

No. 20-795

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
WILLIAM P. BARR,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Second Circuit**

**BRIEF OF CHICAGO, PROVIDENCE, THE
U.S. CONFERENCE OF MAYORS, AND THE
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION AS *AMICI CURIAE*
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether the Department of Justice lacks authority to impose immigration-related conditions on the Edward Byrne Memorial Justice Assistance Grant because Congress provided no authority for those conditions.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are two cities and two nonpartisan municipal organizations that have been involved in litigation that successfully challenged immigration-related conditions, which the Attorney General placed on the Edward Byrne Memorial Justice Assistance Grant (“JAG”) and which petitioners also challenge here.¹ *Amici* therefore have a vital interest in this

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief, in whole or in part, and no person other than *amici* contributed monetarily to its preparation or submission. All parties received notice of the

case.

Chicago, Illinois, and Providence, Rhode Island, are major American cities with significant immigrant populations. Like other local governments, Chicago and Providence are responsible for the health, safety, and welfare of their residents, and the immigration-related conditions placed upon JAG adversely affect two areas of vital interest for them: trust between local governments and immigrant residents, and federal funding for local law enforcement. To protect those interests, Chicago and Providence filed suit to challenge the imposition of those conditions and won permanent injunctions against them, which were affirmed by the United States Courts of Appeals for the Seventh Circuit and for the First Circuit.²

The U.S. Conference of Mayors (the “Conference”), founded in 1932, is the official nonpartisan organization of United States cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each city is represented in the Conference by its chief elected official, the mayor. To protect its members nationwide, the Conference, along with the City of Evanston, Illinois, filed suit to challenge the JAG conditions and obtained a membership-wide

filing of this brief more than ten days before the filing deadline and have consented in writing to the filing of this brief.

² *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020).

injunction against them.³

The International Municipal Lawyers Association (“IMLA”) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA has supported local governments as an amicus curiae in lawsuits across the country challenging the JAG conditions.

STATEMENT

Trust between Immigrants and Local Government. Immigrants are hugely important in America’s cities.⁴ Of the 15.1 million residents of New York City, Los Angeles, and Chicago, more than 5.1 million are immigrants.⁵ The New York City metropolitan area has approximately 1.1 million undocumented residents; the Los Angeles metropolitan area has approximately 925,000, and

³ *City of Evanston v. Sessions*, No. 18-cv-4853, 2018 WL 10228461 (N.D. Ill. Aug. 9, 2018).

⁴ See Americas Society/Council of the Americas, *Immigrants & Competitive Cities*, available at <https://www.as-coa.org/sites/default/files/ImmigrantsandCompetitiveCities.pdf>.

⁵ U.S. Census Bureau, 2015-2019 American Community Survey 5-Year Estimates.

Chicago's has approximately 400,000.⁶

Without cooperation of immigrant communities, local governments cannot prevent or investigate crime effectively because “[t]he moment [immigrant] victims and witnesses begin to fear that their local police will deport them, cooperation with their police then ceases.”⁷ In one study, 50% of immigrants and 67% of undocumented individuals reported they are less likely to offer information about crimes to police for fear that officers will inquire about their or others’ immigration status.⁸

Police associations have also recognized that police cooperation with federal immigration enforcement “could have a chilling effect in immigrant

⁶ Pew Research Center, *Estimates of unauthorized immigrant population* (Mar. 11, 2019), available at <https://www.pewresearch.org/hispanic/interactives/unauthorized-immigrants-by-metro-area-table/>.

⁷ *Border Insecurity: The Rise of MS-13 and Other Transnational Criminal Organizations*, Hearing before the S. Comm. on Homeland Sec. and Govt. Affairs, 115th Cong. 4 (2017) (statement of J. Thomas Manger, Chief of Police, Montgomery County, Maryland); accord National Immigration Law Center, *Austin Police Chief: Congress Should Consider Good Policy, Not Politics* (2013), available at <https://perma.cc/TJ9R-HTNS> (“Senators who propose that we should engage in immigration enforcement do not realize how this would undermine everything we do to build trust and prevent crime . . .”).

⁸ Nik Theodore, *Insecure Communities*, 5-6 (2013), available at <https://perma.cc/SMV7-FZGA>.

communities and could limit cooperation with police by members of those communities”⁹ and “undermines the trust and cooperation with immigrant communities which are essential elements of community oriented policing.”¹⁰ Moreover, “the failure to obtain . . . victim and witness cooperation could both hinder law enforcement efforts and allow criminals to freely target communities with a large undocumented population, knowing that their crimes will be less likely to be reported.”¹¹

Trust between immigrants and local government is also essential to maintaining public health, particularly during a pandemic. “The first rule of public health is to gain people’s trust to come forward: People who don’t seek care cannot be tested or treated, and their contacts won’t be traced”¹²

To ensure immigrants’ willingness to interact

⁹ International Association of Chiefs of Police, *Enforcing Immigration Law*, at 5, available at <https://perma.cc/M2J2-LDSL>.

¹⁰ *Major Cities Chiefs Association Immigration Position* (Oct. 2011), available at <https://bit.ly/2IoRh91>.

¹¹ *City of Chicago v. Sessions*, 888 F.3d 272, 280 (7th Cir. 2018)

¹² Miriam Jordan, “We’re Petrified,” N.Y. Times, Mar. 18, 2020; see also *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 341 (E.D. Pa. 2018) (recognizing “potential risks to public health if immigrants did not feel safe seeking care”).

with local officials, more than 600 counties and cities have limited their involvement in federal immigration enforcement.¹³ Chicago, for example, has for decades refined a “Welcoming City” policy to build trust with immigrant residents.¹⁴ Chicago prioritizes local crimefighting and safety over federal civil immigration infractions. “The Welcoming City Ordinance reflects the City’s determination that, as a City in which one out of five of its residents is an immigrant, ‘the cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City’s goals of protecting life and property, preventing crime and resolving problems.’”¹⁵ Other local governments have adopted similar policies.¹⁶

Importantly, these policies provide no so-called “sanctuary” from federal immigration laws. They do

¹³ Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, ¶ 12 (2017) (“*Effects of Sanctuary Policies*”), available at <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

¹⁴ Municipal Code of Chicago, Ill. § 2-173-005, et seq.

¹⁵ *Chicago*, 888 F.3d at 279.

¹⁶ *E.g.*, Phila. Exec. Order No. 5-16; N.Y.C. Exec. Order 41 (2003); N.Y.C. Admin. Code § 9-131(h)(1); Cook Cty., Ill., Res. 07-R-240; Cook Cty., Ill., Mun. Code § 46-37(b); Madison, Wis., Res. 17-00125; Oakland, Cal., Res. No. 86498 (2016) and No. 63950 (1986); Minneapolis, Minn., Code Title 2 Ch. 19.

“not interfere in any way with the federal government’s lawful pursuit of its civil immigration activities, and presence in such localities will not immunize anyone to the reach of the federal government”; “[t]he federal government can and does freely operate in ‘sanctuary’ localities.”¹⁷ Moreover, “crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties . . . controlling for population characteristics.”¹⁸

JAG Funding. JAG “is the primary provider of federal criminal justice funding to states and units of local government.”¹⁹ It allows grantees “flexibility to spend money for programs that work for them rather than to impose a ‘one size fits all’ solution.”²⁰ Local governments spend JAG funds on diverse projects. For example, Chicago earmarked 2017 JAG funds for expansion of ShotSpotter technology, which identifies the location of shooting incidents, so officers can respond more precisely. Providence applied for 2017 JAG funds to pay overtime funds for patrols in “hot spot” areas and to contract with bilingual police liaisons to assist with crisis intervention.

¹⁷ *Chicago*, 888 F.3d at 281.

¹⁸ Wong, *supra* note 13, ¶¶ 15-16.

¹⁹ JAG FY 2018 Local Solicitation at 5, *available at* <https://www.bja.gov/Funding/JAGLocal18.pdf>.

²⁰ H.R. Rep. No. 109-233, at 89 (2005).

JAG is a formula grant, requiring that the Attorney General “shall allocate” funds according to population and crime statistics.²¹ The statute affords the Attorney General only narrow discretion over non-substantive aspects of the program and authorizes him to “reserve not more than 5 percent” of the total funds for specific purposes after finding the reserve is “necessary” to address “extraordinary increases in crime” or “mitigate significant programmatic harm.”²² Nonetheless, in 2017, the Attorney General announced two new conditions on JAG funds. First, a “notice” condition requires recipients, upon request, to provide DHS notice when an alien in custody will be released. Second, an “access” condition requires recipients to permit federal agents to access correctional facilities to meet with aliens or suspected aliens to inquire about their right to remain in the country. The Attorney General also re-imposed a condition requiring certification of compliance with 8 U.S.C. § 1373.

These conditions conflicted with local policies, and local governments could not follow them without undermining their policing strategies. Grantees across the country filed suit.²³ The district court

²¹ 34 U.S.C. §§ 10152(a)(1), 10156(d)(2)(A).

²² 34 U.S.C. § 10157(b).

²³ *City of Chicago v. Sessions*, No. 17-cv-05720 (N.D. Ill.); *City of Philadelphia v. Sessions*, No. 17-cv-03894 (E.D. Pa.); *City of Los Angeles v. Sessions*, No. 17-cv-07215 (C.D. Cal.); *California*

below, and every court but the court of appeals panel in this case, concluded that the conditions are invalid and enjoined them.²⁴ The federal government has sought review of the Ninth Circuit's decision invalidating the conditions,²⁵ and petitioners seek

v. Sessions, No. 17-cv-04701 (N.D. Cal.); *City & County of San Francisco v. Sessions*, No. 18-cv-05146 (N.D. Cal.); *City of Evanston v. Sessions*, No. 18-cv-4853 (N.D. Ill.) (joined by U.S. Conference of Mayors); *Illinois v. Sessions*, No. 18-cv-04791 (N.D. Ill.); *City of Providence v. Sessions*, No. 18-cv-00437 (D.R.I.); *Oregon v. Trump*, 18-cv-01959 (D. Or.); *Colorado v. DOJ*, No. 19-cv-00736 (D. Colo.).

²⁴ *City & County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F. 3d 931 (9th Cir. 2019); *City of Philadelphia v. Attorney General*, 916 F.3d 276 (3d Cir. 2019); *Chicago*, 888 F.3d at 276-87; *Colorado v. DOJ*, 455 F. Supp. 3d 1034 (D. Colo. 2020); *Oregon v. Trump*, 406 F. Supp. 3d 940 (D. Or. 2019); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018); *City of Los Angeles v. Sessions*, No. 17-cv-07215, 2018 WL 6071072 (C.D. Cal. Sept. 13, 2018); *City of Evanston v. Sessions*, No. 18-cv-4853, 2018 WL 10228461 (N.D. Ill. Aug. 9, 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018); *Philadelphia*, 309 F. Supp. 3d at 296-97.

²⁵ *Barr v. City & County of San Francisco*, No. 20-666.

review of the Second Circuit’s lone decision upholding the conditions²⁶.

SUMMARY OF ARGUMENT

The imposition of immigration-related conditions on JAG to force local governments to aid in enforcement of federal civil immigration enforcement represents a highly politicized and novel decision by the outgoing federal administration. Thus, a high likelihood exists that the new federal administration set to take office on January 20, 2021, will choose not to continue imposing or enforcing those conditions, mooted the issue before the Court. For that reason, the Court should take no action on either the New York petitions in this case or the federal government’s petition from the Ninth Circuit’s ruling until the new administration decides how to proceed.²⁷

If the Court chooses nonetheless to take any action on those petitions, it should resolve the circuit split by denying the federal government’s petition,

²⁶ The States of New York, Connecticut, New Jersey, Rhode Island, and Washington together with the Commonwealths of Massachusetts and Virginia filed a petition for certiorari review of the Second Circuit’s decision. The City of New York separately filed a petition for review of that same decision. *City of New York v. U.S. Department of Justice*, No. 20-796. We refer to both petitions collectively as the “New York petitions.”

²⁷ *Amici* have served New York City and the parties to the Ninth Circuit case with a copy of this brief.

granting the New York petitions, and summarily reversing the Second Circuit's solitary decision upholding the conditions.

ARGUMENT

I. THE COURT SHOULD NOT ACT ON EITHER PETITION UNTIL THE NEW ADMINISTRATION DECIDES WHETHER TO IMPOSE OR ENFORCE THE CONDITIONS.

The Court should not act at this time on the petitions because a high likelihood exists that the incoming administration will choose not to impose or enforce the immigration-related JAG conditions, rendering review of the issue moot. From its beginning, the outgoing federal administration uniquely set out to withhold federal funding from local governments that prioritize cooperation with their immigrant communities over participation in the enforcement of federal immigration law. Within days of taking office, President Trump issued an executive order directing the Attorney General to ensure that such local governments “do not receive Federal funds, except as mandated by law.” Exec. Order No. 13,768 (Jan. 25, 2017). Federal courts enjoined that order as unconstitutional. *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018); *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017).

Having lost its gambit to deny all federal funds to local governments that would not bend to federal will, the outgoing administration sought to repurpose the Byrne JAG program to force local governments to capitulate by imposing new immigration-related conditions on law enforcement funds. With the exception of the panel below, courts across the country consistently rejected the outgoing administration's proffered legal bases for that arrogation of Congress's spending power. *San Francisco*, 965 F.3d at 757; *Chicago*, 961 F.3d at 887; *Providence*, 954 F.3d at 27; *Los Angeles*, 941 F. 3d at 945; *Philadelphia*, 916 F.3d at 293; *Chicago*, 888 F.3d at 287; *Colorado*, 455 F. Supp. 3d at 1040; *Oregon*, 406 F. Supp. 3d at 950; *San Francisco*, 349 F. Supp. 3d at 934; *Los Angeles*, 2018 WL 6071072, at *2; *Evanston*, 2018 WL 10228461, at *4; *Chicago*, 321 F. Supp. 3d at 874-76; *Philadelphia*, 309 F. Supp. 3d at 296-97.

Given the highly political and novel imposition of immigration-related conditions on JAG and the lack of any legal authority for those conditions, there is good reason to believe that the incoming administration will choose not to impose or enforce those conditions. The prospect that a change in federal law or policy may "prevent the problem from arising in the future" has long been viewed as good reason not to hear a case. Eugene Gressman et al., *Supreme Court Practice* 247 (9th ed. 2007) (collecting cases). Accordingly, the Court should not act on the pending petitions until the new administration has an

opportunity to make a decision that may well moot the Court's review.²⁸

II. IF THE COURT TAKES ANY ACTION, IT SHOULD DENY THE FEDERAL GOVERNMENT'S PETITION, GRANT THE NEW YORK PETITIONS, AND SUMMARILY REVERSE THE SECOND CIRCUIT.

Since the current administration began imposing immigration-related conditions on JAG, eight district courts and five courts of appeals have considered their validity. Every single one of those courts, except for the panel below, has agreed that the Attorney General lacks authority to impose them. In addition, six of the twelve Second Circuit judges who considered petitioners' request for rehearing en banc joined the other judges around the country who have concluded that the conditions are invalid. Pet. App. 82a-87a (Lohier, J., concurring); *id.* at 91a-108a (Pooler, J., dissenting); *id.* at 109a-16a (Katzman, C.J., dissenting). One of the judges below aptly summarized the state of the law: "Until today, every single circuit judge to have considered the questions

²⁸ Given the passage of time between the filing of this brief and the Court's review of it, the incoming administration may already have taken actions that moot the issue. In that event, the Court may wish to grant the New York petitions, vacate the Second Circuit's judgment, and remand for consideration of mootness. See *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

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.” Pet. App. 82a (Lohier, J., concurring).

As we explain above, the Court should not act at this time on either petition for review of the immigration-related JAG conditions. If the Court nonetheless chooses to act, the overwhelming consensus of judges across the country that the Attorney General lacks authority to impose immigration-related conditions on JAG charts a clear path for this Court. This result is so clear that plenary consideration of this case is not warranted. The Court should eliminate the sole circuit split by granting the New York petitions, summarily reversing the Second Circuit's outlier opinion, and denying the federal government's petition for review of the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, the Court should not act on the petitions seeking review of the immigration-related conditions imposed on JAG, but, if the Court does take any action, it should grant the New York petitions, summarily reverse the Second

Circuit, and deny the federal government's petition from the Ninth Circuit.

Respectfully submitted,

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December 22, 2020