Does disagreement about such a reference warrant *en banc* review? Second, and in any event, the statutory rulemaking authority applies generally to provisions of the Byrne grant. *See* 34 U.S.C. § 10155. These provisions authorize certain action by the Attorney General with respect to statutory requirements for compliance certification, notice, and access. With respect, I am at a loss to understand how a court can fairly assess the scope of that authority without taking into account that it is informed by a general rulemaking authority.

[9] The opinion of the First Circuit that Judge Pooler praises for its "apt[] observ[ations]" arguably deserves no direct response, being more notable for its tone than for its persuasive reasoning. A few citations will suffice as a mini-baedeker for the curious. Our construction of the statutory phrase "all other applicable Federal laws," 34 U.S.C. § 10153(a)(5)(D), is derided as "simplis-

In the final analysis, the resolution of this dispute will be determined not by arithmetic, but rather, by the strength and persuasiveness of the several decisions. There can be little doubt that, in the fullness of time, the conflict among the Circuits will be resolved by our highest tribunal.

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tic," *City of Providence*, 954 F.3d at 36; "strain[ing] credulity," *id.* at 37; "extravagant," *id.*; "blind[ly] allegian[t] to the dictionary," *id.*; and, relying on the author's favorite source for authority, "flout[ing] th[e] principle" that "[c]ourts generally ought not to interpret statutes in a way that renders words or phrases either meaningless or superfluous," *id.* at 37 (citing *United States v. Walker*, 665 F.3d 212, 225 (1st Cir. 2011)). Res ipsa loquitur. Meanwhile, the First Circuit makes no mention of the fact that the very definition of "applicable" on which our opinion relies has been employed by the Supreme Court. *See New York v. DOJ*, 951 F.3d at 106 n.21 (citing *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69-70 (2011) (construing provision of Bankruptcy Code)). Much less does it acknowledge that Congress's use of the word "all" in the phrase "*all* other applicable Federal laws" is a powerful signal of its intent to imbue the phrase with its broadest possible meaning. *Id.* at 106 (citing *Norfolk & W Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128-29 (1991) (explaining that phrase "all other law" is "clear, broad, and unqualified")). It accuses our opinion of "reading the term 'applicable' out of the statute," *City of Providence*, 954 F.3d at 37, while failing even to acknowledge the opinion's argument that "the word 'applicable' does serve a limiting function in the statutory text," *New York v. DOJ*, 951 F.3d at 106. I am, frankly, astounded (as it were), that Judge Pooler applauds as an "apt[] observ[ation]" the First Circuit's charge that, in construing 34 U.S.C. § 10153(a)(5)(D), this Court is simply "assuming" a legislative intent having no basis in statutory text or "sound principles of statutory construction." *City of Providence*, 954 F.3d at 36-37.

LOHIER, *Circuit Judge*, joined by HALL, *Circuit Judge*, concurring:

Until today, every single circuit judge to have considered the questions presented by this appeal has resolved them the same way. That's twelve judges—including one former Supreme Court Justice—appointed by six different presidents, sitting in four separate circuits, representing a remarkable array of views and backgrounds, responsible for roughly forty percent of the United States population, who, when asked whether the Attorney General may impose the challenged conditions, have all said the same thing: No.

Undeterred, the panel breaks course in an opinion as novel as it is misguided. As my colleagues explain in their dissent from the denial of rehearing in banc, and as Justice Souter and Judges Selya, Barron, Rendell, Ambro, Scirica, Rovner, Bauer, Manion, Wardlaw, Ikuta, and Bybee have collectively demonstrated, the panel opinion misreads statutory text, misconstrues constitutional doctrine, and mistakes the conclusion that it prefers for the one that the law requires.[1] The task of remedying these very serious errors will now fall to the Supreme Court. I vote against rehearing in banc so that it may do so sooner rather than later. Indeed, if there is a single panel decision that the Supreme Court ought to review from this Circuit next Term, it is this one.[2]

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[1] Chief Judge Katzmann aptly describes the opinions of other sister Circuits. *See* Katzmann, *C.J.*, Dissenting Op. at 2 n.1.

[2] See Cabranes, *J.*, Concurring Op. at 5 ("There can be little doubt that . . . the conflict among the Circuits will be resolved by our highest tribunal.").

Just last year, a number of my colleagues who vote now to deny rehearing in banc reminded us all that "[t]he legitimacy of Congress' power to legislate [via a federal grant program] . . . rests on whether the State voluntarily and knowingly accepts the terms of [that grant program]." *N.Y. State Citizens' Coal. for Children v. Poole*, 935 F.3d 56, 59 (2d Cir. 2019) (Livingston, *J*., dissenting from the denial of rehearing in banc) (quotation marks omitted). This limit on the Spending Clause power that they so enthusiastically embraced comes from *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), in which the Supreme Court required Congress to "speak *unambiguously* in imposing conditions on federal grant money." *New York v. U.S. Dep't of Justice*, 951 F.3d 84, 109 (2d Cir. 2020) (emphasis added) (citing *Pennhurst).* After *Pennhurst*, the requirement for clarity from Congress in this context is basic and fundamental. And so here the Department urged, the panel concluded, and the principal concurrence in the denial of rehearing in banc now insists that 34 U.S.C. § 10153(a)(5)(D) unambiguously informs States that they must abide by the certification condition. *See* Brief for Defendants-Appellants at 26–30; *New York*, 951 F.3d at 110–11; Cabranes, *J*., Concurring Op. at 1–2.

The problem with this "thrice-asserted view," however, is that it "is wrong, wrong, and wrong again." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 80 (2013) (Kagan, *J*., dissenting). To start, the panel itself acknowledges that Section 10153(a)(5)(D) "fails to specify precisely [by] which laws" States must a bide. *New York*, 951 F.3d at 110. No surprise, then, that States, cities, and municipalities across the country—the very entities whose knowing acceptance is paramount—have agreed with the First Circuit that

the panel's interpretation of Section 10153(a)(5)(D) is "extravagant." Brief for Chicago et al. as Amici Curiae Supporting Plaintiffs-Appellees at 14 (quoting *City of Providence v. Barr*, 954 F.3d 23, 37 (1st Cir. 2020)). Sheriffs, police chiefs, and district attorneys have likewise criticized the panel's interpretation as "striking." Brief for Local Law Enforcement Leaders as Amici Curiae Supporting Plaintiffs-Appellees at 3. And again, every judge to have considered the certification condition has determined that Section 10153(a)(5)(D) does not permit it. But these federal judges, States, cities, municipalities, sheriffs, police chiefs, and district attorneys are not just wrong, says the panel, they are unambiguously wrong: there is no room for debate about what Section 10153(a)(5)(D) means.

How does the panel reach such a self-assured conclusion? It first claims that Section 10153(a)(5)(D) is unambiguous by observing that while it "fails to specify precisely which laws are applicable, that uncertainty can pertain as much for laws applicable to requested grants as for those applicable to grant applicants." *New York*, 951 F.3d at 110 (quotation marks omitted). In other words, multiple ambiguities translate into clarity, two "maybes" mean yes. But as several of my colleagues in this case and a chorus of others have explained, there is one good reason after another to think that "applicable" in fact means laws applicable to the grant itself, not to grant recipients broadly speaking. *See* Pooler, *J.*, Dissenting Op. at 5–6; *see also City of Chicago v. Barr*, 961 F.3d 882, 898–909 (7th Cir. 2020); *City of Providence*, 954 F.3d at 36–39; *City of Philadelphia v. Attorney Gen.*, 916 F.3d 276, 288–91 (3d Cir. 2019).

The panel's second interpretive twist is more striking still. Here, the panel admits that Section

10153(a)(5)(D) may be ambiguous but contends that the Attorney General's identification of 8 U.S.C. § 1373 as an "applicable Federal law" under Section 10153(a)(5)(D) is a permissible "clarifying interpretation[]" of it. *New York*, 951 F.3d at 110. To support that argument, the panel leans heavily on *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985). But *Bennett* held that "ambiguities in the requirements [of a federal grant program] should [not] invariably be resolved against the Federal Government as the drafter of the grant agreement." *Id.* at 669. Thus while *Bennett* remarked that Congress often "[can]not prospectively resolve every possible ambiguity" in a federal grant program, *see id.*, *Bennett* did not answer the relevant question before us: whether *this* ambiguity in Section 10153(a)(5)(D) should give us pause before embracing the Department's position.

Until the challenged conditions were announced in 2016, the Edward Byrne Memorial Justice Assistance Grant Program (the Byrne JAG Program), 34 U.S.C. §§ 10151–10158, had never in its existence conditioned the availability of its funds on the fidelity that localities displayed to federal immigration policies. Nor did localities appear to use the Byrne JAG Program funds for immigration purposes. *See New York*, 951 F.3d at 93. This is as it should be. After all, the Byrne JAG Program, spurred by the murder of NYPD Officer Edward Byrne, was designed to aid States and cities in fighting crime, not immigration. *See*, *e.g.*, 34 U.S.C. § 10152(a) (listing the criminal justice purposes toward which Byrne JAG Program funds may be directed); Nathan James, Cong. Research Serv., RS22416, Edward Byrne Memorial Justice Assistance Grant Program: Legislative and Funding History 1–2 (2008) (explaining that the Byrne JAG Program reflected increased support for state and local law

enforcement to respond to rising crime rates); *see also* Pooler, *J*., Dissenting Op. at 2 ("Immigration enforcement is not identified as an area for which grant funds may be used. The statute requires the DOJ to issue Byrne grants pursuant to a formula that distributes funds based on state and local populations and crime rates.").

The panel opinion, in less than two pages of text, ignores virtually all of this. Instead, it concludes that "[k]nowing acceptance is no concern here." *New York*, 951 F.3d at 110 (quotation marks omitted).[3] Again, several of my colleagues who vote here to deny rehearing in banc took a different position last year in *Poole*.[4] 935 F.3d at 59 (Livingston, *J*., dissenting from the denial of rehearing in banc) (emphasizing the importance of "whether the State voluntarily and knowingly accepts the terms of" a federal grant program); *compare also New York*, 951 F.3d at 109 (recognizing "Congress's duty to speak unambiguously in imposing conditions on federal grant money") *with* Cabranes, *J*., Concurring Op. at 2 ("[R]easonable judicial minds can differ as to whether the relevant statutory text permits the Department of Justice to impose the challenged conditions on

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[3] For substantially the reasons provided by my colleagues dissenting from the decision to deny rehearing in banc, I also agree that the panel decision incorrectly resolved the other statutory interpretation issues before it. *See* Pooler, *J*., Dissenting Op. at 3–11.

[4] Judge Sullivan misunderstands my point about *Poole*. In referring to the inconsistency of their opinions, I have not accused him or any of my colleagues of "bad faith or hypocrisy." Sullivan, *J*., Concurring Op. at 1. And the differences Judge Sullivan lists between *Poole* and this case relate only to policy and result. None deflects from the Supreme Court's central holding in *Pennhurst* that Congress must speak unambiguously as to the terms on which it provides funds to States and municipalities.

grants of money to state and municipal law enforcement.").

Why has this decision careened so far off the textualist track? How can it be that the language of the statute is both unambiguous and at the same time that reasonable minds could differ about the meaning of the statutory text? Setting aside the policy result of cutting funds to local police forces that refuse to toe the Department line on immigration and that want to focus instead on combatting local crime, what the panel has done here is not an approach that is true to Congress's words or to ordinary principles of statutory construction.

This error creates an important circuit split that needs to be repaired definitively and now.[5] Unfortunately, the split arises at the end of our Term. Our already cumbersome process for proceeding in banc, slowed by a pandemic, is not likely to correct anything anytime soon. And even if we rectified the panel's error, the Department, encouraged by the panel's decision, would continue to peddle its false and contorted theory to the remaining circuits that have yet to debunk it. Under these circumstances, the better course, in my view, is for the Supreme Court to grant certiorari and reverse. It can do so faster than we can, and it alone can forestall the spread of this grievous error.

For that reason, and that reason only, I concur in the denial of rehearing in banc.

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[5] I agree with my colleagues who dissent from the denial of rehearing in banc that this case is of exceptional importance. *See* Pooler, *J.*, Dissenting Op. at 3; Katzmann, *C.J.*, Dissenting Op. at 9. The panel's decision, should it stand, has serious consequences that we should carefully consider. For example, nothing in the decision stops the Department from conditioning Byrne grants on a State's allegiance to federal environmental laws.

RICHARD J. SULLIVAN, *Circuit Judge*, joined by JOSÉ A. CABRANES, DEBRA ANN LIVINGSTON, and JOSEPH F. BIANCO, *Circuit Judges*, concurring in the order denying rehearing *en banc*:

I concur with the denial of *en banc* review for the reasons set forth in the panel's opinion and in Judge Cabranes's concurrence. I write separately only to address an erroneous and, to my mind, gratuitous point raised in Judge Lohier's concurrence.

The concurrence attacks the panel's opinion (and those who voted to deny rehearing *en banc*) for grafting onto the Byrne Memorial Justice Assistance Grant Program a condition that was not voluntarily and knowingly accepted by the States. In so arguing, the concurrence chides several judges – myself included – for singing a different tune last year when seeking rehearing *en banc* in *New York State Citizens' Coalition for Children v. Poole*, 935 F.3d 56, 59 (2d Cir. 2019) (Livingston, *J.*, dissenting from the denial of rehearing *en banc*). *See ante* at 6–7 (Lohier, *J.*, concurring in the denial of rehearing *en banc*). It suggests that the two cases are somehow indistinguishable, and that a vote to deny *en banc* rehearing here reflects bad faith or hypocrisy on the part of those who sought such rehearing in *Poole*. But as there is very little harmony between this case and *Poole*, a different tune is to be expected.

For starters, the grant condition imposed in *Poole* resulted in a seemingly nonsensical bargain for the States. *Poole* concerned whether, in exchange for partial reimbursement of certain foster care maintenance payments under the Adoption Assistance and Child Welfare Act of 1980, States had agreed to mandatory minimum foster care spending obligations. *Poole*, 935 F.3d at 58–59. Deciding that it had, the

majority endorsed a perplexing interpretation of the grant program that New York had knowingly "relinquished to federal courts its longstanding control over discretionary judgments about payment rates for foster care providers in exchange for *partial* reimbursement of *some* expenses incurred in the care of a declining percentage of foster care children." *N.Y. State Citizens' Coal. for Children v. Poole*, 922 F.3d 69, 91 (2d Cir. 2019) (Livingston, *J.*, dissenting). And if that were not enough, the majority concluded that Congress intended for this strange deal to be enforceable through private litigation. *Id.* at 92; *see also Poole*, 935 F.3d at 59 (Livingston, *J.*, dissenting from the denial of rehearing *en banc*).

Here, by contrast, the panel's interpretation of the Byrne Grant condition does not result in such a lopsided bargain. In simple terms, States may receive federal funding under the program so long as they do not actively interfere with federal immigration policy, among other things. *See New York v. Dep't of Justice*, 951 F.3d 84, 94–96 (2d Cir. 2020). While a State may determine that this is too great a concession – that the juice is not worth the squeeze – that is a decision that States are free to make ex ante based on their assessment of the costs and benefits of the grant program. And, unlike *Poole*, the panel here did not foist an implied cause of action on unwitting grant recipients. Put bluntly, this case is a far cry from *Poole*.

But that's not all; the posture in which the cases arrived before us could not have been more different. In *Poole*, the majority's interpretation imposed "post acceptance or 'retroactive' conditions" on New York, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981), requiring it to make mandatory payments and assume liability that it could not escape, having

already accepted federal funds. By contrast, the plaintiffs here challenge a condition of which they received "advance notice" before they applied for federal funding. *New York*, 951 F.3d at 110 ("[P]laintiffs were given advance notice that their 2017 Byrne grant applications had to certify a willingness to comply with § 1373. Indeed, they were given such notice twice, first in 2016, and again in 2017."). In other words, *Poole* required us to determine whether New York knew the rules of the game when it agreed to play; here, the plaintiffs are well aware of the rules – they simply want us to change them before they step onto the court.

So, because the panel has not repeated the error permitted in *Poole*, and because the panel's opinion otherwise persuades me that its interpretation of the statute is the correct one, I concur in the denial of rehearing *en banc*.

ROSEMARY S. POOLER, *Circuit Judge,* joined by DENNY CHIN and SUSAN L. CARNEY, *Circuit Judges*, dissenting from the denial of rehearing en banc:

The panel opinion in this case allows the Executive to impose funding conditions on congressionally allocated federal funds in a manner plainly not contemplated by Congress. Astonishingly, given that four other circuits came out the other way, this Court refused to hear this case en banc. I respectfully dissent from the denial of rehearing en banc.

Appellees are states and a city that sought funding from the federal government through the Byrne Memorial Justice Assistance Grants program ("Byrne Grant Program"). The Byrne Grant Program evolved from a 1968 block grant program for law enforcement and criminal justice developed by Congress because "crime is essentially a local problem that must be dealt with by State and local governments." Omnibus Crime Control and Safe Streets Act of 1968 ("1968 Act"), Pub. L. No. 90-351, 82 Stat. 197, 197. In enacting the 1968 Act, Congress intended to "guard against any tendency towards federalization of local police and law enforcement agencies." *Ely v. Verde*, 451 F.2d 1130, 1136 (4th Cir. 1971) (discussing the legislative history of the 1968 Act). It did so by barring federal agencies and Executive Branch employees from using grants administered by the Department of Justice ("DOJ") to "exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof." § 518(a), 82 Stat. at 208. Despite numerous modifications and amendments to the 1968 Act over the years, that provision remains in effect. *See* 34 U.S.C. § 10228(a).

In 2006, Congress reworked the 1968 Act to create and codify the Byrne Grant Program at issue here, with an eye toward providing state and local governments with "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005); *see also* 34 U.S.C. §§ 10151-58. The statute allows grant recipients discretion to use funds to support activities in any of eight broad criminal justice-related programs. 34 U.S.C. § 10152(a)(1). Immigration enforcement is not identified as an area for which grant funds may be used. The statute requires the DOJ to issue Byrne grants pursuant to a formula that distributes funds based on state and local populations and crime rates. *See* 34 U.S.C. § 10156; *see also City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) (noting that "'formula' grants . . . are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula"). So long as they use their funds to satisfy the statute's goals and meet the statute's certification and attestation requirements, state and local governments are entitled to their share of the formula allocation. *See* 34 U.S.C. §§ 10152(a)(1), 10153(A).

In 2017, the DOJ adopted a policy requiring Byrne Grant Program applicants to:

1. Submit a Certification of Compliance with 8 U.S.C. § 1373, a federal law that bars cities or states from restricting communications by their employees with the Department of Homeland Security ("DHS") about the immigration or citizenship status of individuals (the "Certification Condition");

2. Implement a law, policy, or practice that provides DHS officials access to any detention facility to determine the immigration status of those held within (the "Access Condition"); and

3. Implement a law, policy, or practice that ensures correctional facilities will honor any formal written request from the DHS and authorized by the Immigration and Nationality Act seeking advanced notice of the scheduled date and time for a particular alien (the "Notice Condition").

Appellees challenged these conditions by bringing suit in the Southern District of New York. The lower court granted Appellees partial summary judgment, enjoining the DOJ from enforcing the conditions and ordering the release of the 2017 Byrne Grant Program funds. *See New York v. U.S. Dep't of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018). Our Court reversed this grant of summary judgment, vacated the order to release the funds, and remanded the case. *New York v. U.S. Dep't of Justice*, 951 F.3d 84, 124 (2d Cir. 2020).

At the time of the district court's decision, the Seventh Circuit had upheld an injunction precluding enforcement of the Notice and Access Conditions, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part on other grounds, vacated in part on other grounds*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh'g en banc vacated*, Nos. 17-2991, 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). Since then, three more of our sister circuits have also upheld injunctions barring enforcement of all or some of the conditions. *See City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City*

*of Philadelphia v. Attorney Gen.*, 916 F.3d 276 (3d Cir. 2019).

The circuit split—which generated a host of persuasive opinions from our sister circuits—calls into serious question the correctness of our Court's rationale and conclusions. The opinion in *New York v. U.S. Department of Justice* ignores the words of the statute, the relevant legislative history, and the conclusions of our sister circuits. I am, frankly, astounded that my colleagues did not find this a case of exceptional importance warranting en banc review. *See* Fed. R. App. P. 35(a)(2).

I. The DOJ's Statutory Authority to Impose the Challenged Conditions

A. The Certification Condition

The Certification Condition requires applicants submit a Certification of Compliance with 8 U.S.C. § 1373, which bars state and local governments from prohibiting or restricting their employees from providing federal officials with information about individuals' citizenship or immigration status. The panel in *New York* concluded that the DOJ was statutorily authorized to impose the Certification Condition based on a statutory provision requiring that a Byrne Grant Program applicant include in its application "[a] certification, made in a form acceptable to the Attorney General," that "the applicant will comply with all provisions of this part *and all other applicable Federal laws*." 34 U.S.C.§ 10153(a)(5)(D) (emphasis added). Based on the dictionary definition of the word "applicable," the panel determined that an "applicable Federal law" is "one pertaining either to the State or locality seeking a Byrne grant or to the grant being sought." *New York*, 951 F.3d at 106.

That conclusion is in error for a number of reasons. First, the panel's reading of the term "applicable Federal laws" fails to comply with the well-settled principle that statutes should be read so as "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted); *see also United States v. Nordic Vill., Inc*., 503 U.S. 30, 36 (1992) (noting the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Anderson*, 15 F.3d 278, 283 (2d Cir. 1994) ("[C]ourts will avoid statutory interpretations that render provisions superfluous." ). As the Third Circuit explained, an interpretation as expansive as the panel's creates a redundancy issue because if "applicable" is construed to mean laws pertaining to both grants *and* applicants, "all other applicable Federal laws" in effect means "all other Federal laws." *See City of Philadelphia*, 916 F.3d at 289 (internal quotation marks omitted).

The panel argues that its interpretation does not run afoul of the canon against surplusage because "applicable" in fact serves a limiting function; the panel's logic seems to be that the provision is limited because "an applicant must certify its willingness to comply with those laws—beyond those expressly stated in Chapter 34—that can reasonably be deemed 'applicable.'" *New York*, 951 F.3d at 104, 106-07. This is incorrect. As the First Circuit—which issued its opinion after ours—aptly observed:

> The Second Circuit's interpretation of the phrase "applicable Federal laws"—which encompasses all federal laws that apply to state and local governments in any capacity—flouts [the] principle [against surplusage] by

> effectively reading the term "applicable" out of the statute. For instance, a local government can hardly certify that it will comply with a law that does not apply to local governments in the first place. Congress obviously could have written this provision to require Byrne [Grant Program] applicants to certify compliance with "all other Federal laws," but it did not. In our view, the fact that Congress included the word "applicable" strongly implies that the provision must refer to a subset of all federal laws that apply to state and local governments.

*City of Providence*, 954 F.3d at 37.

In addition, while the text of Section 10153(A)(5)(D) does not define "applicable," the statutory context makes clear that "applicable" means applicable to the grant, not the applicant more broadly. *See*, *e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008) ("[T]he term 'applicable' must be examined in context."). The other conditions in Section 10153(A) apply to the grant, not to those who receive the grant. *See*, *e.g*., 34 U.S.C. § 10153(A)(1) (stating that funds cannot be used to replace state or local funds); *id*. § 10153(A)(2), (3) (mandating that grant projects must be submitted for appropriate review); *id*. § 10153(A)(4) (setting forth a reporting requirement on how the grant is administered); *id*. § 10153(A)(6) (requiring a plan for how grant funds will be used). To read Section 10153(A)(5)(D) as the only condition that applies to states and localities' conduct *beyond* that which is undertaken in their capacities as grant recipients makes little sense. *See Kucana v. Holder*, 558 U.S. 233, 246 (2010) (holding that statutory provisions must be read in context and relying on the

other statutory provisions that a particular provision is "sandwiched" between to delineate its scope). There is no reason why Congress would insert a condition unrelated to grant funds into a list that otherwise includes conditions that are closely linked to grant administration. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, 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."); *see also City of Providence*, 954 F.3d at 37-38 ("It strains credulity to think that Congress would bury among those certifications and assurances an authorization for the DOJ to condition grants on certification of compliance with federal laws that . . . lack any nexus to the Byrne [Grant] program.").

The panel's broad reading of "all other applicable Federal laws" allows the Attorney General to condition the receipt of funds on any number of statutes, such as Section 1373, which have nothing to do with federal grants, and in so doing require applicants to comply with any federal directive, regardless of that directive's relationship with the grant at issue. But as the First Circuit observed, there is ample reason to "doubt that Congress intended to give the DOJ so universal a trump card." *City of Providence*, 954 F.3d at 38. For instance, as the First Circuit notes, the "formulaic nature" of the Byrne Grant Program undermines the notion that "applicable" should be read so expansively. *Id.*

Additionally, Congress reinforced its desire to avoid generally using grant funds to advance policy goals by "stating expressly in other statutes that noncompliance with those statutes' requirements could trigger the withholding of a set percentage of a Byrne [Grant

Program] grant." *Id.* at 39. For example, Congress provided that no more than 10 percent of funds may be withheld for failure to meet "death-in-custody" reporting requirements. 34 U.S.C. § 60105(c)(2); *see also id.* § 40914(b)(1) (providing for a withholding of 4 percent of funds for failure to meet background check requirements); *id.* § 20927(a) (providing for a 10 percent reduction for failure to meet sex offender registration requirements); *id.* § 30307(e)(2)(A) (providing for a 5 percent reduction for failure to comply with measures to eliminate prison rape). No more than 5 percent of Byrne Grant Program funds were allowed to be used for discretionary grants, which could be granted only under limited circumstances. *Id.* § 10157(b). These provisions further demonstrate that Congress did not intend to condition funds on compliance with every law applicable to applicants. "If Congress had already given the Attorney General [the] sweeping authority to withhold all funds for any reason, it would have no need to delineate numerous, specific circumstances under which the Attorney General may withhold limited amounts of funds." *City of Philadelphia*, 916 F.3d at 286. And if Congress were so concerned about state and local authorities flouting federal immigration law, it well knew how to codify that concern and utterly failed to do so here.

Congress in fact considered, on multiple occasions, making compliance with Section 1373 a condition of receiving federal funds—but has never actually done so. *See City of Chicago*, 888 F.3d at 277-78 (collecting bills). The panel's decision notes that enactment of Section 1373 "was informed by Congress's concern that States and localities receiving federal grants were hampering the enforcement of federal immigration laws," *New York*, 951 F.3d at 108, but it hardly follows from this observation that Congress intended to

express that policy by conditioning the receipt of Byrne grants on compliance with Section 1373. If that were the case, Congress could have followed through with any one of its attempts to accomplish that goal. This is not the Executive Branch clarifying an ambiguity in a manner that gives effect to congressional intent—this is the Executive Branch sidestepping Congress's refusal to condition grant funds on compliance with Section 1373.

Finally, such a move violates the rule that conditions imposed on the recipients of federal grants are to be "unambiguously" set out by Congress. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Congress is, of course, free to "attach conditions on the receipt of federal funds," and may use that power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation marks and citation omitted). But "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously . . ., enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207 (internal quotation marks, brackets, and citation omitted).

The panel in *New York v. U.S. Department of Justice* asserts that there is no "knowing acceptance" concern here because the DOJ provided advance notice that the 2017 Byrne Grant Program applications had to certify a willingness to comply with Section 1373. *New York*, 951 F.3d at 110 (internal quotation marks omitted). But the fact that the DOJ "unambiguously" sets out the grant requirements is of no moment, because the conditions are to be set by Congress.

Absent Congress writing Section 10153(a)(5)(D) to specify that compliance with every statute and regulation applicable to states and localities acts as a grant condition, Section 10153(a)(5)(D) cannot be read so expansively. To do so would allow the DOJ to exert a tremendous amount of leverage over state and local police authorities and to interfere in an area reserved to the states by imposing new interpretations of federal immigration statutes. *See* U.S. Dep't of Justice, Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2018 Local Solicitation 36-37, 44-45 (2018) (interpreting 8 U.S.C. §§ 1226(a), 1226(c), 1231(a)(4), 1324(a), 1357(a), 1366(1), 1366(3), 1373).

It is true, as the panel points out, that the Supreme Court has recognized that in establishing federal grant programs, Congress cannot always "prospectively resolve every possible ambiguity concerning particular applications of [a program's] requirements." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). But reading Section 10153(a)(5)(D) so broadly does not resolve an ambiguity in the statute—it instead reads into the statute a meaning that simply is not there. That is contrary to Congress's intent to create a formula-based program that distributes awards through a "carefully defined calculation" that takes into account just population and crime statistics. *City of Chicago*, 888 F.3d at 285; *see also* 34 U.S.C. § 10156(a)(1) ("[T]he Attorney General shall . . . allocate" funds based on the statutory formula). Allowing the Attorney General to set policy-related conditions "destabilize[s] the formula nature of the grant." *City of Philadelphia*, 916 F.3d at 290; *see also City of Providence*, 954 F.3d at 34 (stating that "it is nose-on-the-face plain that Congress intended [Byrne Grant Program] to operate as a formula grant program").

In sum, there are numerous reasons why the panel erred in holding that "applicable Federal laws" means all laws applicable to states or localities applying for Byrne grants, including Section 1373. Rather, as our sister circuits have concluded, it is apparent that "applicable Federal laws" "are federal laws that apply to state and local governments in their capacities as Byrne [Grant Program] grant recipients." *City of Providence*, 954 F.3d at 38-39. As such, there is no statutory provision authorizing the DOJ's imposition of the Certification Condition.

B. The Notice and Access Conditions

The panel's rationale for upholding the Notice and Access Conditions is also problematic. The panel determined that these conditions are authorized by the coordination requirement contained in Section 10153(A)(5)(C), which requires grant recipients to certify "in a form acceptable to the Attorney General" that "there has been appropriate coordination with affected [federal] agencies," and the reporting requirement contained in Section 10153(a)(4), which requires the maintenance and reporting of "such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." *See New York*, 951 F.3d at 117-18, 121. The panel explained that the coordination requirement provided statutory authorization because "when a State seeks Byrne funding for programs that relate to the prosecution, incarceration, or release of persons, some of whom will be removable aliens, there must be coordination with the affected federal agency, the Department of Homeland Security [], before a formal application is filed . . . ." *Id.* at 119. Similarly, the panel concluded that the reporting requirement provided statutory authorization for the Notice Condition because the

release of information pursuant to this condition is programmatic "at least for Byrne-funded programs that relate in any way to the criminal prosecution, incarceration, or release of persons." *Id.* at 117.

Again, this overly expansive reading of the statute cannot stand. As the Third Circuit thoroughly explained:

> The data-reporting requirement is expressly limited to "programmatic and financial" information—*i.e.*, information regarding the handling of federal funds and the programs to which those funds are directed. It does not cover Department priorities unrelated to the grant program. Furthermore, the coordination requirement asks for a certification that there "has been" appropriate coordination. . . . [W]e interpret [that] to require certification that there *was* appropriate coordination in connection with the grantee's application. This does not serve as a basis to impose an *ongoing* requirement to coordinate on matters unrelated to the use of grant funds.

*City of Philadelphia*, 916 F.3d at 285. It is thus clear from the statutory text that Congress provided authority for the DOJ to mandate only that grant recipients "maintain and report information about its grant and the programs that the grant funds." *City of Providence*, 954 F.3d at 35; *see also City of Los Angeles,* 941 F.3d at 944-45; *City of Philadelphia,* 916 F.3d at 285. In addition, the DOJ is authorized "only to require a certification that the applicant has coordinated in the preparation of its application with agencies affected by the programs for which the applicant seeks funding." *City of Providence*, 954 F.3d at 35; *see also City of Los Angeles,* 941 F.3d at 945; *City of Philadelphia,* 916

F.3d at 285. Yet what the DOJ seeks to require under the Notice and Access Conditions extends far beyond what the reporting and coordination provisions envision.

Rather than properly cabining the DOJ's authority, however, the panel concluded that the DOJ could impose the Access and Notice Conditions for nearly all law enforcement purposes, regardless of whether those purposes relate in any way to the grant. But as discussed above, Congress set out eight programs for which Byrne Grant Program funds may be used, and none is enforcement of federal immigration law. *See* 34 U.S.C. § 10152(a)(1). The statute simply does not support the weight the panel places on it. By permitting the DOJ to stretch its authority beyond its statutory bounds, the *New York* panel invites the Executive Branch to compel states and localities to provide information to, and coordinate with the federal government on, all aspects of law enforcement activity.

For these reasons, the panel's interpretation of the various statutory provisions contained in the Byrne Grant Program statute, as well as its ultimate conclusion that these provisions grant the DOJ authority to impose the Certification, Access, and Notice Conditions, is deeply flawed, and a worthy subject for en banc review.

### II. Whether Section 1373 Violates the Anti-commandeering Doctrine

The panel's treatment of the Tenth Amendment challenge in this case also calls for en banc consideration. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const. amend. X. Congress thus has only "the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). This mandate is enforced via the anticommandeering doctrine, which provides that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997).

As the panel noted, this Court previously upheld Section 1373 as constitutional in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999). There, we concluded that "federal measures that seek to impress state and local governments into the administration of federal programs" violate the Tenth Amendment, but "federal measures that prohibit states from compelling passive resistance to particular federal programs" do not. *Id.* at 35. But the Supreme Court's recent decision in *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018), calls the viability of *City of New York* into serious question.

In *Murphy*, the Supreme Court invalidated a provision of the federal Professional and Amateur Sports Protection Act ("PASPA"), which prohibited states from allowing sports betting. 138 S. Ct. 1461. In defending the federal law, the DOJ argued that the anti-commandeering doctrine only prohibited the federal government from "affirmatively command[ing]" what the states must do, rather than prohibiting states from enacting certain types of laws. *Id.* at 1478 (internal quotation marks omitted). Thus, the DOJ argued PASPA did not run afoul of the anti-commandeering doctrine because it did not prevent the complete legalization of sports gambling, just

those state laws that authorized gambling with restrictions, such as limiting the location where such bets could be made. The Supreme Court rejected this argument:

> The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do. . . . It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.
>
> Neither [the sports leagues] nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. . . .

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

*Id.* at 1478.

Section 1373 provides in relevant part that:

> (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 govern-

> ment entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) Additional authority of government entities
>
> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373.

Just as PASPA did, Section 1373 seeks to skirt the anti-commandeering doctrine's prohibition against coercing states into enforcing federal law. While PASPA sought to accomplish this goal by providing that states could not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports betting, 28 U.S.C. § 3702(1), Section 1373 attempts to do so by stripping from state governments the right to control state officials' communication of information collected for state purposes and at state expense. Just as PASPA barred states from taking

certain action (that is, authorizing sports betting), Section 1373 bars states from taking certain action—that is, prohibiting certain communications to federal officials. Thus, our Circuit's previous reliance on the distinction between "measures that seek to impress state and local governments into the administration of federal programs" and "federal measures that prohibit states from compelling passive resistance to particular federal programs" in striking down a Tenth Amendment challenge to Section 1373, *City of New York*, 179 F.3d at 35, is no longer valid in light of *Murphy*. Even the *New York* panel does not seem to challenge this conclusion. 951 F.3d at 113 (noting that "*Murphy* may well have clarified that prohibitions as well as mandates can manifest impermissible commandeering").

Nonetheless, the panel held that the district court erred in concluding that Section 1373 violated the Tenth Amendment because the district court failed to identify a "reserved power States have to enact laws or policies seemingly foreclosed by 8 U.S.C. § 1373." *Id.* at 114. The panel relied heavily on the broad power of the federal government in the immigration context, suggesting that states accordingly lacked power in this arena. *Id.* at 113. But the relevant power reserved to the states in this situation is not the power to enact immigration-related legislation. Rather, the reserved power at issue is the authority of the states to refuse the aid of state officials in enforcing federal law. In failing to engage with this power, the panel erred in its analysis of whether Section 1373 would be facially unconstitutional. *See Printz*, 521 U.S. at 932 n.17, 935 (holding that a statute, which "requires [state employees] to provide information that belongs to the State and is available to them only in their official capacity," violates the Tenth Amendment); *see also id.* at 928 (explaining that the purpose of anti-commandeering

doctrine is the "[p]reservation of the States as independent and autonomous political entities").

The panel then went on to conclude that "§ 1373 does not violate the Tenth Amendment *as applied* here to a federal funding requirement." 951 F.3d at 114. It seems the panel concluded that the as-applied challenge fails because Congress has the ability to fix conditions, such as compliance with "applicable Federal laws" as was the case here, on receipt of federal funds. *Id.* at 114-15. But this conclusion makes little sense, in my view. If Section 1373 is a facial violation of the Tenth Amendment, and therefore unconstitutional, then it cannot fall within the scope of "applicable Federal laws," even if the Certification Condition stands. Thus, by relying on the validity of the condition here to suggest that Section 1373 is constitutional as applied, the panel engages in circular reasoning and evades the ultimate issue.

Every other court to have considered the issue post-*Murphy* reached the correct conclusion: Section 1373 violates the Tenth Amendment and is unconstitutional, even as applied to the situation at hand. *See City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018); *cf. United States v. California*, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018).

For the reasons given above and found in the opinions of our sister circuits, I respectfully dissent from the denial of rehearing en banc. Perhaps the Appellees will find the relief they seek at the Supreme Court.

KATZMANN, *Chief Judge*, dissenting from the denial of rehearing en banc:

I am usually reluctant to vote in favor of rehearing en banc, informed by the institutional experience of our Circuit and the explicit policy of the Federal Rules that en banc rehearing is ordinarily "not favored." Fed. R. App. P. 35(a). That institutional experience is one of general deference to panel adjudication—a deference which holds whether or not the judges of the Court agree with the panel's disposition of the matter before it. Thus, although I disagree with the panel's decision for the reasons stated by Judge Pooler and Judge Lohier, in the vast majority of cases I would have joined those of my colleagues who have voted against rehearing despite such disagreements with the panel's opinion.

Nevertheless, this is a rare case in which I respectfully believe we should have granted rehearing en banc. Judge Pooler and Judge Lohier have described in compelling detail why the panel's statutory analysis was mistaken. I write separately to highlight additionally that the panel did not adhere to the normal rules of appellate litigation to reach this result. In short, the panel reversed the district court's grant of partial summary judgment in favor of Plaintiffs based on legal arguments that Defendants either had not made, had abandoned, or had even expressly disavowed. Few principles are better established in our Circuit than the rule that "arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court." *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005); *see Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993). The panel opinion does not explain why a departure from this principle

was warranted in this case, and I cannot see why it was.

As Judge Pooler and Judge Lohier each note, most of the substantive statutory issues here have been discussed at length by our sister Circuits, all of which persuasively differ from the panel's interpretations.[1]

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[1] With respect to the Notice Condition, Judge Ikuta's opinion for the Ninth Circuit, joined by Judge Bybee, demonstrates the deficiency in the panel's conclusion that the provision referring to "programmatic" information authorizes a condition requiring real-time reporting of information unrelated to a program funded by a Byrne JAG grant. *City of Los Angeles v. Barr*, 941 F.3d 931, 944–45 (9th Cir. 2019). So does Judge Selya's opinion for the First Circuit, joined by Justice Souter and Judge Barron, *City of Providence v. Barr*, 954 F.3d 23, 35–36 (1st Cir. 2020), and Judge Rendell's opinion for the Third Circuit, joined by Judges Ambro and Scirica, *City of Philadelphia v. Attorney General of U.S.*, 916 F.3d 276, 285 (3d Cir. 2019).

The panel's conclusion that the Access Condition is authorized by the statutory language requiring a certification "that there has been appropriate coordination with affected agencies" has been rejected in persuasive discussions by the First, Third, and Ninth Circuits. *See City of Providence*, 954 F.3d at 33 ("The text of the provision itself belies this jerry-built justification."); *City of Los Angeles*, 941 F.3d at 945 (the statutory language neither "support[s] DOJ's interpretation that a recipient must coordinate with DHS agents who are not part of a funded program" nor authorizes the imposition of "an ongoing obligation on the applicant to coordinate with DHS agents throughout the life of the grant"); *City of Philadelphia*, 916 F.3d at 285 (given Congress's choice of verb tense, language requiring certification that there "has been" appropriate coordination "does not serve as a basis to impose an *ongoing* requirement to coordinate on matters unrelated to the use of grant funds").

Our sister Circuits also cogently disagree with the panel's interpretation of the language "all other applicable federal laws" as authorizing the Certification Condition, *City of Providence*, 954 F.3d at 36–39; *City of Philadelphia*, 916 F.3d at 288–91. Judge Rovner's opinion for the Seventh Circuit, joined by Judge

Those discussions illustrate well why the panel was mistaken to conclude that the Byrne JAG statute itself required the challenged conditions. But the panel also concluded that the Byrne JAG statute confers "considerable" discretion upon the Attorney General to set the substantive conditions for a successful grant application beyond those specifically required by the statute. *New York v. Dep't of Justice*, 951 F.3d 84, 103 (2d Cir. 2020); *see id.* at 103 n.18.[2] To reach this conclusion, the panel adopted two novel arguments that set its reasoning further apart from that of the other Circuits: first, that the Attorney General has discretion to impose substantive conditions on grant recipients under various provisions of the Byrne JAG statute conferring authority over the "form" of an application, and second, that the Attorney General has such discretion under 34 U.S.C. § 10155, the provision conferring general rulemaking authority to carry out the Byrne JAG program. *See New York*, 951 F.3d at 104–05, 116–

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Bauer, further explains why the panel's interpretation of "all other applicable laws" creates serious constitutional problems. *City of Chicago v. Barr*, 961 F.3d 882, 906–08 (7th Cir. 2020) ("Congress, under its spending power, can attach only conditions that "bear some relationship to the purpose of the federal spending," and the universe of *all* federal laws as promoted by the Attorney General would necessarily include many laws that fail to meet that standard[,] . . . rendering the conditions ambiguous."); *see id.* at 933 (Manion, J., concurring in the judgment) (agreeing with and emphasizing this point).

[2] This aspect of the panel's decision is concerning for the additional reason, helpfully explained by a group of former grant administrators as *amici curiae*, that it transforms the mandatory formula grant program Congress enacted into a discretionary one. *See* Br. of Former Grant Administrators as *Amici Curiae* Supporting Plaintiffs-Appellees and Supporting Rehearing En Banc at 2–12.

17, 121–22. Neither argument was properly raised on appeal.

First, the panel holds that several provisions of the Byrne JAG statute, each authorizing the Attorney General to determine the "form" of an applicant's required certifications or assurances, delegates to the Attorney General the authority to fashion conditions on the receipt of Byrne JAG funds not already specified in the Byrne JAG statute. According to the panel, the Attorney General's authority is "evident in the requirement that Byrne grant applicants provide certification in a 'form acceptable to the Attorney General.'" *New York*, 951 F.3d at 105 (quoting 34 U.S.C. § 10513(a)(5)).[3]

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[3] In my view, the better interpretation of the statutory text is that Congress delegated authority only over the "form" of the certifications and assurances necessary for a Byrne JAG application, not their content. Without the benefit of adversarial briefing, the panel reached the opposite conclusion on the basis of a single dictionary definition. Relying on that dictionary definition, the panel concludes that the word "form" in this context refers to the document on which an applicant must provide any requested information, and thereby concludes that Congress's choice of the word "form" was in fact meant to confer authority over an application's substance.

Dictionary definitions can be useful in interpreting statutory language, especially when trying to ascertain the meaning of a specialized term, or a term of art, or a word's usage at the time of the law's enactment. But because interpretive challenges often arise from the way a particular word is used in the context of the provision or statute as a whole, dictionaries are often less helpful in addressing them than we might hope. And in some cases "dictionaries must be used as sources of statutory meaning only with great caution." *United States v. Costello*, 666 F.3d 1040, 1043 (7th Cir. 2012) (Posner, J.). That is not only because "[d]ictionary definitions are acontextual," unlike statutory language, *id.* at 1044, but also because dictionary definitions—particularly

The panel thought this question worthy of "only brief discussion," characterizing it as "not seriously disputed." 951 F.3d at 104. If that is an accurate description, it is only because Defendants had abandoned the argument the panel adopted. Defendants had argued the point in the district court, *see* Defs.' Mem. of Law at 19, *New York v. Dep't of Justice*, No. 1:18-CV-6474 (ER) (S.D.N.Y. Sept. 14, 2018), ECF No. 51. But the district court reached precisely the opposite conclusion in its well-reasoned opinion. *See New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 230 (S.D.N.Y. 2018). And the State Appellees defended that conclusion in clear terms on appeal. Br. of Appellees State of New York, et al., at 34 ("As the district court explained, the Byrne JAG statute's grant of authority to the Attorney General to prescribe the *form* of Byrne JAG applications and certifications, *see* 34 U.S.C. § 10153(a), cannot reasonably be construed as authorization to dictate *substantive* eligibility requirements beyond those set forth by Congress."). On appeal, Defendants argue that the *statute itself* makes certification of compliance with Section 1373 a condition of any Byrne JAG application, on the theory that Section 1373 is an "applicable Federal law," but do not argue that the Attorney General has the authority to "identify" Section 1373 as an "applicable" law by virtue of his authority over the "form" of an application, or otherwise has discretion to impose conditions in addition to those imposed by the statute.

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dictionary definitions of common words—can supply a judge with many possible meanings and no reasoned basis to choose among them. We have referred to Judge Posner's discussion as "helpful cautionary advice," *United States v. Bove*, 888 F.3d 606, 608 n.5 (2d Cir. 2018) (Cabranes, J.), and I think that advice would have been well followed here with respect to the panel's interpretation of the word "form."

*See* Br. of Appellants at 26–27. The panel's brief discussion does not mention this history, or explain why it should not lead to the conclusion that Defendants had abandoned this particular argument.

Second, the panel also concluded that the Attorney General possessed additional authority to impose the Notice and Access Conditions pursuant to his authority, codified at 34 U.S.C. § 10155, to "issue rules to carry out" the Byrne JAG program. *See New York*, 951 F.3d at 116–17, 121–22. Whether or not the challenged conditions could be valid exercises of that authority, Defendants did not assert the Attorney General's Section 10155 rulemaking authority as a basis for the challenged conditions either in the district court or on appeal. *See* Defs.' Mem. of Law, ECF No. 51; Br. for Appellants. I do not think the panel should have adopted it under the well-settled principles I have discussed above. *See JP Morgan Chase Bank*, 412 F.3d at 428; *Knipe*, 999 F.2d at 711. Having reached out to consider this argument, however, the panel should have stopped short again, because Defendants had already expressly stated to one of our sister Circuits that the challenged conditions were not promulgated as an exercise of the Attorney General's Section 10155 rulemaking authority. *See* Oral Arg. at 5:17–5:31, *City & Cty. of San Francisco v. Barr*, No. 18-17308 (9th Cir. Dec. 2, 2019), *available at* https://www.ca9.uscourts.gov/media/viewvideo.php?pkvid=0000016625.

* * *

For the panel to rely on two legal bases for the challenged conditions that Defendants have not offered—and in one case, have disavowed—is especially troubling in the context of this case. As the Seventh Circuit has documented, "the Attorney General has presented the courts with one statutory 'authorization' after

another for the decision to withhold all Byrne JAG funding from sanctuary cities." *City of Chicago*, 961 F.3d at 920. In my view, there was no reason for the panel to add to that mix two arguments that were never presented to this Court.[4]

Considering only the arguments presented by the parties in this case, I would interpret the Byrne JAG statute as Judge Pooler lays out. If the Attorney General was without discretion (or did not exercise what discretion he has) to impose the challenged conditions, then, as Judge Pooler explains, the challenged conditions can survive a Spending Clause challenge only if the statute imposes them unambiguously. For the reasons explained by Judge Pooler and Judge Lohier, it does not. To be sure, I believe Judge Pooler's

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[4] Judge Cabranes downplays the panel's reliance on these two unpreserved arguments as unremarkable or unworthy of en banc review. Ante at 3–4 n.8 (Cabranes, J., concurring in the denial of rehearing en banc). With utmost respect, I disagree. In both cases, the panel read the statute to confer discretion on the Attorney General that the Attorney General either had not claimed, had not exercised, or both. That conclusion was of special significance to this litigation, because if the statute itself was the only basis for the challenged conditions—rather than the Attorney General's exercise of discretion conferred by the statute—then the statute's language must independently live up to the Spending Clause's requirement that conditions on federal funds be "unambiguous[]." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Thus, as Judge Pooler explains, "the fact that the DOJ 'unambiguously' sets out the grant requirements is of no moment, because the conditions are to be set by Congress." Ante at 8 (Pooler, J., dissenting from the denial of rehearing en banc); *see* Br. of Former Grant Administrators as *Amici Curiae* at 2 ("The defining characteristic of a mandatory grant is that Congress, not the agency, determines who receives grant funds and in what amount."). In my view, the statutory analysis set forth by Judge Pooler and the considerations noted in this dissent should have led us to rehear this case en banc.

reading of the statute is the better one on its own terms, but those who find the statutory language ambiguous should conclude that the challenged conditions cannot be imposed on Plaintiffs consistent with the Constitution.

As Judge Cabranes has rightly observed, and as Judge Lohier's opinion makes manifest, "the decision not to convene the en banc court does not necessarily mean that a case either lacks significance or was correctly decided. Indeed, the contrary may be true." *United States v. Taylor*, 752 F.3d 254, 256 (2d Cir. 2014) (Cabranes, J., dissenting from the denial of rehearing en banc). For the reasons stated by Judge Pooler and Judge Lohier, I believe the contrary is true here. Indeed, I share my colleagues' view that this case is of exceptional importance, *see* ante at 8 n.5 (Lohier, J., concurring in the denial of rehearing en banc); ante at 3 (Pooler, J., dissenting from the denial of rehearing en banc), a view that Judge Cabranes all but endorses in his concurring opinion, *see* ante at 1 (Cabranes, J., concurring in the denial of rehearing en banc).

All of my participating colleagues also seem to agree that Supreme Court review is now inevitable. *See* ante at 5 (Cabranes, J., concurring in the denial of rehearing en banc); ante at 8 (Lohier, J., concurring in the denial of rehearing en banc); ante at 15 (Pooler, J., dissenting from the denial of rehearing en banc). Of course, that will be for the Supreme Court to decide. Now that our Court has declined to rehear this case, I hope my colleagues are right.

For these reasons, I respectfully dissent from today's order denying rehearing en banc.

**APPENDIX C**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed November 30, 2018]

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18 Civ. 6471 (ER)

18 Civ. 6474 (ER)

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STATES OF NEW YORK, CONNECTICUT, NEW JERSEY, RHODE ISLAND, and WASHINGTON, and COMMONWEALTHS OF MASSACHUSETTS and VIRGINIA,

*Plaintiffs*,

–against–

UNITED STATES DEPARTMENT OF JUSTICE, and MATTHEW G. WHITAKER, in his official capacity as Acting Attorney General of the United States,

*Defendants*.

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CITY OF NEW YORK,

*Plaintiff*,

–against–

MATTHEW G. WHITAKER, in his official capacity as Acting Attorney General of the United States, and UNITED STATES DEPARTMENT OF JUSTICE,

*Defendants*.[*]

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[*] Pursuant to Federal Rule of Civil Procedure 25(d), Acting Attorney General Matthew G. Whitaker is automatically sub-

OPINION AND ORDER

Ramos, D.J.:

Since Congress created the modern version of the program in 2006, the Plaintiff States and City of New York have received funding for criminal justice initiatives through the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") program, named after New York City police officer Edward R. Byrne, who was killed in the line of duty. In 2017, for the first time in the history of the program, the U.S. Department of Justice ("DOJ") and Attorney General (collectively, "Defendants") imposed three immigration-related conditions that grantees must comply with in order to receive funding. Plaintiffs bring this suit challenging these new conditions. Consistent with every other court that has considered these issues, the Court concludes that Defendants did not have lawful authority to impose these conditions. For the reasons set forth below, Plaintiffs' motion for partial summary judgment is GRANTED, and Defendants' motion for partial summary judgment or in the alternative to dismiss is DENIED.

I. Background

A. The Byrne JAG Program

The Byrne JAG program has its origins in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. I, 82 Stat. 197, which created grants to assist the law enforcement efforts of state and local authorities. After undergoing several amendments, the modern Byrne JAG program was created through the Violence Against Women and Department

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stituted as a party in place of former Attorney General Jefferson B. Sessions III.

of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006). The Byrne JAG program is now codified at 34 U.S.C. §§ 10151–10158.

Under the Byrne JAG program, states and localities may apply for funds to support criminal justice programs in a variety of categories, including law enforcement, prosecution, crime prevention, corrections, drug treatment, technology, victim and witness services, and mental health. 34 U.S.C. §§ 10152(a)(1), 10153(a). The funds are disbursed according to a formula based on the particular jurisdiction's population and violent crime statistics. *Id.* § 10156. Grantees may also make subgrants to localities or community organizations, *id.* § 10152(b), and some state funds are set aside for subgrants to localities, *id.* § 10156(c)(2).

On July 25, 2017, Defendants announced that they were imposing three new immigration-related conditions on applicants for Byrne JAG funds in fiscal year ("FY") 2017.[1] According to the press release announc-

[1] In 2016, Defendants imposed a related but different condition on the City of New York's Byrne JAG grant. The condition required the City to "undertake a review to validate its compliance with 8 U.S.C § 1373," a statute which prohibits states and localities from restricting their officials from communicating with immigration authorities regarding anyone's citizenship or immigration status (as will be discussed in detail below). City's FY 2016 Byrne JAG Grant ¶ 53, Trautman Decl. Ex. A, Doc. 53-1. The City was further required to submit documentation several months after accepting the grant showing that it was in compliance or that it came into compliance. *Id.* The City accepted the condition and submitted documents certifying that "its laws and policies comply with and operate within the constitutional bounds of § 1373." City's June 27, 2017 Letter 2, Soler Decl. Ex. A, Doc. 41-1. This condition was not imposed on the Plaintiff

ing the change, the conditions were intended to "encourage . . . 'sanctuary' jurisdictions to change their policies and partner with federal law enforcement to remove criminals."[2] Holt Decl. Ex. 17, at AR-00992, Doc. 33-17.[3]

The first condition requires grantees, upon request, to give advance notice to the Department of Homeland Security ("DHS") of the scheduled release date and time of aliens housed in state or local correctional facilities (the "Notice Condition"). As stated in the award documents, the Notice Condition provides:

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States. *See* New York State's FY 2016 Byrne JAG Grant, Trautman Decl. Ex. B, Doc. 53-2; Trautman Decl. ¶ 3, Doc. 53.

[2] The Court notes that the label of "sanctuary" cities or states "is commonly misunderstood." *City of Chicago v. Sessions*, 888 F.3d 272, 281 (7th Cir. 2018), *vacated in part*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). Although Defendants claim that "'sanctuary' policies . . . intentionally undermine our laws and protect illegal aliens who have committed crimes," AR-00992, many so-called sanctuary jurisdictions "do[] not interfere in any way with the federal government's lawful pursuit of its civil immigration activities, and presence in such localities will not immunize anyone to the reach of the federal government," *Chicago*, 888 F.3d at 281. Indeed, many such jurisdictions will cooperate with immigration enforcement authorities for persons most likely to present a threat to the community, and "refuse such coordination where the threat posed by the individual is lesser, reflect[ing] 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." *Id.*; *see also United States v. California*, 314 F. Supp. 3d 1077, 1105 (E.D. Cal. 2018) ("Standing aside does not equate to standing in the way.").

[3] Unless otherwise indicated, references to "Doc." relate to documents filed in the City's action, No. 18 Civ. 6474. The motion papers and supporting documents submitted in the two related actions are essentially identical.

> 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.

New York State's FY 2017 Byrne JAG Grant ¶ 55(1)(B), Holt Decl. Ex. 1, Doc. 33-1.

The second condition requires grantees to give federal agents access to aliens in state or local correctional facilities in order to question them about their immigration status (the "Access Condition"). The Access Condition provides:

> 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.

*Id.* ¶ 55(1)(A).[4]

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[4] While the quoted provisions apply to state jurisdictions, similar terms apply to local jurisdictions. *See* New York State's FY 2017 Byrne JAG Grant ¶ 56(1)(A)–(B).

The third condition requires grantees to certify their compliance with 8 U.S.C. § 1373, which prohibits states and localities from restricting their officials from communicating with immigration authorities regarding anyone's citizenship or immigration status (the "Compliance Condition"). The Compliance Condition provides:

> [N]o State or local government entity, -agency, or -official may prohibit or in any way restrict — (1) any government entity or -official from sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. 1373(a); or (2) a government entity or -agency from sending, requesting or receiving, maintaining, or exchanging information regarding immigration status as described in 8 U.S.C. 1373(b).

*Id.* ¶ 53(1).

Grantees are also required to monitor any subgrantees' compliance with the three conditions, and to notify DOJ if they become aware of "credible evidence" of a violation of the Compliance Condition. *Id.* ¶¶ 53(3), 54(1)(D), 55(2), 56(2). Grantees must certify their compliance with the three conditions, which carries the risk of criminal prosecution, civil penalties, and administrative remedies. *Id.* ¶ 1; Holt Decl. Ex. 17, at AR-01031, -01033.

B. Plaintiffs

The States of New York, Connecticut, New Jersey, Rhode Island, and Washington, the Commonwealths of Massachusetts and Virginia (collectively, the "States"), and the City of New York (the "City") have received Byrne JAG funds since at least 2006 (and some had received predecessor grants for decades).

Pls.' 56.1 ¶¶ 63, 66, 89, 114, Doc. 23. Plaintiffs have used these funds to support a broad array of law enforcement, criminal justice, public safety, and drug treatment programs. *Id.* ¶¶ 64, 115.

On June 26, 2018, DOJ issued award letters to the States requiring their acceptance of the new conditions described above in order to receive their FY 2017 Byrne JAG funds, which collectively totaled over $25 million. *Id.* ¶¶ 26, 30. Although the City had also applied for a FY 2017 Byrne JAG grant of over $4 million, the City did not receive an award letter at that time. *Id.* ¶¶ 44, 51, 114. Instead, in letters sent several months earlier, DOJ informed the City that, "based on a preliminary review, the Department has determined that [the City] appears to have laws, policies, or practices that violate 8 U.S.C. § 1373," DOJ's Oct. 11, 2017 Letter 1, Soler Decl. Ex. B., Doc. 41-2, which could result in the City's "ineligib[ility] for FY 2017 Byrne JAG funds," DOJ's Jan. 24, 2018 Letter 2, Soler Decl. Ex. D, Doc. 41-4.

DOJ cited, among other things, the City's Executive Order No. 41 as a policy that "appears to . . . violate" § 1373's prohibition on restricting communications between local officials and immigration authorities regarding immigration status. DOJ's Oct. 11, 2017 Letter 1–2. Executive Order No. 41, together with Executive Order No. 34, forms the City's "General Confidentiality Policy," which was issued by then-Mayor Michael Bloomberg in 2003. Pls.' 56.1 ¶ 143. This policy protects "confidential information," which is defined as including, as relevant here, information concerning an individual's immigration status.[5] Exec.

[5] "[C]onfidential information" also includes information relating to an individual's sexual orientation, status as a victim of domestic violence or sexual assault, status as a crime witness,

Order No. 41, § 1 (2003), Negrón Decl. Ex. B, Doc. 42-2. Under the policy, City employees may not disclose an individual's immigration status except in limited circumstances, such as when the disclosure is authorized by the individual, is required by law, is to another City employee as necessary to fulfill a governmental purpose, pertains to an individual suspected of illegal activity (other than mere status as an undocumented immigrant), or is necessary to investigate or apprehend persons suspected of terrorist or illegal activity (other than mere undocumented status). *Id.* § 2. Additionally, police officers may not inquire about a person's immigration status unless investigating illegal activity other than mere undocumented status, and may not inquire about the immigration status of crime victims or witnesses at all. *Id.* § 4(4). Other City employees may not inquire about any person's immigration status unless the inquiry is required by law or is necessary to determine eligibility for or to provide government services. *Id.* § 4(3).

The purpose of the City's General Confidentiality Policy is to assure residents that "they may seek and obtain the assistance of City agencies regardless of personal or private attributes, without negative consequences to their personal lives," because "the obtaining of pertinent information, which is essential to the performance of a wide variety of governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved." *Id.* at 1. The City maintains that its General Confidentiality Policy, in conjunction with other privacy laws and policies, encourages residents to report

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receipt of public assistance, or income tax records. Exec. Order No. 41, § 1.

crimes, seek medical treatment, and use other City services because they can trust that the City will protect their personal information. Pls.' 56.1 ¶ 177. The City believes that these laws and policies are instrumental in maintaining the City's historically low crime rates by promoting trust and cooperation between the New York Police Department and the public, including immigrant communities that otherwise may retreat into the shadows if they believe that the police will share their information with federal immigration authorities. *Id.* ¶¶ 184, 187, 189. Similarly, if people fear that the City could disclose their information to immigration authorities, they may refuse to cooperate with public health investigations or obtain medical services such as immunizations. *Id.* ¶ 194.

C. Related Litigation

The new conditions on Byrne JAG funding have generated litigation throughout the country. In Chicago, a district court in the Northern District of Illinois issued a nationwide preliminary injunction against the Notice and Access Conditions. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017). On an interlocutory appeal, the Seventh Circuit affirmed that decision, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), but later stayed the nationwide scope of the injunction pending en banc review, *see generally City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268814, at *1 (7th Cir. Aug. 10, 2018). The district court, on summary judgment, then permanently enjoined not only the Notice and Access Conditions, but also the Compliance Condition, citing the Supreme Court's intervening decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), and similarly stayed

the injunction's nationwide scope. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018).

In a related case also in the Northern District of Illinois, the City of Evanston and the U.S. Conference of Mayors obtained a preliminary injunction against all three conditions, but the district court stayed the injunction's "near-nationwide effect" as to the Conference. *City of Evanston v. Sessions*, No. 18 Civ. 4853, slip op. at 11 (N.D. Ill. Aug. 9, 2018), Doc. 23. The Seventh Circuit then lifted the stay as to the Conference given that the injunction was "limited to the parties actually before the court." *U.S. Conference of Mayors v. Sessions*, No. 18-2734, slip op. at 2 (7th Cir. Aug. 29, 2018), Doc. 13. In other words, the injunction applied only to the City of Evanston and those local jurisdictions that are actually members of the U.S. Conference of Mayors.[6]

In Philadelphia, a district court in the Eastern District of Pennsylvania preliminarily enjoined the Attorney General from denying that city FY 2017 Byrne JAG funds on the basis of the challenged conditions. *City of Philadelphia v. Sessions*, 280 F.

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[6] The City of New York is a member of the U.S. Conference of Mayors. As a result of the *Evanston* litigation, DOJ issued the City's FY 2017 Byrne JAG award on October 10, 2018, and represented that it will not at this time enforce the challenged conditions against the City. The parties agree that (1) the City's claims are not moot because DOJ may in the future enforce the challenged conditions against the City if the preliminary injunction in *Evanston* is dissolved or reversed on appeal, *see N.Y. State Nat. Org. for Women v. Terry*, 159 F.3d 86, 92 (2d Cir. 1998) ("[V]oluntary cessation of misconduct does not engender mootness where the cessation resulted from a coercive order and a threat of sanctions."), and (2) the City's claims under the Administrative Procedure Act are ripe in light of DOJ's reaching a decision on the City's Byrne JAG application. *See* Docs. 65, 72.

Supp. 3d 579 (E.D. Pa. 2017). Following a bench trial, the district court then permanently enjoined all three conditions. *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018). The Attorney General has appealed to the Third Circuit.

In California, the state and the City and County of San Francisco sued over the conditions in the Northern District of California, and the district court initially denied California's request for a preliminary injunction against the Compliance Condition. *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015 (N.D. Cal. 2018). Subsequently, with the benefit of a full record on summary judgment, the district court then permanently enjoined all three conditions but stayed the injunction's nationwide scope. *City & County of San Francisco v. Sessions*, Nos. 17 Civ. 04642, 17 Civ. 04701 (WHO), 2018 WL 4859528 (N.D. Cal. Oct. 5, 2018).

D. This Case

The States and the City brought two related actions on July 18, 2018, and filed amended complaints on August 6, 2018. States' First Am. Compl. ("FAC"), No. 18 Civ. 6471, Doc. 32; City's FAC, No. 18 Civ. 6474, Doc. 15. The States challenge the imposition of the three FY 2017 conditions on five bases: (1) the conditions violate the separation of powers, (2) the conditions are ultra vires under the Administrative Procedure Act ("APA"), (3) the conditions are not in accordance with law under the APA, (4) the conditions are arbitrary and capricious under the APA, and (5) § 1373 violates the Tenth Amendment's prohibition on commandeering. States' FAC ¶¶ 116–150. In addition to these claims, the City also asserts that the conditions violate the Spending Clause and seeks a declaratory judgment that § 1373 is unconstitutional

or, in the alternative, that the City complies with § 1373. City's FAC ¶¶ 111–148, 173–179.[7]

The States and the City have moved for partial summary judgment on their claims challenging the FY 2017 conditions. No. 18 Civ. 6471, Doc. 56; No. 18 Civ. 6474, Doc. 21. Defendants have moved to dismiss or, alternatively, for partial summary judgment on those claims. No. 18 Civ. 6471, Doc. 88; No. 18 Civ. 6474, Doc. 50. The motions are fully briefed, and oral argument was held on November 16, 2018.

## II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a

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[7] In their amended complaints, the States and the City also assert related claims challenging identical conditions as well as additional conditions attached to FY 2018 funds, which were announced on July 20, 2018. States' FAC ¶¶ 4, 151–173; City's FAC ¶¶ 6, 149–172. According to the amended complaints, in addition to the three conditions imposed on FY 2017 grants, recipients of FY 2018 funds must also certify that they will not (1) violate 8 U.S.C. § 1644, another statute prohibiting restrictions on exchanging immigration status information with federal authorities; (2) violate 8 U.S.C. § 1324(a), which prohibits knowingly or recklessly concealing or harboring aliens; (3) impede federal authorities in the arrest or removal of aliens as authorized by 8 U.S.C. §§ 1226(a), (c), 1231(a)(4); (4) impede federal authorities in the interrogation of aliens as authorized by 8 U.S.C. § 1357(a)(1); or (5) impede the Attorney General's reports on the number of undocumented immigrants incarcerated in federal and state prisons for felonies and efforts to remove them pursuant to 8 U.S.C. § 1366(1), (3). States' FAC ¶ 4; City's FAC ¶ 6. The FY 2018 conditions are not at issue in the instant motions for partial summary judgment.

reasonable jury could return a verdict for the non-moving party." *Senno v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009)). A fact is "material" if it might affect the outcome of the litigation under the governing law. *Id.*

The party moving for summary judgment is initially responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its burden, the nonmoving party must "come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *FDIC. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010).

In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)). However, in opposing a motion for summary judgment, the non-moving party may not rely on unsupported assertions, conjecture, or surmise. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). Rather, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." *Senno*, 812 F. Supp. 2d at 467–68 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 256–57 (1986)).

In challenges to agency action under the APA, summary judgment is the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise

consistent with the APA standard of review. *Chen v. Bd. of Immigration Appeals*, 164 F. Supp. 3d 612, 617 (S.D.N.Y. 2016). "Where, as here, a party seeks review of agency action under the APA and 'the entire case on review is a question of law,' summary judgment is generally appropriate." *Noroozi v. Napolitano*, 905 F. Supp. 2d 535, 541 (S.D.N.Y. 2012) (quoting *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07 Civ. 0451 (S), 2008 WL 2746566, at *25 (W.D.N.Y. July 8, 2008)).

III. Discussion

This case challenges the authority of the Executive Branch of the federal government to compel states to adopt its preferred immigration policies by imposing conditions on congressionally authorized funding to which the states are otherwise entitled. As such, this case is fundamentally about the separation of powers among the branches of our government and the interplay of dual sovereign authorities in our federalist system. "The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny" through limits on concentrated power. *Chicago*, 888 F.3d at 277. "Concentration of power in the hands of a single branch is a threat to liberty," which "is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452,

458–59 (1991). That balance of power must be maintained "[b]y guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002). It is incumbent on the judiciary "to act as a check on such usurpation of power," whether among the branches of government or the federal and state governments. *Chicago*, 888 F.3d at 277. With these principles in mind, the Court turns to the legal issues that govern this case.

A. Statutory Authority for the Conditions

Under the APA, courts must "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," "or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C). In determining whether an agency action is ultra vires, "the question . . . is always whether the agency has gone beyond what Congress has permitted it to do." *City of Arlington v. FCC*, 569 U.S. 290, 297–98 (2013); *see also NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (discussing the "well-established principle" that "an agency literally has no power to act . . . unless and until Congress confers power upon it" (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986))).

At the outset, the Court notes that the Byrne JAG grant is "a formula grant rather than a discretionary grant," *Chicago*, 888 F.3d at 285, which means it is "not awarded at the discretion of a state or federal agency, but . . . pursuant to a statutory formula," *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989). Under the Byrne JAG statute, "the Attorney General *shall* . . . allocate" grant money pursuant to a statutory formula based on the state's

population and violent crime statistics. 34 U.S.C. § 10156(a)(1) (emphasis added).

Because § 10156(a)(1) does not give the Attorney General discretion to award or withhold Byrne JAG grants or determine the conditions under which they are disbursed, the authority for the challenged conditions must come from some other statutory provision, if at all. Defendants point to two potential provisions: 34 U.S.C. § 10102(a)(6) and 34 U.S.C. § 10153(a)(5)(D).

i. 34 U.S.C. § 10102(a)(6)

Section 10102, which is located in a different subchapter from the Byrne JAG program, sets out the duties of the Assistant Attorney General for the Office of Justice Programs[8] and provides as follows:

> The Assistant Attorney General shall—
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> (1) publish and disseminate information on the conditions and progress of the criminal justice systems;
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> (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 govern-

[8] By statute, DOJ's Office of Justice Programs is headed by this Assistant Attorney General. 34 U.S.C. § 10101.

> ments 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
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> (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. § 10102(a) (emphasis added).

Defendants contend that the italicized language permits the Assistant Attorney General to "prioritize federal grant monies for those state and local jurisdictions that assist in furthering relevant federal purposes," by imposing "special conditions" such as those challenged here "on all grants" including the Byrne JAG program. Defs.' Mem. 15, 18 (emphases omitted), Doc. 51. However, Defendants' "interpretation is contrary to the plain meaning of the statutory language." *Chicago*, 888 F.3d at 284. The problem for Defendants is that the italicized language begins with the word "including," which "by definition is used to designate that a . . . thing is part of a particular group." *Id.* (citing *Including*, Oxford English Dictionary (3d ed. 2016)). Thus, the Assistant Attorney General can only place special conditions or determine priority purposes to the extent that power already "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). In other words, the italicized language is not a "stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants"; rather, such authority must come from elsewhere in the chapter or have been delegated by the Attorney General, who may only delegate it to the extent that he has such power himself. *Chicago*, 888 F.3d at 285. Because Defendants cannot cite another provision granting that power to the Assistant Attorney General or the Attorney General, § 10102(a)(6) does not provide authority for imposing any of the challenged conditions.

Moreover, the statutory structure indicates that § 10102(a)(6) is "an unlikely place for Congress to place a power as broad" as Defendants would have it. *Id.* The "including" clause is tacked on to a catch-all provision at the end of a list of explicit powers, which "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." *Id.* It would also be "inconsistent with the goal of the statute to support the needs of law enforcement while providing flexibility to state and local governments" and "at odds with the nature of the Byrne JAG grant, which is a formula grant rather than a discretionary grant." *Id.* "[I]t 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 . . . 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." *Id.* at 286.[9]

ii. 34 U.S.C. § 10153(a)(5)(D)

Defendants contend that § 10153(a)(5)(D) provides authority for imposing the Compliance Condition only. This section provides that applicants for Byrne JAG funds must submit an application with a number of certifications, assurances, and details, including:

> 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—
>
> (A) the programs to be funded by the grant meet all the requirements of this part;
>
> (B) all the information contained in the application is correct;
>
> (C) there has been appropriate coordination with affected agencies; and
>
> (D) the applicant will comply with all provisions of this part and *all other applicable Federal laws*.

34 U.S.C. § 10153(a)(5) (emphasis added).

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[9] The Court need not address whether Defendants' "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" that does not apply to the challenged conditions. *Chicago*, 888 F.3d at 285 n.2 (citing *Philadelphia*, 280 F. Supp. 3d at 617).

Defendants argue that 8 U.S.C. § 1373 is an "applicable Federal law," with which applicants must certify compliance. Defendants contend that § 10153(a)(5)(D) covers all federal laws applicable to Byrne JAG applicants, i.e., states and localities (as opposed to private individuals or entities). Defs.' Mem. 20. They further contend that the authority to require a "certification, made in a form acceptable to the Attorney General," 34 U.S.C. § 10153(a)(5),[10] constitutes "a delegation to the Attorney General to determine whether a particular federal law constitutes an 'applicable Federal law[],'" Defs.' Mem. 19 (alteration in original) (quoting 34 U.S.C. § 10153(a)(5)(D)).

Plaintiffs respond that "applicable Federal laws" refers to only those laws that expressly apply to federal grants. Pls.' Mem. 26, Doc. 22. For example, prohibitions on discrimination in "any program or activity receiving Federal financial assistance" would meet this definition, 42 U.S.C. § 2000d, while the provisions concerning communications with immigration authorities in § 1373 would not. They argue that Congress could not have intended to require applicants to certify, under threat of criminal prosecution, their compliance with every possible law that could conceivably apply to them.[11] They argue that such a broad interpretation would be inconsistent with the structure of § 10153, which sets forth largely technical

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[10] *See also* 34 U.S.C. § 10153(a) (providing that applicants "shall submit an application to the Attorney General . . . in such form as the Attorney General may require").

[11] While vast, presumably the range of applicable laws would be limited by the constitutional principle that the conditions must "bear some relation to the purpose of the federal funds." *Chicago*, 264 F. Supp. 3d at 945 (citing *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987)).

and ministerial application requirements pertaining to the grant itself;[12] past practice of DOJ, which understood applicable laws to have the narrower construction;[13] and the goal of the program to reduce administrative burdens in the grant process.[14] Pls.' Mem. 27–29; *see also* ACLU's Amici Br. 3–8, Doc. 71.

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[12] *See* 34 U.S.C. § 10153(a)(1) (Byrne JAG funds may not be used to supplant state or local funds); *id.* § 10153(a)(2)–(3) (application must be submitted for review and public comment); *id.* § 10153(a)(4) (applicant must report programmatic and financial data during the grant period); *id.* § 10153(a)(6) (applicant must set forth plan for how the funds will be used).

[13] *See* Dep't of Justice Study Grp., *Report to the Attorney General: Restructuring the Justice Department's Program of Assistance to State and Local Governments for Crime Control and Criminal Justice System Improvement* 8–9 (1977) (identifying "over twenty Federal statutes impos[ing] controls and limitations on the use of [Law Enforcement Assistance Administration] grant funds"), Holt Decl. Ex. 22, Doc. 33-25; *see also* New York State's FY 2016 Byrne JAG Grant, Trautman Decl. Ex. B (requiring compliance with certain laws applicable to federal grants, such as those pertaining to nondiscrimination, but not § 1373). Even a certification form currently in use still appears to equate "applicable federal statutes and regulations" with "federal statutes and regulations applicable to the award." Holt Decl. Ex. 17, at AR-01037 (emphasis added) (certifying that "(a) the Applicant will comply with all award requirements and all federal statutes and regulations *applicable to the award*; (b) the Applicant will require all subrecipients to comply with all applicable award requirements and all applicable federal statutes and regulations").

[14] *See* S. Rep. No. 96-142, at 8 (1979) (listing "reduced red tape" as the first goal of reforms to a predecessor program); *Federal Assistance to State and Local Criminal Justice Agencies: Hearing on S. 1245, S. 1882, S. 3270, and S. 3280 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 95th Cong. 383 (1978) (letter of Att'y Gen. Griffin B. Bell) (stating that the bill was "designed" to "simplify[] the grant process"), Holt Decl. Ex. 25, Doc. 33-28.

Plaintiffs further argue that the Attorney General's authority to determine the "form" of the application cannot constitute authority to alter the substantive requirements of compliance with particular laws, 34 U.S.C. § 10153(a)(5), and in any event, Congress could not have intended to delegate the authority to determine what constitutes an "applicable" law, because otherwise it would have done so explicitly, as it has done in other statutes.[15] Pls.' Reply 16–17, Doc. 56.

On this final point, Plaintiffs are surely correct that the Attorney General's authority to determine the "form" of the application does not include the ability to dictate the "substance" of which laws an applicant must comply with as a condition of grant funding. *Form*, Black's Law Dictionary (10th ed. 2014) (defining "form" as "[t]he outer shape, structure, or configuration of something, as distinguished from its substance or matter"). "There is no indication that an acceptable form of the certification would encompass additional substantive compliance with laws not directly required by Congress." *San Francisco*, 2018 WL 4859528, at *18; *see Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (stating that "[i]t would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority . . . but to have given him, just by implication," much broader authority). If Congress wanted to delegate this substantive authority to the Attorney General, it would have done so explicitly. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say,

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[15] *See* 26 U.S.C. § 432(e)(9)(E)(iv)(II) (referencing compliance with "other applicable law, *as determined by the Secretary of the Treasury*" (emphasis added)).

hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

However, the question remains as to the scope of "applicable" federal laws with which applicants must certify compliance: Does this mean laws applicable to the state or locality, or laws applicable to the grant? "Both positions are plausible," *Chicago*, 264 F. Supp. 3d at 944, and "the question is a 'close call,'" *Philadelphia*, 280 F. Supp. 3d at 619. On one hand, "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." *Chicago*, 264 F. Supp. 3d at 945. And the command that "the applicant will comply with . . . all other applicable Federal laws," by virtue of the proximity of the words, suggests laws that are applicable to the "applicant." 34 U.S.C. § 10153(a)(5)(D). But this does not answer the question of whether this means laws applicable to the applicant as a state or locality, or laws applicable to the applicant *as an applicant for federal grant funding*. The structure of § 10153, which concerns requirements pertaining to the grant and the application, points toward the latter reading. *See San Francisco*, 2018 WL 4859528, at *17 ("[B]ecause all the other conditions in Section 10153(a) apply to the grant itself, the statutory context does not support imposing a condition beyond the grant administration process.").

In any event, it is unclear from the statutory language whether Congress intended to condition Byrne JAG funds on compliance with all federal laws applicable to the state or locality or compliance with all federal laws applicable to federal grants. What is clear, however, is that "if Congress intends to impose a condition on the grant of federal moneys, it must do

so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* Under this "clear notice" rule, the Court must view the statute "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds," and "must ask whether such a state official would clearly understand that one of the obligations of the Act is the [purported] obligation," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), i.e., to comply with all federal laws "applicable" to the state. "This malleable language does not provide the 'clear notice that would be needed to attach such a condition to a State's receipt of . . . funds.'" *Philadelphia*, 280 F. Supp. 3d at 647 (quoting *Arlington Cent.*, 548 U.S. at 300). Conversely, given the structure of § 10153, which concerns the requirements of the application and the grant, as well as the parties' long history of treating "applicable Federal laws" as encompassing laws applicable to federal grants, grant recipients, and the grant-making process, such a construction gives fair notice of the terms of the funding. Accordingly, the Court concludes that "applicable Federal laws" for purposes of 34 U.S.C. § 10153(a)(5)(D) means federal laws applicable to the grant.

As the parties do not dispute, § 1373 is not one of those applicable laws under this narrower construction of § 10153(a)(5)(D). Accordingly, Defendants did not have statutory authority to condition Byrne JAG funding on compliance with § 1373. But even if Defendants' broader interpretation of § 10153(a)(5)(D) carried the day, § 1373 would still not be an "applica-

ble" law because it is unconstitutional, as will be explained below, and "no matter the breadth of this provision, it will never capture an unconstitutional statute." *Chicago*, 321 F. Supp. 3d at 875.

B. Section 1373 and the Tenth Amendment

i. The Anticommandeering Doctrine

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992).

The Tenth Amendment embodies an "anticommandeering principle," which "withhold[s] from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018); *see Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); *New York*, 505 U.S. at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

There are three significant purposes served by the anticommandeering doctrine. First, by "divid[ing] authority between federal and state governments," it promotes a "healthy balance of power between the States and the Federal Government [that reduces] the risk of tyranny and abuse from either front." *Murphy*,

138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 181). Second, the anticommandeering doctrine supports "political accountability," because "if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred." *Id.* And third, the anticommandeering rule "prevents Congress from shifting the costs of regulation to the States," because "if Congress can compel the States to enact and enforce its program, Congress need not" "weigh the expected benefits of the program against its costs." *Id.*

Most recently, in *Murphy*, the Supreme Court held that the Professional and Amateur Sports Protection Act ("PASPA"), which prohibited states from authorizing sports gambling, violated the anticommandeering rule because it "unequivocally dictates what a state legislature may and may not do." *Id.* at 1478. The Court explained that PASPA operated "as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals," which was a "direct affront to state sovereignty." *Id.*

In *Murphy*, the supporters of PASPA argued that commandeering occurs only when Congress "command[s] 'affirmative' action as opposed to imposing a prohibition," but the Supreme Court rejected that distinction as "empty." *Id.* "The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.*

There are two important limits on the anticommandeering doctrine. First, "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Id.* Thus, Congress may enact laws

that "appl[y] equally to state and private actors." *Id.* at 1479.

Second, commandeering does not occur when Congress validly preempts state law through the Supremacy Clause. In preemption, "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Id.* at 1480. To qualify as a preemption provision, the law "must represent the exercise of a power conferred on Congress by the Constitution," and it "must be best read as one that regulates private actors" because "the Constitution 'confers upon Congress the power to regulate individuals, not States.'" *Id.* at 1479 (quoting *New York*, 505 U.S. at 166). Although a preemption provision that prohibits contrary state law "might appear to operate directly on the States," in fact, it "confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints" and "to be free from any other . . . requirements." *Id.* at 1480–81. In sum, "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States." *Id.* at 1481. Thus, the PASPA provision prohibiting state authorization of sports gambling, which did not confer any federal rights nor impose any federal restrictions on private actors, could not be understood "as anything other than a direct command to the States," which put it firmly in the category of impermissible commandeering and not permissible preemption. *Id.*

ii. Section 1373

Section 1373 provides, in relevant part:

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

8 U.S.C. § 1373(a)–(b).

In sum, § 1373 "prohibits any 'government entity or official' from restricting any other 'government entity

or official' from exchanging immigration status information" with immigration authorities.[16] *Chicago*, 321 F. Supp. 3d at 868. Plaintiffs contend that this command to state and local governments offends the Tenth Amendment's anticommandeering rule.

The Second Circuit has once before passed on the constitutionality of § 1373, in *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), nineteen years before *Murphy* was decided. There, the court rejected the City's facial challenge under the Tenth Amendment to § 1373 and the related provision 8 U.S.C. § 1644, which had conflicted with a mayoral executive order that prohibited City employees from transmitting immigration information to federal immigration authorities specifically, except in certain circumstances.[17] *Id.* at 31–32. Crucially, the court reasoned that through these provisions,

> Congress has not compelled state and local governments to enact or administer any

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[16] For purposes of this case, subsections (a) and (b) essentially overlap. Subsection (a) applies the prohibition on restricting government communication to any "government entity or official," and subsection (b) applies a similar prohibition to any "person or agency." 8 U.S.C. § 1373 (a)–(b). "Subsection (b) does not meaningfully expand the statute's scope by including 'person[s]': Who but a government actor can restrict the activities of a government entity or official?" *Chicago*, 321 F. Supp. 3d at 868–69 (alteration in original).

[17] The court expressly declined to opine on whether § 1373 "would survive a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status." *City of New York*, 179 F.3d at 37. The City's current General Confidentiality Policy repealed and replaced the executive order at issue in *City of New York*. Exec. Order No. 34, § 1 (2003), Negrón Decl. Ex. A, Doc. 42-1.

> 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 [federal immigration authorities].

*Id.* at 35. The court thus drew a clear distinction "between invalid federal measures that seek to impress state and local governments into the administration of federal programs and valid federal measures that prohibit states from compelling passive resistance to particular federal programs," and concluded that the challenged provisions fell into the latter category. *Id.*

This Court is, of course, required to follow Second Circuit precedent. But this Court is also duty bound to follow the U.S. Constitution as authoritatively interpreted by the Supreme Court. "When 'a subsequent decision of the Supreme Court so undermines [Second Circuit precedent] that it will almost inevitably be overruled,' the District Court is bound by the Supreme Court's ruling and not by the Second Circuit's prior decisions." *Austin v. United States*, 280 F. Supp. 3d 567, 572 (S.D.N.Y. 2017) (alteration in original) (quoting *United States v. Emmenegger*, 329 F. Supp. 2d 416, 429 (S.D.N.Y. 2004)).

It is clear that *City of New York* cannot survive the Supreme Court's decision in *Murphy*. *See Chicago*, 321 F. Supp. 3d at 873 ("*Murphy*'s holding deprives *City of New York* of its central support . . . ."); *United States v. California*, 314 F. Supp. 3d 1077, 1108 (E.D. Cal.

2018) ("[T]he Supreme Court's holding in *Murphy* undercuts portions of the Second Circuit's reasoning [in *City of New York*] and calls its conclusion into question."). *City of New York* rested on the premise that § 1373 does not "affirmatively conscript[] states, localities, or their employees into the federal government's service" or "directly compel states or localities to require or prohibit anything," and rather merely "prohibit[s] state and local governmental entities or officials" from taking certain action. *City of New York*, 179 F.3d at 35. In other words, *City of New York* depended on "the distinction it draws between affirmative obligations and proscriptions." *Chicago*, 321 F. Supp. 3d at 873. That is precisely the distinction that the Supreme Court in *Murphy* characterized as "empty." *Murphy*, 138 S. Ct. at 1478. Whether Congress attempts to command affirmative action or impose a prohibition, "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.* Accordingly, this Court is not bound by *City of New York* and must follow the Supreme Court's clear direction in *Murphy*.

It necessarily follows that § 1373 is unconstitutional under the anticommandeering principles of the Tenth Amendment. Section 1373 "unequivocally dictates what a state legislature may and may not do." *Id.* Section 1373's prohibition on states and localities from restricting their officials from communicating with immigration authorities constitutes a "direct order[]" to states and localities in violation of the anticommandeering rule. *Id.*

The purposes served by the anticommandeering rule illustrate why it compels this result. First, § 1373 impinges on Plaintiffs' sovereign authority and their citizens' liberty to be regulated under their preferred

state and local policies. Section 1373 requires Plaintiffs "to submit control of their own officials' communications to the federal government and forego passing laws contrary to Section 1373." *San Francisco*, 2018 WL 4859528, at *15. "[T]he statute prevents [Plaintiffs] from extricating [themselves] from federal immigration enforcement," *Chicago*, 321 F. Supp. 3d at 870, and thereby denies Plaintiffs the "critical alternative" required by the Tenth Amendment to "decline to administer the federal program," *New York*, 505 U.S. at 176–77.[18]

Second, § 1373 undermines political accountability because "the statute makes it difficult for citizens to distinguish between state and federal policy in the immigration context by barring states from adopting policies contrary to those preferred by the federal government." *Chicago*, 321 F. Supp. 3d at 870. Faced with the "appearance of a uniform federal/state/local immigration enforcement policy indiscernible to [Plaintiffs'] residents," those residents cannot properly credit or blame their state or local officials when their policies are compelled by the federal government. *San Francisco*, 2018 WL 4859528, at *15.

Third, § 1373 "shifts a portion of immigration enforcement costs onto the States." *Id.* at *16. "The statute . . . forces states to allow their employees to participate in the federal scheme, shifting employee time—and thus corresponding costs—to federal

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[18] *See also* Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 Stan. L. Rev. 2029, 2046 (2018) ("Because states operate through their officials, the power of the state to decline to carry out a federal program entails the power to forbid state officials from carrying out that federal program.").

initiatives and away from state priorities." *Chicago*, 321 F. Supp. 3d at 870.

Defendants attempt to save § 1373 by claiming that it is a preemption provision, Defs.' Mem. 38–39, "but it is no such thing," *Murphy*, 138 S. Ct. at 1479. To validly preempt, the provision "must be best read as one that regulates private actors." *Id.* A preemption provision "confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints." *Id.* at 1480. Parroting back this language, Defendants claim that "Section 1373 confers upon entities or individuals a federal right to engage in certain conduct (the voluntary transmission of information to federal immigration authorities) subject only to certain federal constraints." Defs.' Mem. 39. Conspicuously absent from this recitation is the key word "*private*." That is because by its own terms, § 1373 confers this purported federal right to transmit information only on "*government* entit[ies] or official[s]." 8 U.S.C. § 1373(a) (emphasis added); *see San Francisco*, 2018 WL 4859528, at *14 ("Section 1373 . . . does not regulate private actors or provide private actors with any additional rights in the [Immigration and Nationality Act]'s statutory scheme."); *Philadelphia*, 309 F. Supp. 3d at 329 ("Given their plain language, neither Section 1373(a) nor Section 1373(b) can be best read as regulating private actors. On their face, they regulate state and local governmental entities and officials, which is fatal to their constitutionality under the Tenth Amendment."). Defendants have failed to show that § 1373 regulates private actors at all, let alone that it is "best

read as . . . regulat[ing] private actors." *Murphy*, 138 S. Ct. at 1479.[19]

Next, Defendants attempt to fit § 1373 into a commandeering carve-out for statutes facilitating "the provision of information to the Federal Government," relying on dicta in *Printz*, 521 U.S. at 918; Defs.' Mem. 40. This argument is similarly unavailing. First, the Supreme Court has never actually held that such an exception to the anticommandeering doctrine exists. *See Printz*, 521 U.S. at 918 ("[Some statutes], which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case."); *see also id.* at 936 (O'Connor, J., concurring) ("[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.").

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[19] Defendants' reliance on *Arizona v. United States*, 567 U.S. 387 (2012), is misplaced. While the federal government has "broad, undoubted power over the subject of immigration and the status of aliens," *id.* at 394, *Arizona* underscores that federal immigration laws may preempt because they "not only impose federal registration obligations on *aliens* but also confer a federal right to be free from any other registration requirements," *Murphy*, 138 S. Ct. at 1481 (emphasis added) (discussing *Arizona*). Here, Defendants have not shown that § 1373 imposes any obligations or confers any rights on aliens, let alone that it is "best read" as doing so. *Id.* at 1479. To the contrary, "[o]n [its] face, [§ 1373] regulate[s] state and local governmental entities and officials." *Philadelphia*, 309 F. Supp. 3d at 329.

Second, even if a commandeering exception for certain information reporting did exist, § 1373 would not qualify for it. "Section 1373 is more than just an information-sharing provision," *Chicago*, 321 F. Supp. 3d at 872, because it prevents states and localities from doing anything that "in any way restrict[s]" the flow of certain information to immigration authorities, 8 U.S.C. § 1373(a). As such, § 1373 prevents state and local policymakers from enacting a wide range of information-governance rules, *Chicago*, 321 F. Supp. 3d at 872, and even prevents them from "disciplining an employee for choosing to spend her free time or work time assisting in the enforcement of federal immigration laws," *Philadelphia*, 280 F. Supp. 3d at 651. Section 1373 thus presents a graver intrusion into state sovereignty than merely requiring the reporting of certain data. *San Francisco*, 2018 WL 4859528, at *16; *Chicago*, 321 F. Supp. 3d at 872.[20]

The Court acknowledges Defendants' argument that access to the information covered by § 1373 would

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[20] Defendants also suggest that § 1373 is permissible because it "regulates the States as the owners of data bases," as the Driver's Privacy Protection Act of 1994 ("DPPA") validly did in *Reno v. Condon*, 528 U.S. 141, 151 (2000). But it is clear that the DPPA was constitutional because it "applied equally to state and private actors." *Murphy*, 138 S. Ct. at 1479 (discussing *Reno*); *see Reno*, 528 U.S. at 151 ("The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce."). Here, as previously discussed, § 1373 applies only to state actors. *See Chicago*, 321 F. Supp. 3d at 869 ("Section 1373 does not evenhandedly regulate activities in which both private and government actors engage. Thus, the saving grace of *Reno* does not apply here.").

assist them in their immigration enforcement duties.[21] Defs.' Mem. 40–41. However, a "federal need for state information does not automatically free the federal government of the sometimes laborious requirement to acquire that information by constitutional means." *Chicago*, 321 F. Supp. 3d at 872. "[T]he federalist diffusion of power necessarily creates political barriers and inefficiencies. But these inefficiencies are part of federalism's intended structure, not imperfections to be remedied by judicially-wrought consolidation of power." *Id.*

Finally, Defendants contend that the Tenth Amendment does not apply to the challenged conditions here because the Byrne JAG program is a voluntary federal grant, and "a perceived Tenth Amendment limitation on congressional regulation of state affairs d[oes] not concomitantly limit the range of conditions legitimately placed on federal grants." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987); Defs.' Mem. 36–37. To be sure, Congress may offer funds conditioned on compliance with specified conditions to "induce the States to adopt policies that the Federal Government itself could not impose," such as raising the state drinking age to 21. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 537 (2012) (citing *Dole*, 483 U.S. at 205–06). But Defendants' point misunderstands the nature of Plaintiffs' challenge. Congress may impose "conditions *legitimately* placed on federal grants," *Dole*, 483 U.S. at 210 (emphasis added), but Defendants—an agency and official of the Executive

[21] For instance, Defendants claim that this information assists federal officials in interrogating aliens as to their status, 8 U.S.C. § 1357(a)(1), removing certain deportable aliens, *id.* §§ 1227(a), 1228, or detaining certain deportable aliens when they are released from criminal custody, *id.* § 1226(c)(1).

Branch administering a nondiscretionary formula grant—did not have statutory authority to legitimately place the three conditions here. With respect to the Compliance Condition, Defendants claimed statutory authority on the basis that § 1373 was an "applicable Federal law[]" requiring compliance under § 10153(a)(5)(D). "As an unconstitutional law, Section 1373 automatically drops out of the possible pool of 'applicable Federal laws' described in the Byrne JAG statute." *Chicago*, 321 F. Supp. 3d at 875. "Thus, the Compliance Condition does not fail because it violates the anticommandeering doctrine. It fails because the statutory authority on which it depends sanctions only the imposition of 'applicable' federal laws; because Section 1373 no longer falls within that category, the authority for the Compliance Condition has been stripped away." *Id.* at 876.

Accordingly, the Court holds that 8 U.S.C. § 1373(a)–(b), insofar as it applies to states and localities, is facially unconstitutional under the anticommandeering doctrine of the Tenth Amendment.[22] *San Francisco*,

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[22] This holding, of course, does not disturb § 1373 to the extent it regulates the activities of the federal government. *See* 8 U.S.C. § 1373(a)–(b) (imposing prohibitions on "Federal . . . government entit[ies] or official[s]"); *see also id.* § 1373(c) (requiring that federal immigration authorities respond to inquiries); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006))); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1049 (9th Cir. 2007) (recognizing that "some of the provisions [of a statute] might be facially invalid, and [others] might not").

2018 WL 4859528, at *17; *Chicago*, 321 F. Supp. 3d at 872; *Philadelphia*, 309 F. Supp. 3d at 331.

C. Separation of Powers

In light of Defendants' lack of authority to impose the three conditions on federal funding, Plaintiffs contend that the conditions violate the separation of powers. Pls.' Mem. 41–42.

The Constitution vests Congress with the spending power to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions." *NFIB*, 567 U.S. at 537. Congress may also "delegate such authority to the Executive Branch." *Chicago*, 888 F.3d at 283.

But for the reasons explained above, Congress has neither conditioned Byrne JAG funds on the three conditions here nor delegated the authority to impose these conditions to the Executive Branch. The Executive Branch does not have the power of the purse and "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." *Id.*; *see also City & County of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) ("Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals."). The Byrne JAG statute provides "a firm commitment" of funding according to statutorily prescribed criteria, and the Executive Branch does not have "the seemingly limitless power to withhold funds" from grantees who refuse to accept its unilaterally imposed condi-

tions. *Train v. City of New York*, 420 U.S. 35, 45–46 (1975).

The separation of powers acts as a check on tyranny and the concentration of power. "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." *Chicago*, 888 F.3d at 277. Because that is what Defendants attempted to do here by imposing the three challenged conditions, these conditions violate the separation of powers.[23] *Id.*; *San Francisco*, 2018 WL 4859528, at *33; *Philadelphia*, 309 F. Supp. 3d at 321.

D. Arbitrary and Capricious Agency Action

Aside from the three conditions' statutory and constitutional flaws, Plaintiffs also contend that the conditions are arbitrary and capricious. Pls.' Reply 24–28.

Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm*

[23] Because the Court concludes that the separation of powers prevents Defendants from imposing the three conditions at all, the Court need not consider Plaintiffs' argument that the conditions are impermissibly unrelated or ambiguous under the Spending Clause. *See* Pls.' Reply 38–43 & n.34.

*Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). When an agency changes its policy, the agency must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

In support of the decision to impose the three conditions, Defendants point to five documents in the administrative record: (1) a 2007 audit report by DOJ's Office of the Inspector General on the cooperation of jurisdictions participating in the State Criminal Alien Assistance Program in the removal of criminal aliens ("2007 OIG Audit"), Holt Decl. Ex. 9, at AR-00001–109, Doc. 33-9; (2) a May 2016 memorandum from DOJ's Office of the Inspector General regarding alleged violations of § 1373 by grant recipients ("2016 OIG Memo"), Holt Decl. Ex. 9, at AR-00366–375; (3) a July 2016 memorandum from DOJ's Office of Justice Programs responding to the aforementioned memo ("2016 OJP Memo"), Holt Decl. Ex. 10, at AR-00384–391, Doc. 33-10; (4) a one-page "Backgrounder" on the FY 2017 Byrne JAG conditions distributed to the media "on background," Holt Decl. Ex. 17, at AR-00993, Doc. 33-17; and (5) a July 2017 press release announcing the conditions that accompanied the

Backgrounder ("Press Release"), Holt Decl. Ex. 17, at AR-00992.[24] *See* Defs.' Mem. 24–28.

Defendants claim that the 2007 OIG Audit described a high level of cooperation on immigration between the federal and state governments, which later deteriorated. The audit concluded that "[t]he 99 jurisdictions that responded to the questionnaire stated almost unanimously that there was no legislation or policy impeding the ability of local officers and agencies to communicate with ICE on immigration-enforcement matters," and noted that "many state, county, and local law enforcement agencies are unwilling to initiate immigration enforcement but have policies that suggest they are willing to cooperate with ICE when they arrest individuals on state or local charges and learn that those individuals may be criminal aliens." AR-00040–41, -00044.

The 2016 OIG Memo reported on information that "differs significantly from what OIG personnel found nearly 10 years ago during the earlier audit." AR-00367 n.1. The memo stated that the 10 jurisdictions reviewed had laws or policies that "limited in some way the authority of the jurisdiction to take action with regard to ICE detainers," and opined that certain policies "may be causing local officials to believe and apply the policies in a manner that prohibits or restricts cooperation with ICE in all respects." AR-

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[24] Defendants also cite a declaration from Francisco Madrigal of Immigration and Customs Enforcement, Doc. 52, but because it was not part of the administrative record, the Court may not consider it for purposes of arbitrary-and-capricious review. *See Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 279 (2d Cir. 2015) (stating that review is "limited to examining the administrative record" (quoting *NRDC v. Muszynski*, 268 F.3d 91, 97 (2d Cir. 2001))).

00369, -00373. The memo suggested that DOJ "consider," among other things, "[r]equir[ing] grant applicants to provide certifications specifying the applicants' compliance with Section 1373, along with documentation sufficient to support the certification." AR-00374.

The 2016 OJP Memo concluded that "Section 1373 is an applicable federal law for the purposes of the [Byrne JAG] program," and stated that OJP had provided guidance to "grantees and applicants with clear direction on the requirements of Section 1373." AR-00384. The memo noted that "OJP already requires all applicants for any grant program electronically to acknowledge and accept" a document that "assures and certifies compliance with all applicable Federal statutes, regulations, policies, guidelines, and requirements." AR-00385.

The Backgrounder announced that DOJ would impose the Compliance Condition, Access Condition, and Notice Condition on FY 2017 Byrne JAG grantees, stating that these conditions have "the goal of increasing information sharing between federal, state, and local law enforcement" so that "federal immigration authorities have the information they need to enforce the law and keep our communities safe." AR-00993. The Backgrounder stated that some grantees "have adopted policies and regulations that frustrate the enforcement of federal immigration law, including by refusing to cooperate with federal immigration authorities in information sharing about illegal aliens who commit crimes," and the new conditions will "prevent the counterproductive use of federal funds for policies that frustrate federal immigration enforcement." *Id.* Similarly, the Press Release declared DOJ's intent to "encourage these 'sanctuary' jurisdictions to

change their policies and partner with federal law enforcement to remove criminals." AR-00992.

Conspicuously absent from all of these documents is any discussion of the negative impacts that may result from imposing the conditions, and the record is devoid of any analysis that the perceived benefits outweigh these drawbacks. This absence is particularly glaring given that Assistant Attorney General Peter J. Kadzik, in a 2015 letter to Senator Richard Shelby, stated that withholding Byrne JAG funding to jurisdictions that do not meet immigration-related conditions "would have a significant, and unintended, impact on the underserved local populations who benefit from these programs, most of whom have no connection to immigration policy."[25] Holt Decl. Ex. 9, at AR-00113. Defendants did not consider whether the perceived benefits of the conditions outweighed these negative impacts on underserved local populations or whether such impacts could be mitigated. Even though Defendants were aware of these detrimental effects, they are not addressed anywhere in the administrative record. While one may well argue about the weight to be given to such evidence relative to other factors, it cannot simply be ignored. *See El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (holding that agency action was arbitrary and capricious where the agency "failed adequately to address relevant evidence before it"); *El Paso Elec. Co. v. FERC*, 201 F.3d 667, 672 (5th Cir.

[25] Assistant Attorney General Kadzik also noted that "[i]n many cases . . . the Department does not have the discretion to suspend funding at all," because "many Department grant funds are formula-based, with the eligibility criteria (and related penalties, if any) set firmly by statute." AR-00113.

2000) (holding that the agency could not "rely on the potential advantages of [the action] . . . while ignoring the potential disadvantages"). In addition, the documents proffered by Defendants do not reflect that they in any way considered whether jurisdictions' adherence to the conditions would undermine trust and cooperation between local communities and government, or the extent to which this would harm public welfare or frustrate local law enforcement, which is the very thing that the Byrne JAG program is supposed to assist. *See Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency has overlooked 'an important aspect of the problem' . . . turns on what a relevant substantive statute makes 'important.'").

Defendants "entirely failed to consider an important aspect of the problem" by failing to recognize how the conditions would harm local populations, undermine relationships between local communities and law enforcement, and "interfere[] with local policies that promote public health and safety." *Philadelphia*, 280 F. Supp. 3d at 625 (quoting *State Farm*, 463 U.S. at 43). Accordingly, the three challenged conditions are arbitrary and capricious.

E. Mandamus Relief

The States seek mandamus relief compelling Defendants to reissue their award letters without the three unlawful conditions and to disburse their FY 2017 awards without regard to those conditions.[26] Pls.' Mem. 47–48.

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[26] As a result of the preliminary injunction obtained by the U.S. Conference of Mayors, of which the City is a member, the City obtained its FY 2017 Byrne JAG award and intends to withdraw its request for mandamus relief, as it confirmed at oral

Under the Mandamus Act, the Court has jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus relief is appropriate only where "(1) the plaintiffs have a right to have the act performed, (2) the defendant is under a clear nondiscretionary duty to perform the act requested, and (3) plaintiff has exhausted all other avenues of relief." *City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984).

Defendants object to mandamus relief on the grounds that they are not legally required to issue the awards. Defs.' Mem. 51. They point out that the Byrne JAG statute provides that the Attorney General "may" make grants for criminal justice programs. 34 U.S.C. § 10152(a)(1). The full text of this provision reads:

> (a) Grants authorized
>
> (1) In general
>
> From amounts made available to carry out this part, the Attorney General may, in accordance with the formula established under section 10156 of this title, make grants to States and units of local government, for use by the State or unit of local government to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of the following programs:

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argument. *See* City's Oct. 23, 2018 Letter, Doc. 65; *see also U.S. Conference of Mayors*, slip op. at 2; *Evanston*, slip op. at 11.

> (A) Law enforcement programs.
>
> (B) Prosecution and court programs.
>
> (C) Prevention and education programs.
>
> (D) Corrections and community corrections programs.
>
> (E) Drug treatment and enforcement programs.
>
> (F) Planning, evaluation, and technology improvement programs.
>
> (G) Crime victim and witness programs (other than compensation).
>
> (F) Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.

*Id.*

As noted above, the Byrne JAG grant is "a formula grant rather than a discretionary grant." *Chicago*, 888 F.3d at 285. Thus, in the context of the structure of the statute and the nondiscretionary nature of the Byrne JAG formula grant, the single word "may" does not support the proposition that the Attorney General may withhold grants entirely. Rather, this provision means that the Attorney General may issue grants only for the statutorily prescribed purposes.[27] The mandatory nature of this program is clear from

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[27] The subsection heading confirms that the provision is meant to list the particular "[g]rants authorized." 34 U.S.C. § 10152(a); *see Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, 'they supply cues' as to what Congress intended." (citations omitted)).

§ 10156, which provides that "the Attorney General *shall* . . . allocate" funds pursuant to the statutory formula. 34 U.S.C. § 10156(a)(1) (emphasis added); *see San Francisco*, 2018 WL 4859528, at *33 ("The Byrne JAG program is a formula grant that requires the Attorney General to disburse funds annually . . . ."); *Philadelphia*, 309 F. Supp. 3d at 343–44 ("[T]he JAG statute is a formula (rather than discretionary) grant, [and] the JAG Program enabling statute is couched in mandatory language." (citation omitted)).

Defendants also suggest that they are under no statutory deadline to issue grants. Defs.' Mem. 51. However, an agency's "unreasonable delay" may be "so egregious as to warrant mandamus," which the Court assesses in light of several principles:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

*Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79–80 (D.C. Cir. 1984) (citations omitted).

As the district court in *San Francisco* concluded, "[e]ach factor supports mandamus relief for the Byrne JAG grant":

> For the first two factors, delays beyond a year time frame preclude recipients from receiving their awards when they need them to support more immediate projects or programs. The Byrne JAG program is a formula grant that requires the Attorney General to disburse funds annually . . . . Factor three favors relief because the delay impacts human health and welfare, particularly [because] Byrne JAG funds aid [law enforcement programs]. Similarly, factor five supports relief because the human welfare and community safety [programs] that [Plaintiffs'] grant funding [supports] are at risk of being discontinued for lack of funding and are prejudiced by this delay. Expediting this matter, as discussed in factor four, would not prejudicially affect the federal government's tangentially related interest in federal immigration enforcement. Finally, the sixth factor . . . would favor relief because DOJ is withholding grant funding based on conditions that violate the separation of powers.

*San Francisco*, 2018 WL 4859528, at *33–34 (citations omitted); *see also Philadelphia*, 309 F. Supp. 3d at 343 ("[I]t bears emphasis that Congress specifically set the JAG Program as an annual award, and the DOJ's delay has precluded the City from receiving the intended award at such time as the City can make timely use of it.").

Accordingly, the Court will grant the States mandamus relief compelling Defendants to reissue their award letters without the three unlawful conditions and to disburse their FY 2017 awards without regard to those conditions.

F. Injunctive Relief

Plaintiffs seek a permanent injunction to bar Defendants from imposing the three unlawful conditions. Pls.' Mem. 42–47.

A plaintiff seeking a permanent injunction must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 422 (2d Cir. 2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010)). Each of these factors is satisfied here.

As to the first two factors, Plaintiffs have demonstrated an irreparable "constitutional injury" that cannot be adequately compensated by monetary damages because Defendants have imposed on them unlawful conditions that violate the separation of powers. *San Francisco*, 2018 WL 4859528, at *30; *see Scelsa v. City Univ. of N.Y.*, 806 F. Supp. 1126, 1135 (S.D.N.Y. 1992) ("[A] constitutional deprivation constitutes per se irreparable harm."). Plaintiffs have also demonstrated that complying with the unlawful conditions would undermine trust between immigrant communities and local government, which would discourage individuals from reporting crimes, cooperating with investiga-

tions, and obtaining medical services, thereby harming public safety and welfare. *E.g.*, Pls.' 56.1 ¶¶ 184, 194. "Trust once lost is not easily restored, and as such, this is an irreparable harm for which there is no adequate remedy at law." *Chicago*, 321 F. Supp. 3d at 877–78. Furthermore, "the Hobson's choice that now confronts [Plaintiffs]—whether to suffer this injury or else decline much-needed grant funds—is not a choice at all and is itself sufficient to establish irreparable harm." *Id.* at 878.

As to the third factor, the balance of hardships weighs in favor of Plaintiffs. As just explained, the unlawful conditions impose an irreparable injury on Plaintiffs and encumber more than $29 million in grant funds that Plaintiffs would otherwise use for law enforcement and public safety purposes. On the other side of the scale, Defendants "suffer[] little hardship here because the injunction does not strip away any option [they] could otherwise exercise" in pursuit of their claimed goal of increasing cooperation on immigration matters. *Id.* at 879. "Though the Attorney General has many tools at his disposal to increase such local cooperation, conditioning the Byrne JAG grant as he has here is not one of them." *Id.*

Finally, an injunction will serve the public interest in the lawful administration of government consistent with the separation of powers. "By enjoining the unlawful Conditions, the Court acts as a check on the executive's encroachment of congressional power and thus serves the public interest by constraining the Attorney General's authority in order to preserve the Byrne JAG program as Congress envisioned." *Id.* Accordingly, Plaintiffs are entitled to a permanent injunction against the three challenged conditions.

A question remains as to the scope of the injunction. Plaintiffs seek a nationwide injunction barring Defendants from imposing the conditions on any jurisdiction, contending that unlawful agency action must be completely set aside and forcing other jurisdictions to relitigate issues that are not fact dependent would be inefficient. Pls.' Mem. 46–47. Defendants ask that injunctive relief be limited to the parties before the Court, arguing that a broader scope is unnecessary to accord relief to the parties and would short circuit the percolation of these issues in courts around the country. Defs.' Mem. 52–55.

"Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976) (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Although "the scope of a district court's equitable powers to remedy past wrongs is broad," *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971), "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs' before the court," *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Thus, "[w]here relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown," but "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (emphasis omitted).

Here, Plaintiffs have not made a sufficient showing of "nationwide impact" demonstrating that a nationwide injunction is necessary to completely accord relief to them. *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018). Moreover, the Court notes that of the courts handling the Byrne JAG litigation around the country, only one has issued a nationwide injunction, which was briefly affirmed by the Seventh Circuit, only to be stayed as to the nationwide scope pending en banc review. *See generally City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268814, at *1 (7th Cir. Aug. 10, 2018). Since then, each district court to consider a nationwide injunction against the Byrne JAG conditions has stayed the injunction's nationwide scope. *See San Francisco*, 2018 WL 4859528, at *30; *Chicago*, 321 F. Supp. 3d at 882. At this juncture, the Court will similarly limit injunctive relief to the parties before the Court and their political subdivisions.[28]

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[28] At oral argument, the States requested that, to the extent the Court limits injunctive relief to the parties, such relief also extend to the States' political subdivisions, which may be direct grantees or subgrantees of the Byrne JAG program. The political subdivisions experience the same injuries described earlier, which necessarily flow to the States by virtue of the subdivisions' position within the States' geographic boundaries and political systems, and which are compounded insofar as the States must make and monitor compliance with subdivisions' subgrants with unlawful conditions. Accordingly, the Court agrees that in order to accord complete relief to the States, an injunction must protect both the States and their political subdivisions. *See California ex rel. Becerra v. Sessions*, No. 17 Civ. 04701 (WHO), 2018 WL 6069940, at *1 (N.D. Cal. Nov. 20, 2018) (enjoining the challenged conditions from being imposed on "any California state entity" or "any California political subdivision").

IV. Conclusion

Plaintiffs' motion for partial summary judgment is GRANTED, and Defendants' motion for partial summary judgment or in the alternative to dismiss is DENIED. Specifically, the Court hereby ORDERS as follows:

1. The Notice, Access, and Compliance Conditions are ultra vires and not in accordance with law under the APA. Summary judgment is GRANTED to the States on their Counts II and III and to the City on its Count II.

2. 8 U.S.C. § 1373(a)–(b), insofar as it applies to states and localities, is facially unconstitutional under the anticommandeering doctrine of the Tenth Amendment. Summary judgment is GRANTED to the States on their Count V and to the City on its Counts V and XI.

3. The Notice, Access, and Compliance Conditions violate the constitutional separation of powers. Summary judgment is GRANTED to the States on their Count I and to the City on its Count I. The motions for summary judgment with respect to the City's Count IV (violation of the Spending Clause) are DENIED as moot.

4. The Notice, Access, and Compliance Conditions are arbitrary and capricious under the APA. Summary judgment is GRANTED to the States on their Count IV and to the City on its Count III.

5. Defendants are MANDATED to reissue the States' FY 2017 Byrne JAG award documents without the Notice, Access, or Compliance Conditions, and upon acceptance, to disburse those awards as they would in the ordinary course without regard to those conditions.

6. Defendants are ENJOINED from imposing or enforcing the Notice, Access, or Compliance Conditions for FY 2017 Byrne JAG funding for the States, the City, or any of their agencies or political subdivisions.

The Clerk of the Court is respectfully directed to terminate the motions, Docs. 56 and 88 in No. 18 Civ. 6471, and Docs. 21 and 50 in No. 18 Civ. 6474, and to update the docket as noted in the caption.

It is SO ORDERED.

Dated: November 30, 2018
New York, New York

/s/ Edgardo Ramos, U.S.D.J.
Edgardo Ramos, U.S.D.J.

**APPENDIX D**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed January 4, 2019]

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18 Civ. 6471 (ER)

18 Civ. 6474 (ER)

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STATES OF NEW YORK, CONNECTICUT, NEW JERSEY, RHODE ISLAND, and WASHINGTON, and COMMONWEALTHS OF MASSACHUSETTS and VIRGINIA,

*Plaintiffs*,

—against—

UNITED STATES DEPARTMENT OF JUSTICE, and MATTHEW G. WHITAKER, in his official capacity as Acting Attorney General of the United States,

*Defendants*.

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CITY OF NEW YORK,

*Plaintiff*,

—against—

MATTHEW G. WHITAKER, in his official capacity as Acting Attorney General of the United States, and UNITED STATES DEPARTMENT OF JUSTICE,

*Defendants*.

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ORDER

Ramos, D.J.:

On November 30,2018, the Court issued an Opinion and Order granting Plaintiffs' motion for partial summary judgment, denying Defendants' motion for partial summary judgment or in the alternative to dismiss, and granting declaratory, mandamus, and injunctive relief. Doc. 114, at 42-43, No. 18 Civ. 6471; Doc. 81, at 42-43, No. 18 Civ. 6474. Pending before the Court are the parties' requests to modify the mandamus relief ordered by the Court in Paragraph 5 of the "Conclusion" section of its Opinion and Order. Docs. 117, 119, 121, No. 18 Civ. 6471; Docs. 82, 85, 86, No. 18 Civ. 6474.

Defendants request that the mandamus relief be modified to remove the requirement that Defendants issue the FY 2017 Byrne JAG award documents without the text of the Notice, Access, or Compliance Conditions, and instead require Defendants to issue the awards without *enforcement* of those conditions, which are already enjoined pursuant to Paragraph 6. Plaintiffs do not oppose this request, but request a further modification clarifying that acceptance of the awards will not be construed as acceptance of the enjoined conditions. Defendants likewise do not oppose this additional modification. The Court agrees with the parties' proposed modifications and will order them accordingly. *See California ex rel. Becerra v. Sessions,* No. 17 Civ. 04701 (WHO), 2018 WL 6069940, at *2 (N.D. Cal. Nov. 20, 2018).

Plaintiffs also request that Defendants inform them of the expected timing of the disbursement of the Byrne JAG funds. Defendants respond that, in light of the lapse of appropriations to the Department of

Justice on December 21, 2018, Defendants cannot estimate when Plaintiffs' Byrne JAG funds will be disbursed until the appropriations are restored and Plaintiffs return their executed award letters. The Court will direct Defendants to provide such an estimate upon the occurrence of these events.

Accordingly, Paragraph 5 of the "Conclusion" section of the Court's Opinion and Order is hereby modified to read as follows: "Defendants are MANDATED to issue the States' FY 2017 Byrne JAG award documents, and upon acceptance by those jurisdictions, to disburse those awards as they would in the ordinary course but without regard to the Notice, Access, or Compliance Conditions. Acceptance of the FY 2017 awards shall not be construed as acceptance of the enjoined conditions."

Upon restoration of appropriations to the Department of Justice and Plaintiffs' acceptance of the award documents, Defendants are directed to inform Plaintiffs of the expected timing of the disbursement of their FY 2017 Byrne JAG funds. The Court expects that, upon the occurrence of these events, Defendants will disburse the funds without further delay.

The Clerk of the Court is respectfully directed to terminate the motions, Doc. 117 in No. 18 Civ. 6471, and Doc. 82 in No. 18 Civ. 6474.

It is SO ORDERED.

Dated: January 4, 2019
New York, New York

/s/Edgardo Ramos
Edgardo Ramos, U.S.D.J.

# APPENDIX E

## U.S. Constitution, amend. X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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## 8 U.S.C. § 1373.

### 8 U.S.C. § 1373. Communication between government agencies and the Immigration and Naturalization Service

#### (a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

#### (b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

**(c) Obligation to respond to inquiries**

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

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**34 U.S.C. § 10228(a).**

**34 U.S.C. § 10228. Prohibition of Federal control over State and local criminal justice agencies; prohibition of discrimination**

**(a) General rule**

Nothing in this chapter or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof.

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## 34 U.S.C. §§ 10151–10158.

### 34 U.S.C. § 10151. Name of program

#### (a) In general

The grant program established under this part shall be known as the "Edward Byrne Memorial Justice Assistance Grant Program".

#### (b) References to former programs

(1) Any reference in a law, regulation, document, paper, or other record of the United States to the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs, or to the Local Government Law Enforcement Block Grants program, shall be deemed to be a reference to the grant program referred to in subsection (a).

(2) Any reference in a law, regulation, document, paper, or other record of the United States to section 506 of this Act as such section was in effect on the date of the enactment of the Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009,1 shall be deemed to be a reference to section 505(a) of this Act as amended by the Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009.

### 34 U.S.C. § 10152. Description

#### (a) Grants authorized

##### (1) In general

From amounts made available to carry out this part, the Attorney General may, in accordance with the formula established under section 10156 of this title, make grants to States and units of local government, for use by the State or unit of local

government to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of the following programs:

(A) Law enforcement programs.

(B) Prosecution and court programs.

(C) Prevention and education programs.

(D) Corrections and community corrections programs.

(E) Drug treatment and enforcement programs.

(F) Planning, evaluation, and technology improvement programs.

(G) Crime victim and witness programs (other than compensation).

(H) Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.

**(2) Rule of construction**

Paragraph (1) shall be construed to ensure that a grant under that paragraph may be used for any purpose for which a grant was authorized to be used under either or both of the programs specified in section 10151(b) of this title, as those programs were in effect immediately before January 5, 2006.

**(b) Contracts and subawards**

A State or unit of local government may, in using a grant under this part for purposes authorized by subsection (a), use all or a portion of that grant to

contract with or make one or more subawards to one or more—

(1) neighborhood or community-based organizations that are private and nonprofit; or

(2) units of local government.

**(c) Program assessment component; waiver**

(1) Each program funded under this part shall contain a program assessment component, developed pursuant to guidelines established by the Attorney General, in coordination with the National Institute of Justice.

(2) The Attorney General may waive the requirement of paragraph (1) with respect to a program if, in the opinion of the Attorney General, the program is not of sufficient size to justify a full program assessment.

**(d) Prohibited uses**

Notwithstanding any other provision of this Act, no funds provided under this part may be used, directly or indirectly, to provide any of the following matters:

(1) Any security enhancements or any equipment to any nongovernmental entity that is not engaged in criminal justice or public safety.

(2) Unless the Attorney General certifies that extraordinary and exigent circumstances exist that make the use of such funds to provide such matters essential to the maintenance of public safety and good order—

(A) vehicles (excluding police cruisers), vessels (excluding police boats), or aircraft (excluding police helicopters);

(B) luxury items;

(C) real estate;

(D) construction projects (other than penal or correctional institutions); or

(E) any similar matters.

**(e) Administrative costs**

Not more than 10 percent of a grant made under this part may be used for costs incurred to administer such grant.

**(f) Period**

The period of a grant made under this part shall be four years, except that renewals and extensions beyond that period may be granted at the discretion of the Attorney General.

**(g) Rule of construction**

Subparagraph (d)(1) shall not be construed to prohibit the use, directly or indirectly, of funds provided under this part to provide security at a public event, such as a political convention or major sports event, so long as such security is provided under applicable laws and procedures.

**34 U.S.C. § 10153. Applications**

**(*A*)[1] In general**

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

[1] So in original. Probably should be "(a)".

form as the Attorney General may require. Such application shall include the following:

(1) A certification that Federal funds made available under this part will not be used to supplant State or local funds, but will be used to increase the amounts of such funds that would, in the absence of Federal funds, be made available for law enforcement activities.

(2) An assurance that, not fewer than 30 days before the application (or any amendment to the application) was submitted to the Attorney General, the application (or amendment) was submitted for review to the governing body of the State or unit of local government (or to an organization designated by that governing body).

(3) An assurance that, before the application (or any amendment to the application) was submitted to the Attorney General—

(A) the application (or amendment) was made public; and

(B) an opportunity to comment on the application (or amendment) was provided to citizens and to neighborhood or community-based organizations, to the extent applicable law or established procedure makes such an opportunity available.

(4) An assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require.

(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—

(A) the programs to be funded by the grant meet all the requirements of this part;

(B) all the information contained in the application is correct;

(C) there has been appropriate coordination with affected agencies; and

(D) the applicant will comply with all provisions of this part and all other applicable Federal laws.

(6) A comprehensive Statewide plan detailing how grants received under this section will be used to improve the administration of the criminal justice system, which shall—

(A) be designed in consultation with local governments, and representatives of all segments of the criminal justice system, including judges, prosecutors, law enforcement personnel, corrections personnel, and providers of indigent defense services, victim services, juvenile justice delinquency prevention programs, community corrections, and reentry services;

(B) include a description of how the State will allocate funding within and among each of the uses described in subparagraphs (A) through (G) of section 10152(a)(1) of this title;

(C) describe the process used by the State for gathering evidence-based data and developing and using evidence-based and evidence-gathering approaches in support of funding decisions;

(D) describe the barriers at the State and local level for accessing data and implementing evidence-based approaches to preventing and reducing crime and recidivism; and

(E) be updated every 5 years, with annual progress reports that—

(i) address changing circumstances in the State, if any;

(ii) describe how the State plans to adjust funding within and among each of the uses described in subparagraphs (A) through (G) of section 10152(a)(1) of this title;

(iii) provide an ongoing assessment of need;

(iv) discuss the accomplishment of goals identified in any plan previously prepared under this paragraph; and

(v) reflect how the plan influenced funding decisions in the previous year.

**(b) Technical assistance**

**(1) Strategic planning**

Not later than 90 days after December 16, 2016, the Attorney General shall begin to provide technical assistance to States and local governments requesting support to develop and implement the strategic plan required under subsection (a)(6). The Attorney General may enter into agreements with 1 or more non-governmental organizations to provide technical assistance and training under this paragraph.

**(2) Protection of constitutional rights**

Not later than 90 days after December 16, 2016, the Attorney General shall begin to provide technical assistance to States and local governments, including any agent thereof with responsibility for administration of justice, requesting support to meet the obligations established by the Sixth Amendment to the Constitution of the United States, which shall include—

(A) public dissemination of practices, structures, or models for the administration of justice consistent with the requirements of the Sixth Amendment; and

(B) assistance with adopting and implementing a system for the administration of justice consistent with the requirements of the Sixth Amendment.

**(3) Authorization of appropriations**

For each of fiscal years 2017 through 2021, of the amounts appropriated to carry out this subpart, not less than $5,000,000 and not more than $10,000,000 shall be used to carry out this subsection.

**34 U.S.C. § 10154. Review of applications**

The Attorney General shall not finally disapprove any application (or any amendment to that application) submitted under this part without first affording the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration.

**34 U.S.C. § 10155. Rules**

The Attorney General shall issue rules to carry out this part. The first such rules shall be issued not later than one year after the date on which amounts are first made available to carry out this part.

**34 U.S.C. § 10156. Formula**

**(a) Allocation among States**

**(1) In general**

Of the total amount appropriated for this part, the Attorney General shall, except as provided in paragraph (2), allocate—

(A) 50 percent of such remaining amount to each State in amounts that bear the same ratio of—

(i) the total population of a State to—

(ii) the total population of the United States; and

(B) 50 percent of such remaining amount to each State in amounts that bear the same ratio of—

(i) the average annual number of part 1 violent crimes of the Uniform Crime Reports of the Federal Bureau of Investigation reported by such State for the three most recent years reported by such State to—

(ii) the average annual number of such crimes reported by all States for such years.

**(2) Minimum allocation**

If carrying out paragraph (1) would result in any State receiving an allocation less than 0.25 percent

of the total amount (in this paragraph referred to as a "minimum allocation State"), then paragraph (1), as so carried out, shall not apply, and the Attorney General shall instead—

(A) allocate 0.25 percent of the total amount to each State; and

(B) using the amount remaining after carrying out subparagraph (A), carry out paragraph (1) in a manner that excludes each minimum allocation State, including the population of and the crimes reported by such State.

**(b) Allocation between States and units of local government**

Of the amounts allocated under subsection (a)—

(1) 60 percent shall be for direct grants to States, to be allocated under subsection (c); and

(2) 40 percent shall be for grants to be allocated under subsection (d).

**(c) Allocation for State governments**

**(1) In general**

Of the amounts allocated under subsection (b)(1), each State may retain for the purposes described in section 10152 of this title an amount that bears the same ratio of—

(A) total expenditures on criminal justice by the State government in the most recently completed fiscal year to—

(B) the total expenditure on criminal justice by the State government and units of local government within the State in such year.

**(2) Remaining amounts**

Except as provided in subsection (e)(1), any amounts remaining after the allocation required by paragraph (1) shall be made available to units of local government by the State for the purposes described in section 10152 of this title.

**(d) Allocations to local governments**

**(1) In general**

Of the amounts allocated under subsection (b)(2), grants for the purposes described in section 10152 of this title shall be made directly to units of local government within each State in accordance with this subsection, subject to subsection (e).

**(2) Allocation**

**(A) In general**

From the amounts referred to in paragraph (1) with respect to a State (in this subsection referred to as the "local amount"), the Attorney General shall allocate to each unit of local government an amount which bears the same ratio to such share as the average annual number of part 1 violent crimes reported by such unit to the Federal Bureau of Investigation for the 3 most recent calendar years for which such data is available bears to the number of part 1 violent crimes reported by all units of local government in the State in which the unit is located to the Federal Bureau of Investigation for such years.

**(B) Transitional rule**

Notwithstanding subparagraph (A), for fiscal years 2006, 2007, and 2008, the Attorney

General shall allocate the local amount to units of local government in the same manner that, under the Local Government Law Enforcement Block Grants program in effect immediately before January 5, 2006, the reserved amount was allocated among reporting and nonreporting units of local government.

**(3) Annexed units**

If a unit of local government in the State has been annexed since the date of the collection of the data used by the Attorney General in making allocations pursuant to this section, the Attorney General shall pay the amount that would have been allocated to such unit of local government to the unit of local government that annexed it.

**(4) Resolution of disparate allocations**

(A) Notwithstanding any other provision of this part, if—

(i) the Attorney General certifies that a unit of local government bears more than 50 percent of the costs of prosecution or incarceration that arise with respect to part 1 violent crimes reported by a specified geographically constituent unit of local government; and

(ii) but for this paragraph, the amount of funds allocated under this section to—

(I) any one such specified geographically constituent unit of local government exceeds 150 percent of the amount allocated to the unit of local government certified pursuant to clause (i); or

(II) more than one such specified geographically constituent unit of local government exceeds 400 percent of the amount allocated to the unit of local government certified pursuant to clause (i),

then in order to qualify for payment under this subsection, the unit of local government certified pursuant to clause (i), together with any such specified geographically constituent units of local government described in clause (ii), shall submit to the Attorney General a joint application for the aggregate of funds allocated to such units of local government. Such application shall specify the amount of such funds that are to be distributed to each of the units of local government and the purposes for which such funds are to be used. The units of local government involved may establish a joint local advisory board for the purposes of carrying out this paragraph.

(B) In this paragraph, the term "geographically constituent unit of local government" means a unit of local government that has jurisdiction over areas located within the boundaries of an area over which a unit of local government certified pursuant to clause (i) has jurisdiction.

**(e) Limitation on allocations to units of local government**

**(1) Maximum allocation**

No unit of local government shall receive a total allocation under this section that exceeds such unit's total expenditures on criminal justice

services for the most recently completed fiscal year for which data are available. Any amount in excess of such total expenditures shall be allocated proportionally among units of local government whose allocations under this section do not exceed their total expenditures on such services.

**(2) Allocations under $10,000**

If the allocation under this section to a unit of local government is less than $10,000 for any fiscal year, the direct grant to the State under subsection (c) shall be increased by the amount of such allocation, to be distributed (for the purposes described in section 10152 of this title) among State police departments that provide criminal justice services to units of local government and units of local government whose allocation under this section is less than $10,000.

**(3) Non-reporting units**

No allocation under this section shall be made to a unit of local government that has not reported at least three years of data on part 1 violent crimes of the Uniform Crime Reports to the Federal Bureau of Investigation within the immediately preceding 10 years.

**(f) Funds not used by the State**

If the Attorney General determines, on the basis of information available during any grant period, that any allocation (or portion thereof) under this section to a State for such grant period will not be required, or that a State will be unable to qualify or receive funds under this part, or that a State chooses not to participate in the program established under this part, then such State's allocation (or portion thereof) shall

be awarded by the Attorney General to units of local government, or combinations thereof, within such State, giving priority to those jurisdictions with the highest annual number of part 1 violent crimes of the Uniform Crime Reports reported by the unit of local government to the Federal Bureau of Investigation for the three most recent calendar years for which such data are available.

**(g) Special rules for Puerto Rico**

**(1) All funds set aside for Commonwealth government**

Notwithstanding any other provision of this part, the amounts allocated under subsection (a) to Puerto Rico, 100 percent shall be for direct grants to the Commonwealth government of Puerto Rico.

**(2) No local allocations**

Subsections (c) and (d) shall not apply to Puerto Rico.

**(h) Units of local government in Louisiana**

In carrying out this section with respect to the State of Louisiana, the term "unit of local government" means a district attorney or a parish sheriff.

**(i) Part 1 violent crimes to include human trafficking**

For purposes of this section, the term "part 1 violent crimes" shall include severe forms of trafficking in persons (as defined in section 7102 of title 22).

**34 U.S.C. § 10157. Reserved funds**

(a) Of the total amount made available to carry out this part for a fiscal year, the Attorney General shall reserve not more than—

(1) $20,000,000, for use by the National Institute of Justice in assisting units of local government to identify, select, develop, modernize, and purchase new technologies for use by law enforcement, of which $1,000,000 shall be for use by the Bureau of Justice Statistics to collect data necessary for carrying out this part; and

(2) $20,000,000, to be granted by the Attorney General to States and units of local government to develop and implement antiterrorism training programs.

(b) Of the total amount made available to carry out this part for a fiscal year, the Attorney General may reserve not more than 5 percent, to be granted to 1 or more States or units of local government, for 1 or more of the purposes specified in section 10152 of this title, 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 established under section 10156 of this title.

**34 U.S.C. § 10158. Interest-bearing trust funds**

**(a) Trust fund required**

A State or unit of local government shall establish a trust fund in which to deposit amounts received under this part.

**(b) Expenditures**

**(1) In general**

Each amount received under this part (including interest on such amount) shall be expended before the date on which the grant period expires.

**(2) Repayment**

A State or unit of local government that fails to expend an entire amount (including interest on such amount) as required by paragraph (1) shall repay the unexpended portion to the Attorney General not later than 3 months after the date on which the grant period expires.

**(3) Reduction of future amounts**

If a State or unit of local government fails to comply with paragraphs (1) and (2), the Attorney General shall reduce amounts to be provided to that State or unit of local government accordingly.

**(c) Repaid amounts**

Amounts received as repayments under this section shall be subject to section 10108 of this title as if such amounts had not been granted and repaid. Such amounts shall be deposited in the Treasury in a dedicated fund for use by the Attorney General to carry out this part. Such funds are hereby made available to carry out this part.