No.

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Department of Justice administers the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, which provides millions of dollars in financial assistance to law enforcement in the form of grant awards to States and local governments nationwide. For Fiscal Year 2017, the Department announced two new special conditions designed to ensure that, in their programs receiving such federal assistance, grantees provide a basic level of cooperation with federal authorities with respect to aliens held in state or local criminal custody. The "notice condition" requires grantees to have a policy designed to ensure that facilities provide, upon a request by the Department of Homeland Security, advance notice of the scheduled release date and time for a particular alien. The "access condition" requires grantees to have a policy to afford federal authorities access to the grantee's facilities to meet with an alien. In addition, the Department of Justice imposed the "certification condition," requiring grantees to comply with 8 U.S.C. 1373—which generally bars state and local governments from restricting the sharing of "information regarding the citizenship or immigration status * * * of any individual" with federal immigration authorities, *ibid.*—and to certify such compliance. The questions presented are as follows:

1. Whether the Department has statutory authority to impose the notice and access conditions on grantees that accept Byrne JAG awards.

2. Whether the Department may withhold Byrne JAG funds from respondents for noncompliance with 8 U.S.C. 1373.

PARTIES TO THE PROCEEDING

Petitioners are William P. Barr, in his official capacity as Attorney General;[*] Katharine Sullivan, in her official capacity as Principal Deputy Assistant Attorney General of the Office of Justice Programs;[**] and the United States Department of Justice.

Respondents are the City and County of San Francisco, which was the plaintiff in the district court in No. 17-cv-4642 and the appellee in the court of appeals in No. 18-17308; and the State of California ex rel. Xavier Becerra, in his official capacity as Attorney General of the State of California, which was the plaintiff in the district court in No. 17-cv-4701 and the appellee in the court of appeals in No. 18-17311.

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[*] Former Attorney General Jefferson B. Sessions III was originally named as a defendant in both cases. Attorney General Barr is automatically substituted for his predecessor under this Court's Rule 35.3.

[**] Former Acting Assistant Attorney General Alan R. Hanson was originally named as a defendant in both cases. Principal Deputy Assistant Attorney General Sullivan, who is performing the functions of the office of Assistant Attorney General, is automatically substituted for former Acting Assistant Attorney General Hanson under this Court's Rule 35.3.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

City & County of San Francisco v. *Sessions*, No. 17-cv-4642 (Oct. 5, 2018)

California ex rel. Becerra v. *Sessions*, No. 17-cv-4701 (Nov. 20, 2018) (amended judgment)

United States Court of Appeals (9th Cir.):

City & County of San Francisco v. *Barr*, No. 18-17308 (July 13, 2020)

California ex rel. Becerra v. *Barr*, No. 18-17311 (July 13, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Attorney General, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 965 F.3d 753. The order of the district court (App., *infra*, 24a-113a) is reported at 349 F. Supp. 3d 924.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for

rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari to December 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 122a-133a.

STATEMENT

A. The Byrne JAG Program

1. The Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, see 34 U.S.C. 10151 *et seq.*, "is the 'primary provider' of federal grant dollars to support state and local criminal justice programs." App., *infra*, 4a. The program is administered by the Office of Justice Programs (OJP) within the Department of Justice. *Id.* at 4a-5a. Each year, OJP disburses hundreds of millions dollars in Byrne JAG awards. *New York* v. *United States Dep't of Justice*, 951 F.3d 84, 92 (2d Cir.), reh'g denied, 964 F.3d 150 (2020).

Byrne JAG funds are divided among recipients based on a statutory formula, largely premised on population and crime statistics. 34 U.S.C. 10156. Funds may be used for any purpose specified in 34 U.S.C. 10152(a)(1); see 34 U.S.C. 10152(a)(2). A recipient of a Byrne JAG award may further distribute Byrne JAG funds through subawards to localities and community organizations, and a State that receives a Byrne JAG award must distribute a portion of its grant funds to localities through subawards. 34 U.S.C. 10152(b), 10156(c).

2. Congress created the Byrne JAG program in 2006 by combining two preexisting grant programs. See Violence Against Women and Department of Justice Reauthorization Act of 2005 (DOJ Reauthorization Act),

Pub. L. No. 109-162, Tit. XI, Subtit. B, § 1111, 119 Stat. 3094. In the same statute, Congress also amended an existing statutory provision that addresses the powers of the Assistant Attorney General for OJP. 42 U.S.C. 3712 (2000), recodified as amended, 34 U.S.C. 10102. That provision had previously authorized the Assistant Attorney General for OJP (among other things) to "exercise such other powers and functions as may be vested in [him] pursuant to" Chapter 46 of Title 42 (2000)—which is now codified as Chapter 101 of Title 34—"or by delegation of the Attorney General." 42 U.S.C. 3712(a)(6) (2000). The DOJ Reauthorization Act added to that provision the clause: "including placing special conditions on all grants, and determining priority purposes for formula grants." § 1152(b), 119 Stat. 3113; see 34 U.S.C. 10102(a)(6).

Since 2006, OJP has relied on that authority to impose a variety of conditions on Byrne JAG (and other) awards, such as information-technology requirements, *e.g.*, C.A. E.R. 411 (¶¶ 26-27); protections for human research subjects, *e.g.*, *ibid.* (¶ 29); restrictions on the purchase of certain military-style equipment, *e.g.*, *id.* at 413-414 (¶¶ 45-50); requirements regarding purchases of body armor, *e.g.*, *id.* at 413 (¶¶ 38-39); and training requirements, *e.g.*, *id.* at 411 (¶¶ 32-33).

Congress has provided that an applicant for a Byrne JAG award must submit an application "in such form as the Attorney General may require," 34 U.S.C. 10153(a), and it has authorized the Attorney General to "issue rules to carry out" the program, 34 U.S.C. 10155. In addition, Congress has specified certain application requirements in the statute. 34 U.S.C. 10153(a)(1)-(6). As relevant here, the statute requires an applicant to submit with its application an "assurance" that it "shall

maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." 34 U.S.C. 10153(a)(4). The applicant also must submit a "certification, made in a form acceptable to the Attorney General," that "there has been appropriate coordination with affected agencies," and that the applicant "will comply with" the principal statutory provisions establishing the Byrne JAG program "and all other applicable Federal laws." 34 U.S.C. 10153(a)(5)(C) and (D).

B. The Challenged Conditions

These cases concern three grant conditions that OJP adopted pursuant to its statutory authority for Byrne JAG awards in Fiscal Year (FY) 2017. The conditions are designed to ensure that jurisdictions that receive federal law-enforcement funds are complying with federal laws that govern communications between state and local law enforcement and federal immigration authorities, and to ensure that those jurisdictions' programs supported by Byrne JAG funds do not obstruct the enforcement of federal immigration law with respect to aliens whom they hold in criminal custody.

1. The federal government has "broad, undoubted power over the subject of immigration and the status of aliens," and in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress has "specified which aliens may be removed from the United States and the procedures for doing so." *Arizona* v. *United States*, 567 U.S. 387, 394, 396 (2012). Congress has authorized the Department of Homeland Security (DHS) to remove an alien who is inadmissible or deportable from the United States and authorized (and sometimes required) DHS to arrest and detain the alien pending removal. See 8 U.S.C. 1182, 1226, 1227, 1231.

Recognizing, however, state and local governments' interests in the enforcement of their laws against aliens who commit crimes within their jurisdictions, Congress has provided that DHS "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. 1231(a)(4)(A). If the alien is already subject to a final order of removal, then upon his release from state or local custody, DHS "shall remove the alien from the United States" within 90 days of the release, and DHS generally "shall detain the alien" during that period pending removal. 8 U.S.C. 1231(a)(1)(A), (B)(iii), and (2).

If instead the alien is not yet subject to a final order of removal, DHS may issue a warrant and may arrest and detain the alien pending a determination of whether to remove him. See 8 U.S.C. 1226(a). If the alien has a certain criminal history or has engaged in certain terrorist activities, however, DHS "shall" take the alien into custody "when the alien is released" from state or local custody, 8 U.S.C. 1226(c)(1), and (with a limited exception) it may not release the alien for the duration of the removal proceedings, see 8 U.S.C. 1226(c)(2); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 846-847 (2018).

2. Congress enacted 8 U.S.C. 1373 in 1996 to facilitate communication between federal immigration officials and state and local authorities, as well as to prevent state and local governments from frustrating or impeding federal officials' efforts to enforce the immigration laws. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. VI, § 642, 110 Stat. 3009-707. Section 1373 principally provides that "State" and "local government entit[ies] or official[s]" "may not prohibit, or in any way restrict," any government entity or official from sharing

with federal immigration authorities "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a). It similarly provides that "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from" "[s]ending" to or "requesting or receiving" from federal immigration authorities "information regarding the immigration status, lawful or unlawful, of any individual"; from "[m]aintaining" such information; or from "[e]xchanging such information" with "any other * * * government entity." 8 U.S.C. 1373(b). The statute further provides that federal immigration authorities "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." 8 U.S.C. 1373(c).

Section 1373 thus seeks to ensure that no obstacles will prevent federal, state, and local governments from sharing information that is crucial to enforcement of the immigration laws. A House Conference Report noted that provisions such as Section 1373 were intended to enable state and local officials to "communicate with the [former Immigration and Naturalization Service] regarding the presence, whereabouts, or activities of illegal aliens." H.R. Conf. Rep. No. 725, 104th Cong., 2d. Sess. 383 (1996) (Conference Report).

3. The three grant conditions at issue here were adopted in response to increasing concern about States and localities that receive federal law-enforcement funds but decline to cooperate with federal authorities' efforts to enforce the immigration laws.

In May 2016, prompted by a congressional inquiry, the Department of Justice Inspector General issued a report addressing concerns about compliance with 8 U.S.C. 1373 by ten jurisdictions that received Department grants, including respondent California. See C.A. E.R. 203-218. In July 2016, in light of that report, OJP articulated its understanding that, for purposes of the Byrne JAG program, Section 1373 is an "applicable Federal law[]" with which grant recipients must comply under 34 U.S.C. 10153(a)(5)(D). C.A. E.R. 185-186. For many jurisdictions the Inspector General's report had examined, including California, OJP also included a special condition in their FY 2016 Byrne JAG awards requiring the applicant to review its compliance with Section 1373 and to submit a letter explaining the jurisdiction's basis for its belief that it complied. See, *e.g.*, *id.* at 182, 350, 358-359. California accepted its FY 2016 award subject to that condition, and no jurisdiction challenged the condition in connection with FY 2016 Byrne JAG awards. See *id.* at 335, 396; see also, *e.g.*, *id.* at 355-357.

In October 2016, OJP published guidance explaining that "all Byrne/JAG grant applicants must certify compliance with all applicable federal laws, including Section 1373." C.A. E.R. 200; see *id.* at 199-202. The guidance explained that the certification requirement would not affect Byrne JAG awards for FY 2016 or prior years, but that OJP expected grant recipients to "examine their policies and procedures to ensure they will be able to submit the required assurances" in their FY 2017 applications. *Id.* at 200.

In accordance with that guidance, in the solicitations of applications for FY 2017 Byrne JAG awards released in August 2017, OJP specified that applicants

would be required to certify their compliance with Section 1373 in connection with their applications. C.A. E.R. 228, 242, 247, 249-250, 256 (local governments); *id.* at 269-270, 284, 289, 291-292, 299 (States). The solicitations included a certification form on which an applicant's Chief Legal Officer was to certify that any "program or activity" funded in whole or in part by the grant complies with Section 1373. See *id.* at 265, 308. The special-conditions section of the award documents for FY 2017 accordingly stated that a grantee must comply with Section 1373, that its authority to obligate funds is contingent on such compliance, and that the grantee must certify its compliance (the certification condition). See, *e.g.*, *id.* at 433-435 (¶¶ 52-54).

In addition, OJP's solicitations for FY 2017 Byrne JAG awards included two other conditions designed to ensure that the activities of recipients of federal law-enforcement grants do not impair the federal government's ability to detain and remove aliens upon their release from state or local criminal custody. See C.A. E.R. 257, 300. One requires a Byrne JAG program grantee to have a policy designed to ensure that facilities provide notice to DHS "as early as practicable" of the scheduled release date and time for a particular alien if DHS has provided a formal written request for advance notice (the notice condition). See, *e.g.*, *id.* at 437 (¶ 56.1.B). The other requires a grantee to have a policy that federal agents will be "given access" to correctional or detention facilities to meet with aliens and "inquire as to such individuals' right to be or remain in the United States" (the access condition). *Ibid.* (¶ 56.1.A); see *id.* at 436-437 (¶¶ 55.4.A(2), 56.4.B); 34 U.S.C. 10251(a)(7). Those conditions also apply to any "pro-

gram or activity" funded by the grant. The Acting Assistant Attorney General for OJP announced that compliance with the conditions "will be an authorized and priority purpose of the award." C.A. E.R. 300.

C. The Present Controversies

1. Respondents, the State of California and the City and County of San Francisco, have policies that restrict the exchange of information with federal immigration authorities. See App., *infra*, 13a-15a & nn.4-6. For example, California law prohibits "state or local law enforcement agenc[ies]" in the State from "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities" under certain circumstances. Cal. Gov't Code §§ 7284.4(a), 7284.6(a)(1)(C) (West 2019). California law also bars those agencies from "[p]roviding personal information * * * about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public." *Id.* § 7284.6(a)(1)(D). Similarly, San Francisco's administrative code bars city officials and law-enforcement officers from sharing information about an individual's "release status" or "home or work contact information" with federal immigration authorities. S.F. Mun. Admin. Code §§ 12H.2, 12I.2, 12I.3 (Supp. Apr.-June 2020).

After OJP solicited applications for FY 2017 Byrne JAG awards, respondents each brought suit against the Department and its officials challenging the certification, notice, and access conditions. See 17-cv-4701 Am. Compl. ¶¶ 1-16, 122-153 (D. Ct. Doc. 11 (Oct. 13, 2017)); 17-cv-4642 Am. Compl. ¶¶ 1-20, 166-192 (D. Ct. Doc. 61

(Dec. 12, 2017)). Both suits asserted that the conditions are not statutorily authorized and that Section 1373 violates the Tenth Amendment. See *ibid.* Respondents sought preliminary and permanent injunctions barring the Department from enforcing the conditions, and California sought a writ of mandamus compelling the Department to issue the FY 2017 grants. See 17-cv-4701 Am. Compl. 37-38; 17-cv-4701 D. Ct. Doc. 116, at 33-35; 17-cv-4642 Am. Compl. 41-42. Respondents each also sought a declaration that Section 1373 violates the Tenth Amendment, or alternatively that their respective laws comply with Section 1373. See 17-cv-4701 Am. Compl. 37-38; 17-cv-4642 Am. Compl. 41-42.

2. In a consolidated decision addressing both suits, the district court granted summary judgment to respondents, and it awarded a permanent injunction to both respondents and a writ of mandamus to California. App., *infra*, 24a-113a.

As relevant here, the district court concluded that all three conditions are statutorily unauthorized. App., *infra*, 48a-57a, 69a-70a. The court held that no provision of the Byrne JAG statute, 34 U.S.C. 10151 *et seq.*, authorizes the imposition of the notice and access conditions. App., *infra*, 48a-57a. The court rejected the government's contention that both conditions are authorized by 34 U.S.C. 10102(a)(6), which (as noted) allows the Assistant Attorney General for OJP to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to [Chapter 101] or by delegation of the Attorney General, *including placing special conditions on all grants*, and determining priority purposes for formula grants." *Ibid.* (emphasis added). The court determined that Section 10102(a)(6) does not "establish[] an independent grant

of authority" to place special conditions on Byrne JAG awards, observing that "Section 10102(a)(6) is in a different subchapter than the Byrne JAG statute and there is no text expressly applying it to the Byrne JAG program." App., *infra*, 55a-56a. The court did not address whether the notice and access conditions are independently authorized by 34 U.S.C. 10153(a)(4) and (5)(C), which require grantees to "report such data, records and information (programmatic and financial) as the Attorney General may reasonably require" and to undertake "appropriate coordination with affected agencies." *Ibid.*

The district court also held that OJP lacked authority to impose the condition requiring a grantee to certify its compliance with 8 U.S.C. 1373. App., *infra*, 69a-70a. The court concluded that, although 34 U.S.C. 10153(a)(5)(D) requires an applicant for a Byrne JAG award to certify that it "will comply with * * * all other applicable Federal laws," Section 1373 is not an "applicable Federal law[]" within the meaning of that provision. App., *infra*, 57a, 70a (citation and emphasis omitted). The court construed "applicable Federal laws" in Section 10153(a)(5)(D) to refer only to "laws related to grant applications." *Id.* at 70a. The court additionally concluded that both California's and San Francisco's laws comply with Section 1373, holding that Section 1373 encompasses (and prohibits a state or local government from withholding) only "'information strictly related to immigration status,'" and

thus not "release dates and addresses." *Id.* at 96a, 98a (citation omitted).[*]

In addition to declaring the three conditions unlawful, the district court found that respondents were entitled to a "nationwide" permanent injunction from enforcing the conditions, but it "stay[ed] [the] nationwide scope" of the injunction pending appeal. App., *infra*, 110a; see *id.* at 102a-110a, 115a-116a, 118a-120a. The court also found that California was entitled to a writ of mandamus compelling OJP to disburse Byrne JAG funds to the State. *Id.* at 110a-112a, 120a-121a.

3. In a consolidated decision addressing both cases, the court of appeals affirmed except with respect to the nationwide scope of the injunction, which it vacated. App., *infra*, 1a-23a.

a. The court of appeals concluded that OJP lacked statutory authority to impose the notice and access conditions. App., *infra*, 10a-12a. The court reasoned that its recent decision in *City of Los Angeles* v. *Barr*, 941 F.3d 931 (9th Cir. 2019), which had upheld a preliminary injunction against enforcement of those conditions while the appeals in this case were pending, had rejected the government's arguments that those conditions are authorized by 34 U.S.C. 10102(a)(6) or 10153(a). App., *infra*, 10a-11a.

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[*] The district court also concluded that the three conditions violate the separation of powers and the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1; that 8 U.S.C. 1373 violates the Tenth Amendment; and that all three conditions are arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.* App., *infra*, 47a-49a, 58a-67a, 71a-94a. The court of appeals, however, "d[id] not address" those other questions, expressly limiting its decision to respondents' challenges to OJP's statutory authority. *Id.* at 12a. Those other questions accordingly are not presented here.

The court of appeals observed that, in *Los Angeles*, it had acknowledged that Section 10102(a)(6) does confer "independent authority" on OJP to impose grant conditions. App., *infra*, 11a. But the court noted that it had further held that Section 10102(a)(6) authorizes only "'special conditions'" or "'priority purposes,'" and that the notice and access conditions "were not imposed pursuant to th[at] authority." *Ibid.* (citation omitted). The *Los Angeles* panel had interpreted "special conditions" in Section 10102(a)(6) to mean "individualized requirements included in a specific grant" designed to "tailor[]" the grant "when necessary" to account for a grantee's particular circumstances. 941 F.3d at 941. The court then had concluded that the notice and access conditions did not qualify because they "are not conditions triggered by specific characteristics not addressed by established conditions." *Id.* at 942. And the *Los Angeles* panel had additionally held that "[n]one of the purposes" of Byrne JAG awards enumerated in the statute—"'provid[ing] additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice'"—"corresponds to [OJP's] requirement that the recipient honor DHS's requests for advance notice of detained aliens' release dates or allow federal agents access to correctional facilities to meet with detained aliens." *Ibid.* (citation omitted).

The court of appeals further observed that, in *Los Angeles*, it had rejected the contention that the notice and access conditions are authorized by provisions of Section 10153(a) that require an applicant to provide an "assurance" that the applicant will provide "programmatic" information, 34 U.S.C. 10153(a)(4), and a "certification" that there has been "appropriate coordination

with affected agencies," 34 U.S.C. 10153(a)(5)(C). App., *infra*, 11a. The *Los Angeles* panel had concluded that "programmatic" information encompasses only information about the specific program for which the grant funds are used. 941 F.3d at 944-945. And the court held that the requirement of "appropriate coordination with affected agencies" involves only an applicant's certification that "it has coordinated with the agencies affected by the program to be funded by the Byrne JAG award." *Id.* at 945. The court in *Los Angeles* found that the notice and access conditions exceeded the scope of that authority. See *id.* at 944-945.

The court of appeals acknowledged that the question of OJP's authority to impose the notice and access conditions had "resulted in a circuit split," as the Second Circuit had recently held that the notice and access conditions are authorized by Section 10153. App., *infra*, 11a-12a & n.3 (citing *New York*, *supra*). But the court of appeals noted that it was bound by its decision in *Los Angeles*. *Id.* at 12a.

b. The court of appeals additionally concluded that OJP may not withhold Byrne JAG funds from respondents for noncompliance with the certification condition because it found that respondents' "sanctuary laws do not violate 8 U.S.C. § 1373." App., *infra*, 12a. The court explained that, in another intervening decision issued while the appeals in this case were pending, it had construed Section 1373 to encompass only "'information strictly pertaining to immigration status (*i.e.*, what one's immigration status is),'" and thus not "information about when a person will be released from state or local custody." *Id.* at 14a (quoting *United States* v. *California*, 921 F.3d 865, 891 (2019), cert. denied, No. 19-532 (June 15, 2020)).

Applying that "narrow construction," the court of appeals here concluded that California's and San Francisco's laws do not violate Section 1373. App., *infra*, 16a; see *id.* at 14a-18a. The court reasoned that those laws "do not apply to information regarding a person's citizenship or immigration status," but instead restrict the sharing of information regarding "release status" and certain other personal information, as well as certain forms of cooperation with federal officials' enforcement of immigration laws. *Id.* at 16a, 18a; see *id.* at 16a-18a.

c. The court of appeals vacated the nationwide scope of the permanent injunction the district court had issued. App., *infra*, 18a-22a. But the court left the injunction in force within "California's geographical boundaries." *Id.* at 22a.

REASONS FOR GRANTING THE PETITION

Through the Byrne JAG program, Congress provides hundreds of millions of dollars of federal aid each year to state and local law-enforcement entities. Congress has made receipt of Byrne JAG awards contingent on a grantee's compliance with certain requirements set forth in the statute—which are implemented in the terms of grants that OJP issues—and with special conditions Congress authorized OJP to adopt for some or all grants. The three conditions at issue here, applicable to all Byrne JAG grantees nationwide, seek to ensure a baseline level of coordination and cooperation with the federal government by state and local governments that request and accept Byrne JAG funds. All three seek to ensure that grantees are good partners and that the grants advance rather than undermine Congress's objectives. And all three are lawful both as exercises of OJP's general authority to adopt special conditions for grant programs and as measures

to implement requirements specific to the Byrne JAG program prescribed by Congress.

Deepening an existing circuit conflict, the decision below held two of those conditions unlawful and eviscerated the third. Those rulings rest on untenably narrow interpretations of the statutes that establish OJP's authority and that set the terms of the Byrne JAG program. The Ninth Circuit read into the statutes limitations that have no foundation in the text. And its decision severely curtails OJP's ability to adopt grant conditions going forward, while enabling state and local governments to obtain federal financial assistance for their law-enforcement programs even as those programs actively undermine federal law-enforcement efforts.

The lower-court conflict the decision below cemented is very unlikely to disappear on its own. The Second Circuit recently denied rehearing en banc of a panel decision upholding the same conditions. This Court's review is warranted to resolve the entrenched conflict on this important and recurring question. The petition for a writ of certiorari should be granted.

I. THE DECISION BELOW IS INCORRECT

Congress established the Byrne JAG program to provide federal financial assistance to state and local governments' law-enforcement efforts. Accepting that aid brings with it an obligation to satisfy certain requirements that Congress established and authorized OJP to implement in administering grants, and others Congress authorized OJP to prescribe. All three conditions at issue here are lawful exercises of that authority.

Congress set the ground rules for Byrne JAG grants in the statute itself, establishing baseline requirements that grantees must meet to obtain grant

funds. Apart from procedural rules about the application process, those requirements largely serve to ensure a grantee is a good partner with the federal government whose aid it seeks and accepts. 34 U.S.C. 10153(a). For Byrne JAG grants and other grant programs OJP administers, however, Congress recognized that it could not anticipate every issue that might arise and that OJP would need authority to adopt requirements above and beyond the statutory baseline. In the same 2006 statute that established the Byrne JAG program, Congress accordingly granted OJP express statutory authority to "place special conditions on all grants," including Byrne JAG grants. 34 U.S.C. 10102(a)(6). The three conditions at issue in this case are valid both (1) as exercises of OJP's general authority to adopt special conditions and (2) as implementations of Byrne JAG-specific statutory requirements.

The shortest and simplest path to that conclusion is the first. Section 10102(a)(6) authorizes OJP to "place special conditions on all grants." 34 U.S.C. 10102(a)(6). That text makes clear, and the court of appeals agreed, that OJP has "independent authority" to prescribe conditions on Byrne JAG grants beyond the baseline statutory requirements. App., *infra*, 11a. The notice, access, and certification conditions at issue here fall squarely within that independent authority. Nothing in the statutory language suggests that those modest commitments to coordinate and cooperate with the federal government exceed OJP's authority.

The Ninth Circuit avoided that straightforward conclusion by reading into Section 10102(a)(6) a limitation not found in the text. The court construed that provision to permit only "individualized requirements" "tailored" to a specific grantee's circumstances. *City*

of Los Angeles v. *Barr*, 941 F.3d 931, 941 (9th Cir. 2019); see App., *infra*, 10a-11a. The court had no license to create limitations that Congress did not. And the particular atextual restriction the court superimposed is irreconcilable with the statutory language (authorizing conditions on "all grants," 34 U.S.C. 10102(a)(6)) and with the statutory context and structure. Wherever the outer limits of Section 10102(a)(6) lie, at a minimum the provision authorizes OJP to adopt conditions that, like the three at issue here, are reasonably related to the program funded by a Byrne JAG grant.

Each of the three conditions is independently authorized as a means of implementing the statutory ground rules for Byrne JAG grants. The notice condition implements a grantee's statutorily required commitment to report "such * * * information * * * as the Attorney General may reasonably require." 34 U.S.C. 10153(a)(4). And both the notice and access conditions implement grantees' duty to ensure "appropriate coordination with affected agencies." 34 U.S.C. 10153(a)(5)(C). The court of appeals found both conditions unauthorized based on crabbed interpretations of each of those provisions. The certification condition implements the requirement that a grantee certify that it "will comply with all provisions of [the Byrne JAG statute] and all other applicable Federal laws," 34 U.S.C. 10153(a)(5)(D), which include 8 U.S.C. 1373. The court largely nullified that condition by giving Section 1373 an atextual, artificially narrow scope.

The court of appeals thus disregarded the statutory text and context at every turn. And the end product of its multiple errors is a statute Congress would not recognize. Its decision replaces a statutory framework designed to ensure that grantees are good partners

with one that enables them to accept federal assistance even while openly obstructing the federal government's own law-enforcement efforts.

A. OJP Had Statutory Authority To Impose The Notice And Access Conditions

1. The Byrne JAG statute provides that the "Attorney General may * * * make grants to States and units of local government" to be used for "provid[ing] additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice" to support (among other things) "[l]aw enforcement programs." 34 U.S.C. 10152(a)(1)(A). Congress specified a formula for allocating the total sum appropriated for Byrne JAG awards among eligible grantees. 34 U.S.C. 10156. And it charged the Attorney General with administering the program, including by specifying the form of applications, 34 U.S.C. 10153(a), and by reviewing and adjudicating applications, 34 U.S.C. 10154.

Congress prescribed several requirements that successful grant applicants must satisfy, which are implemented via various "certification[s]" and "assurance[s]" that each grant application must contain. 34 U.S.C. 10153(a)(1)-(5); see 34 U.S.C. 10153(a)(6). Among other requirements, an applicant must certify that it will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require," 34 U.S.C. 10153(a)(4); that "there has been appropriate coordination with affected agencies," 34 U.S.C. 10153(a)(5)(C); and that the applicant "will comply with all provisions of" the Byrne JAG statute "and all other applicable Federal laws," 34 U.S.C. 10153(a)(5)(D); see, *e.g.*, 34 U.S.C. 10153(a)(1).

Cognizant that it could not foresee every contingency, Congress authorized the Assistant Attorney General for OJP to specify additional conditions for Byrne JAG and other grants. In the same enactment that established the Byrne JAG program, Congress amended an existing statutory provision that empowered the Assistant Attorney General to "exercise such other powers and functions as may be vested in [him] pursuant to [Chapter 101 of Title 34] or by delegation of the Attorney General." 42 U.S.C. 3712(a)(6) (2000), recodified as amended, 34 U.S.C. 10102(a)(6). Congress amended the provision to make clear that such powers and functions "includ[e] placing special conditions on all grants, and determining priority purposes for formula grants." 34 U.S.C. 10102(a)(6); see DOJ Reauthorization Act, §§ 1111, 1152(b), 119 Stat. 3094, 3113.

Exercising that authority, OJP has previously imposed special conditions on Byrne JAG grants relating to information-technology requirements, protections for human research subjects, requirements for and restrictions on the purchase of certain equipment, and training. See, *e.g.*, C.A. E.R. 404-415 (¶¶ 1-51) (San Francisco's FY 2016 award). Until the litigation over the FY 2017 conditions at issue here, to the government's knowledge none of those special conditions has ever been questioned by Congress or challenged by a grantee, including respondents. Indeed, in its FY 2016 award, California accepted without objection a special condition requiring it to confirm its compliance with Section 1373, and if not in compliance to take steps to comply. *Id.* at 350 (¶ 55).

2. The notice and access conditions fall squarely within the text authorizing OJP to "place special condi-

tions on all grants," 34 U.S.C. 10102(a)(6). Those conditions, which apply to all grants, require grantees to commit to basic information sharing and law-enforcement coordination with the federal government to enhance public safety and to avoid frustrating federal enforcement of federal immigration laws. And they were adopted to address a special need OJP identified: the unforeseen and unfortunate efforts by some grantees to refuse such basic cooperation with the government.

a. In accepting the "notice" condition, an applicant for a Byrne JAG award agrees that, for any "program or activity" funded by the award, it will have a policy of informing DHS of the scheduled release date of an alien in criminal custody after receiving a formal written request from DHS. C.A. E.R. 436 (¶ 55.1.B). In accepting the "access" condition, an applicant agrees that, with respect to any "program or activity" funded by the grant, it will have a policy providing that federal agents will be "given * * * access" to correctional or detention facilities for the purpose of meeting with aliens and "inquir[ing] as to such individuals' right to be or remain in the United States." *Ibid.* (¶ 55.1.A); see App., *infra*, 5a-6a. In accepting those conditions, applicants simply agree that their program or activity receiving federal financial assistance will not impair the federal government's efforts to enforce federal immigration laws with respect to aliens in state or local criminal custody. Those modest commitments fall comfortably within the broad authority conferred by Section 10102(a)(6)'s text. That should end the analysis.

The statutory context confirms that the notice and access conditions are proper exercises of OJP's authority. The Byrne JAG program provides federal financial assistance to state and local governments to support

their law-enforcement efforts. In that context, OJP's statutory authority to impose "special conditions" naturally encompasses modest requirements that state and local governments that request and receive assistance for their law-enforcement programs do not, in those very programs, simultaneously frustrate the federal government's law-enforcement efforts.

In the INA, Congress determined which aliens may be admitted and which aliens are subject to removal. See *Arizona* v. *United States*, 567 U.S. 387, 394-396 (2012). And Congress authorized and directed DHS to implement those determinations by prosecuting removal proceedings against and removing aliens not entitled to remain. That responsibility often includes arresting and detaining such aliens pending removal proceedings or prior to removal. See 8 U.S.C. 1226, 1231. But recognizing States' and local governments' own interests in enforcing their criminal laws, Congress struck a balance, directing DHS generally not to take aliens serving state sentences into custody until their release. See 8 U.S.C. 1226(c), 1231(a)(1)(A), (B)(iii), (2), and (4)(A).

The notice and access conditions dovetail with that statutory framework. Actions by States or local governments to withhold requested notice of a detained alien's impending release, or to refuse access to federal authorities to conduct a voluntary interview with an alien, thwart DHS's efforts to fulfill its obligation to enforce federal immigration laws. The notice and access conditions curtail such frustration by requiring that state and local governments that willingly seek and accept federal financial assistance for their law-enforcement programs do not undermine the federal government's own law-enforcement responsibilities.

b. The court of appeals concluded that the notice and access conditions exceeded OJP's authority by reading in a limitation not found in the statutory text. The court correctly acknowledged that Section 10102(a)(6) confers "independent authority" on OJP. App., *infra*, 11a (citing *Los Angeles*, 941 F.3d at 939-944); see *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933) ("'[I]nclude' is frequently, if not generally, used as a word of extension or enlargement."). As the court had previously recognized, a contrary reading would "deprive[] the 2006 amendment to § 10102(a)(6)" that added that language "of any meaning." *Los Angeles*, 941 F.3d at 941. But the court adopted in *Los Angeles*, and applied here, an atextual restriction confining OJP's authority to adopting only "individualized requirements" "tailored" to particular grantees. *Id.* at 939-941; see App., *infra*, 11a. That reading is incorrect.

Nothing in the plain language of Section 10102(a)(6) confines the special conditions OJP may impose to sui generis, one-of-a-kind limitations. "Special" does not necessarily signify "unique." And it cannot plausibly carry that meaning in the context of Section 10102(a)(6), which authorizes OJP to impose such conditions on "*all* grants." 34 U.S.C. 10102(a)(6) (emphasis added).

Settled practice confirms what the text makes clear. For years, OJP has applied special conditions to all participants in a specific grant program—including the previously imposed special conditions on Byrne JAG awards noted above. See p. 20, *supra*. OJP has separately crafted conditions applicable only to a particular grantee, but those are known instead as "additional requirements," C.A. E.R. 407, ¶ 14, or "specific award conditions," 2 C.F.R. 200.207(a); see 2 C.F.R. 200.300(a).

c. The court of appeals in *Los Angeles* gave three reasons for limiting Section 10102(a)(6) to individualized requirements. None has merit.

First, the court reasoned that the phrase "special conditions" connotes a requirement "applied 'to meet a particular need' for carrying out a program that is not covered by established requirements." *Los Angeles*, 941 F.3d at 940. But conditions that apply to more than one grantee may still "meet a particular need." *Ibid.* The notice and access conditions, for example, meet the need for basic cooperation between state and local law enforcement and federal law enforcement—a need that became manifest as some jurisdictions increasingly failed to provide such cooperation. The court of appeals' contrary view would implausibly mean that OJP may react only to grantee-specific issues but not to widely proliferating problems.

Second, the court of appeals suggested that a Department of Justice regulation no longer in force—in effect between 1988 and 2014—supported reading "special conditions" narrowly. *Los Angeles*, 941 F.3d at 941 (citing 28 C.F.R. 66.12 (2006)). That regulation provides no basis for narrowing the statutory text. The regulation addressed "special grant or subgrant conditions for 'high-risk' grantees," 28 C.F.R. 66.12 (2006) (emphasis omitted), such as grantees with a history of financial mismanagement. But as the qualifier "for high-risk grantees" illustrates, that regulation did not purport to define the term "special conditions" for all purposes or to address every situation in which special conditions might be appropriate. It merely described one type of special condition applicable to one type of grantee.

Third, the court of appeals noted that the term "special conditions" also appears in 34 U.S.C. 10109(a)(2),

which the court viewed as supporting a narrow interpretation of the phrase. *Los Angeles*, 941 F.3d at 941. That is incorrect. Section 10109(a)(2) provides that an OJP component tasked with auditing grants must "take special conditions of the grant into account and consult with the office that issued those conditions to ensure appropriate compliance." 34 U.S.C. 10109(a)(2). The court erroneously concluded that Congress must have intended such an audit to focus on "individualized requirements included in a specific grant." *Los Angeles*, 941 F.3d at 941. But an audit can just as easily address compliance with generally applicable conditions. And contrary to the court's assumption, the fact that Congress directed the auditor to identify and "consult with the office that issued the condition" does not signify that "special conditions" in Section 10109(a)(2) must be grantee-specific. *Ibid.* (citation omitted). An auditor assessing compliance with a generally applicable condition imposed by another agency component might well consult that component for guidance as to its intended meaning and application.

3. Independent of OJP's general statutory authority to establish special conditions under Section 10102(a)(6), the conditions at issue here are also authorized as measures to implement ground rules set forth in the Byrne JAG statute itself, 34 U.S.C. 10153(a)(4) and (5)(C). See *New York* v. *United States Dep't of Justice*, 951 F.3d 84, 116-122 (2d Cir.), reh'g denied, 964 F.3d 150 (2020).

a. The Byrne JAG statute requires an applicant to provide an "assurance" that it will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably re-

quire." 34 U.S.C. 10153(a)(4). That requirement authorized OJP to impose the notice condition, which simply calls on grantees to report certain information that the Attorney General (through OJP) has deemed appropriate—namely, to provide advance notice of the release date of an alien to DHS after receiving a request for such notice from DHS.

The court of appeals in *Los Angeles* erred in concluding that Section 10153(a)(4) does not authorize the notice condition on the ground that information about an alien's release date is not "programmatic." 941 F.3d at 944. The court reasoned that "DHS requests for notice of the release of a detained alien do not relate to a program funded by Byrne JAG." *Id.* at 945. As the Second Circuit explained in *New York*, however, that is incorrect. 951 F.3d at 117. The statute enumerates the "programs" eligible for Byrne JAG assistance in very general terms, such as "[l]aw enforcement programs," "[p]rosecution and court programs," and "[c]orrections and community corrections programs," among others. 34 U.S.C. 10152(a)(1)(A), (B), and (D). "[T]he 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." *New York*, 951 F.3d at 117. Those categories "include[d] most, if not all, of the programs" for which the grantees in that case had "s[ought] Byrne funding." *Ibid.* Similarly, although California's application did not specify particular programs for which it sought funding, it indicated that funds would be directed to local projects within broad "priority program purpose areas of Prevention and Education, Law Enforcement, and Prosecution, Courts, and Defense."

California Bd. of State and Cmty. Corr., *Edward Byrne Memorial Justice Assistance Grant Program: Federal Fiscal Year 2017 California State Application* 5 (Aug. 25, 2017), https://go.usa.gov/xGFHz.

b. The Byrne JAG statute also requires an applicant to certify that "there has been appropriate coordination with affected agencies." 34 U.S.C. 10153(a)(5)(C). The text of that requirement authorized OJP to impose both the notice and access conditions. When, as here, "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, [DHS], before a formal application is filed." *New York*, 951 F.3d at 119. And "what makes that coordination 'appropriate' is that it will establish the parties' relationship and the sequence of their conduct throughout the grant period." *Ibid.* In the context of immigration enforcement, such coordination is essential because, for example, States and localities may first prosecute state and local crimes, and only when those sentences are served does DHS enforce the immigration laws. "[A] removable alien's State incarceration and release from incarceration will affect DHS's performance of its own statutory duties throughout the grant period." *Id.* at 120. Notice of an alien's impending release from state or local criminal custody, and access to the alien before his release, are critical for DHS to carry out its responsibilities and central to its relationships with state and local authorities. See pp. 21-22, *supra.*

"The Notice Condition serves to ensure such appropriate coordination" by advising grantees "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." *New York*, 951 F.3d at 120. Compliance with the access condition similarly "constitutes 'appropriate coordination'" within the meaning of Section 10153(a)(5)(C) "in that it allows both the [applicant] seeking a Byrne grant * * * and an affected agency, DHS, to carry out their respective duties with respect to incarcerated aliens in an orderly sequence." *Id.* at 121.

The court of appeals in *Los Angeles* rejected that straightforward interpretation of the text, 941 F.3d at 945, concluding that Section 10153(a)(5)(C)'s "appropriate coordination" provision requires only that the applicant has coordinated with other agencies affected by the particular program at the time the certification was made and does not require any "ongoing cooperation." *Ibid.* That restricted reading of the text is implausible. On that view, OJP would have no ability to enforce a grant condition even if the recipient made clear that it intended to end any coordination immediately after the grant was awarded. Instead, as the Second Circuit correctly determined, in this statutory context, "*appropriate* coordination frequently, perhaps invariably, must determine future conduct." *New York*, 951 F.3d at 118.

B. OJP May Withhold Byrne JAG Funds From Respondents For Noncompliance With Section 1373

OJP also acted within its authority in imposing the certification condition, which requires Byrne JAG applicants to comply with 8 U.S.C. 1373 and to certify such compliance. *E.g.*, C.A. E.R. 433-435. The court of appeals' decision threatens to eviscerate OJP's ability to enforce that condition.

1. As with the notice and access conditions, OJP had general authority to impose the certification condition as a "special condition" under 34 U.S.C. 10102(a)(6). See pp. 19-25, *supra*. And like those conditions, the certification condition is also independently authorized by the Byrne JAG statute itself. The statute requires a Byrne JAG applicant to certify that "the applicant will comply with [the Byrne JAG statute] and *all other applicable Federal laws*." 34 U.S.C. 10153(a)(5)(D) (emphasis added). Section 1373 is one such "applicable Federal law[]." *Ibid.* That provision is a federal statute that applies by its terms to any "State" or "local government entity or official." 8 U.S.C. 1373(a). Section 1373 bars those entities and officials from prohibiting or restricting the sharing with federal authorities of "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *Ibid.*; see 8 U.S.C. 1373(b). Under the terms of Section 10153(a)(5)(D), Byrne JAG applicants thus must certify that they will comply with Section 1373.

2. The district court in this case erroneously determined that Section 1373 is not an "applicable Federal law[]" with which Byrne JAG applicants must certify that they will comply in connection with their grant award. App., *infra*, 70a (citation omitted). The court construed "'all other applicable Federal laws'" in Section 10153(a)(5)(D) to refer only to "laws related to grant applications." *Ibid.* (citation omitted). But that narrow reading has no basis in the statutory text. "By itself, the phrase 'all other law' indicates no limitation." *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). And as the Second Circuit correctly recognized, "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." *New York*, 951 F.3d at 106. If Congress had intended to limit the certification required by Section 10153(5)(D) to laws applicable to applications for grants, it could have done so expressly, as it has done elsewhere. See, *e.g.*, 42 U.S.C. 16154(g)(1) ("consistent with the generally applicable Federal laws and regulations governing awards of financial assistance, contracts, or other agreements"); Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1043(a)(3)(C)(ii)(II), 128 Stat. 1246 (recipient "will comply with all applicable Federal laws (including regulations) relating to the use of those funds").

As the Second Circuit has explained, the net result of the district court's narrow interpretation of Section 10153(a)(5)(D) would be that States and localities could demand "federal funds to enforce their own laws while themselves hampering the enforcement of federal laws, or worse, violating those laws." *New York*, 951 F.3d 107. Nothing "dictate[s] that such an applicant must be given federal money even as it continues to flout federal law." *Ibid.*

3. The court of appeals reached a similar ultimate result to the district court—*i.e.*, holding that OJP "cannot withhold Byrne funds pursuant to the Certification Condition by asserting that [respondents'] laws prevent their compliance with § 1373"—but by a different analytical path. App., *infra*, 12a. The court concluded that respondents do not violate Section 1373 (and that they thus comply with the certification condition) even though they have laws or policies expressly barring their employees from providing information essential to

federal enforcement of the immigration laws against individuals in state or local criminal custody. *Id.* at 12a-18a; see *id.* at 94a-102a (district court granting declaratory relief on that alternative basis). In the court of appeals' view, Section 1373's reference to "information regarding" an individual's "citizenship or immigration status," 8 U.S.C. 1373(a), narrowly refers only to "a person's legal classification under federal law," App., *infra*, 16a (quoting *United States* v. *California*, 921 F.3d 865, 891 (9th Cir. 2019), cert. denied, No. 19-532 (June 15, 2020)). That reading is inconsistent with the text, context, and purpose of Section 1373.

Section 1373(a) broadly prohibits restrictions on sharing "information *regarding* [an individual's] citizenship or immigration status." *Ibid.* (emphasis added). Statutory terms like "'regarding'" or "'related to'" have "a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1759-1760 (2018) (citations omitted).

According the term "'regard[ing]'" such a "broadening effect," *Appling*, 138 S. Ct. at 1760 (citation omitted), is especially appropriate in this context, where another nearby subsection omits that term. Section 1373(c) refers simply to "the citizenship or immigration status of any individual." 8 U.S.C. 1373(c). Congress's inclusion of "regarding" in Section 1373(a), juxtaposed with its omission in an otherwise-parallel provision, indicates that "Congress intended a difference in meaning." *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014). This reading also accords with Section 1373(a)'s purpose of ensuring that state and local officials can

"communicate with [federal immigration authorities] regarding the presence, whereabouts, or activities of illegal aliens." *New York*, 951 F.3d at 97 (quoting Conference Report 383) (brackets in original).

Section 1373(a) thus bars restrictions like those respondents have imposed on sharing an individual's release date or home address. Cal. Gov't Code § 7284.6(a)(1)(C) and (D) (West 2019); S.F. Mun. Admin. Code 12H.2, 12I.2, 12I.3 (Supp. Apr.-June 2020). An individual's release date is closely related to immigration status. See *New York*, 951 F.3d at 119-120. For example, the INA provides that a convicted alien in state criminal custody who is subject to a final removal order may not be removed until he "is released from imprisonment," 8 U.S.C. 1231(a)(4)(A), and then must be removed "within a period of 90 days," 8 U.S.C. 1231(a)(1)(A) and (B)(iii). The release date thus bears directly on DHS's ability and obligation to remove the alien, a matter directly related to immigration status. And an alien's home address may bear, for example, on whether he has failed to notify the government of a change in his address, which can subject him to removal proceedings. See 8 U.S.C. 1305(a), 1306(b). The court of appeals' interpretation confining Section 1373 to only an alien's immigration status simpliciter improperly narrows that provision and, with it, OJP's authority.

II. THE DECISION BELOW WARRANTS REVIEW

The decision below deepens a circuit conflict concerning the three conditions at issue and others like them. That division reflects a fundamental disagreement over the scope of OJP's statutory authority and the obligations of state and local governments that seek and accept federal law-enforcement assistance.

A. The circuits are divided over whether the notice and access conditions are authorized by statute. The Second Circuit correctly upheld those conditions as a permissible exercise of authority derived from the Byrne JAG statute. *New York*, 951 F.3d at 116-122. By contrast, in addition to the court of appeals here, the First, Third, and Seventh Circuits have held that those conditions are not authorized. *City of Providence* v. *Barr*, 954 F.3d 23, 32-36, 39-45 (1st Cir. 2020); *City of Philadelphia* v. *Attorney Gen.*, 916 F.3d 276, 285-288 (3d Cir. 2019); *City of Chicago* v. *Barr*, 961 F.3d 882, 892-894 (7th Cir. 2020).

Moreover, even the circuits that have held the notice and access conditions to be unauthorized disagree on the scope of OJP's statutory authority. The court of appeals here recognized that Section 10102(a)(6) does confer "independent authority" on OJP. App., *infra*, 11a; see *Los Angeles*, 941 F.3d at 939-944. In contrast, other circuits have held that OJP has *no* authority to impose special conditions, despite the plain language of 34 U.S.C. 10102(a)(6). See *Chicago*, 961 F.3d at 894; *Providence*, 954 F.3d at 39-45; *Philadelphia*, 916 F.3d at 287-288. That reading nullifies the "special conditions" language that Congress specifically added to the statute, and thus threatens to imperil *all* special conditions—including conditions that the Department has long imposed, without objection, on Byrne JAG (and other) awards. See pp. 19-20, *supra*.

B. The courts of appeals have likewise reached conflicting conclusions about the certification condition. Three circuits have held that grantees can certify their compliance with "applicable Federal laws," and thus receive federal funds, while refusing categorically to comply with 8 U.S.C. 1373. *Chicago*, 961 F.3d at 898-909;

Providence, 954 F.3d at 36-39; *Philadelphia*, 916 F.3d at 288-291. The court of appeals here reached a similar result by giving an unduly restrictive reading to Section 1373 that leaves jurisdictions free to adopt policies prohibiting information sharing in ways that undermine basic law-enforcement cooperation, contrary to the statute's text and purpose. App., *infra*, 13a-18a. In contrast, the Second Circuit has properly recognized both the centrality of information such as an alien's release date from local custody to the enforcement of federal immigration law, and the implausibility of concluding that Congress believed grantees could refuse to comply with Section 1373 even as they seek and accept Byrne JAG grant funds. See *New York*, 951 F.3d at 96-97, 107, 119-120.

C. These divisions are very unlikely to be resolved without this Court's intervention. The Second Circuit recently denied rehearing en banc in *New York*, with multiple judges emphasizing that the issues are of "exceptional importance" and that there is an "important circuit split that needs to be repaired definitively and now." 964 F.3d at 155 & n.5 (Lohier, J., concurring in the denial of rehearing en banc); see *id.* at 150, 153 (Cabranes, J., concurring in the denial of rehearing en banc); *id.* at 169-170 (Katzmann, C.J., dissenting from the denial of rehearing en banc). In light of that denial of rehearing, even if other circuits reconsider their conclusions, the conflict is unlikely to disappear.

This Court's review is warranted now. Five courts of appeals have weighed in on the conditions at issue here. Only one case is currently pending in a court of appeals that has not already addressed the conditions. *State of Colorado* v. *United States Dep't of Justice*, No. 20-1256 (10th Cir. docketed July 13, 2020). With

new grants under the Byrne JAG program being awarded each year, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-17308
D.C. No. 3:17-cv-04642-WHO

CITY AND COUNTY OF SAN FRANCISCO,
PLAINTIFF-APPELLEE

v.

WILLIAM P. BARR, ATTORNEY GENERAL; ALAN R. HANSON; UNITED STATES DEPARTMENT OF JUSTICE; MATT M. DUMMERMUTH, DEFENDANTS-APPELLANTS

No. 18-17311
D.C. No. 3:17-cv-04701-WHO

STATE OF CALIFORNIA, EX REL. XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, PLAINTIFF-APPELLEE

v.

WILLIAM P. BARR, ATTORNEY GENERAL; ALAN R. HANSON; UNITED STATES DEPARTMENT OF JUSTICE; MATT M. DUMMERMUTH; PHIL E. KEITH,
DEFENDANTS-APPELLANTS

Argued and Submitted: Dec. 2, 2019
San Francisco, California
Filed: July 13, 2020

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

OPINION

Before: WILLIAM A. FLETCHER, RICHARD R. CLIFTON, and ERIC D. MILLER, Circuit Judges.

CLIFTON, Circuit Judge:

The federal government has provided funding for state and local criminal justice programs through Edward Byrne Memorial Justice Assistance Grants since 2006. In Fiscal Year ("FY") 2017, the Attorney General and the Department of Justice ("DOJ") announced three new conditions that state and local governments must satisfy to receive Byrne grants. Two conditions require recipient jurisdictions to provide the Department of Homeland Security ("DHS") with (1) access to the jurisdiction's detention or correctional facilities to interview people in custody about their right to be in the United States (the "Access Condition"), and (2) advance notice of the scheduled release of aliens in the jurisdiction's custody (the "Notice Condition"). The third condition requires jurisdictions to certify that their laws and policies comply with 8 U.S.C. § 1373, a federal statute prohibiting states and localities from restricting the flow of "information regarding [an individual's] citizenship or immigration status" between state and local officials and DHS (the "Certification Condition").

Plaintiffs—the City and County of San Francisco and the State of California—are so-called "sanctuary" juris-

dictions, which have enacted laws that limit their employees' authority to assist in the enforcement of federal immigration laws. Plaintiffs sued DOJ, the Attorney General, and other DOJ officials (collectively, "DOJ") to prevent DOJ from denying funding of Byrne grants for failure to comply with the Access, Notice, and Certification Conditions (collectively, the "Challenged Conditions"). Plaintiffs also sought a declaratory judgment that their respective "sanctuary" laws do not violate 8 U.S.C. § 1373, or alternatively, that 8 U.S.C. § 1373 is unconstitutional. On summary judgment, the district court entered declaratory relief in favor of Plaintiffs on all of their legal claims. It also permanently enjoined DOJ, among other things, from "[u]sing the Section 1373 certification condition, and the access and notice conditions . . . as requirements for Byrne JAG grant funding." It extended relief to the entire country by providing that the permanent injunction applied to "any California state entity, any California political subdivision, or any jurisdiction in the United States."

Recent precedential decisions by this court have done the heavy lifting with regard to the merits of the relief granted by the district court. We held that DOJ lacked statutory authority to impose the Access and Notice Conditions on Byrne funds in reviewing a preliminary injunction obtained by the City of Los Angeles. *See City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019). Consistent with our discussion in *City of Los Angeles*, we affirm the injunction barring DOJ from using the Access and Notice Conditions as Byrne funding requirements for any California state entity or political subdivision.

We also uphold the injunction barring DOJ from denying or withholding Byrne funds on account of the Certification Condition based on Plaintiffs' alleged noncompliance with 8 U.S.C. § 1373. We narrowly construed the statutory language of 8 U.S.C. § 1373 in an action filed by DOJ to enjoin California's enforcement of its newly-enacted Values Act, Cal. Gov't Code § 7284 *et seq.*, to conclude that the Values Act did not conflict with § 1373. *See United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 590 U.S. — (U.S. Jun. 15, 2020) (No. 19-532). Consistent with our analysis in that case, we hold that the remaining California and San Francisco laws at issue here also comply with 8 U.S.C. § 1373 and cannot be cited in relation to the Certification Condition as a basis to deny Byrne funding.

With regard to the geographical reach of the relief granted by the district court, however, we conclude that the district court abused its discretion in issuing an injunction that extended nationwide. Although San Francisco offered evidence that some jurisdictions across the country might welcome an injunction against the Challenged Conditions, nothing in the record or in the nature of the claims suggests that the relief granted by the district court needs to be extended to state and local governments outside of California, not parties to this litigation, in order to fully shield Plaintiffs. Therefore, we vacate the nationwide reach of the permanent injunction and limit its reach to California's geographical boundaries.

I. Background

The Byrne program is the "primary provider" of federal grant dollars to support state and local criminal justice programs. DOJ's Office of Justice Programs,

which administers the grant, disburses over $80 million in awards each year. California has used prior Byrne awards to support programs focused on criminal drug enforcement, violent crime, and anti-gang activities. San Francisco has used them to support programs focused on reducing the drug trade and providing services to individuals with substance and mental health issues.

Each year, DOJ distributes Byrne funds pursuant to a statutory formula based on population and violent crime rate. *See* 34 U.S.C. § 10156(d)(2)(A). In FY 2017, California, through its Board of State and Community Corrections, expected to receive $28.3 million and allocate $10.6 million in sub-grants to its localities. San Francisco expected to receive a sub-grant of $923,401, plus a direct award of $524,845 pursuant to its own FY 2017 application.

To receive and draw upon a Byrne award, a state or local government must submit an application that complies with the statutory requirements outlined in 34 U.S.C. § 10153, in a form set forth in annual solicitation documents that DOJ provides and in accordance with all lawful conditions stated therein. *See* 34 U.S.C. § 10153. DOJ's FY 2017 solicitation documents included the Challenged Conditions at issue in this appeal.

A. The Challenged Conditions

The FY 2017 Byrne solicitations included the Access and Notice Conditions, "two new express conditions" related to "the 'program or activity' that would be funded by the FY 2017 award." Respectively, the Access and Notice Conditions require recipient jurisdictions to:

> (1) permit personnel of the U.S. Department of Homeland Security ("DHS") to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States; and
>
> (2) provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act.

The Byrne statute requires applicants to certify 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). In FY 2016, DOJ announced that 8 U.S.C. § 1373 is an "applicable Federal law" under the Byrne statute. In relevant part, 8 U.S.C. § 1373 prohibits states and localities from restricting their officials from sharing "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with DHS.[1]

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[1] Congress enacted 8 U.S.C. § 1373 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* Pub. L. No. 104-208, div. C, tit. VI, § 642, 110 Stat. 3009, 3009-707. It provides in full:

> (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

In FY 2017, DOJ attached the Certification Condition to all Byrne awards. In the FY 2017 Byrne solicitations, DOJ announced that a jurisdiction cannot validly accept an award until its Chief Legal Officer executes and submits a form certifying that the jurisdiction complies with 8 U.S.C. § 1373. This form and the statutory text of 8 U.S.C. § 1373 were attached as appendices to the solicitations.

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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.

B. Factual and Procedural History

The City and County of San Francisco and the State of California filed lawsuits in the Northern District of California in August 2017, seeking to enjoin DOJ from implementing the Challenged Conditions. Plaintiffs asserted that the Challenged Conditions are not authorized by the Byrne statute and violate constitutional separation of powers, the Spending Clause, and the Administrative Procedure Act ("APA"). Plaintiffs also argued that 8 U.S.C. § 1373 cannot be enforced against them because it violates the Tenth Amendment.

Plaintiffs understood the Access and Notice Conditions to be inconsistent with the sanctuary laws and policies they have enacted. Plaintiffs claimed, however, that they could comply with the Certification Condition if the statute on which it is based, 8 U.S.C. § 1373, were appropriately construed. Because DOJ threatened to withhold FY 2017 funds based on the assertion that Plaintiffs' sanctuary laws violate 8 U.S.C. § 1373, Plaintiffs sought declaratory relief narrowly construing § 1373 and holding that the statute as so construed does not conflict with Plaintiffs' sanctuary laws.[2]

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[2] The State of California sought similar relief related to a condition that DOJ placed on FY 2017 awards under the Community Oriented Policing Services ("COPS") grant program and the COPS Anti-Methamphetamine Program ("CAMP"). *See generally* 34 U.S.C. § 10381 *et seq.* Like the Certification Condition attached to Byrne awards, the challenged condition attached to the COPS/CAMP awards requires applicants to certify their compliance with 8 U.S.C. § 1373. California's Department of Justice submitted this certification when it applied for a FY 2017 CAMP award, and although it received $1 million in CAMP funding that year, it was told

In October 2018, the district court decided the case in Plaintiffs' favor on cross-motions for summary judgment. *See City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018), *judgment entered sub nom. California ex rel. Becerra v. Sessions*, No. 3:17-CV-04701-WHO, 2018 WL 6069940 (N.D. Cal. Nov. 20, 2018). It issued declaratory and injunctive relief on all of Plaintiffs' legal claims, holding the Challenged Conditions and 8 U.S.C. § 1373 unconstitutional and unenforceable against Plaintiffs and any other jurisdiction in the United States. The district court stayed the effect of the injunction's nationwide scope pending appellate review. *See id.* at 973-74.

On appeal, DOJ argues that the Challenged Conditions were imposed pursuant to lawful authority and did not violate the Spending Clause or the APA, and that the district court erroneously construed 8 U.S.C. § 1373 and erred in holding that Plaintiffs' respective laws did not conflict with § 1373. DOJ also argues that the district court abused its discretion by extending the scope of injunctive relief to non-parties nationwide.

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it could not "draw down" the funds pending an inquiry into its compliance with § 1373.

The dispositive issue on appeal related to COPS/CAMP is whether California's state laws render California ineligible for COPS/CAMP funding based on asserted non-compliance with 8 U.S.C. § 1373. This issue is identical to the issue regarding the Certification Condition attached to the Byrne program. *See infra* Part IV. For the sake of simplicity, the issue is discussed in the text of this opinion in terms of the Byrne program's Certification Condition, but that discussion and our resolution of that challenge applies similarly to the § 1373 certification condition under COPS/CAMP.

II. Standard of Review

Decisions regarding matters of law, including issues of statutory interpretation, are reviewed *de novo*. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009) (citations omitted). We review a decision to enter a nationwide injunction for abuse of discretion. *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654 (9th Cir. 2011). "District courts abuse their discretion when they rely on an erroneous legal standard or clearly erroneous finding of fact." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020) (citation omitted). "[A]n overbroad injunction is an abuse of discretion." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)).

III. The Access and Notice Conditions

The district court invalidated the Access and Notice Conditions on multiple grounds, holding that they exceed DOJ's statutory authority, violate constitutional separation of powers, violate the Spending Clause, and are arbitrary and capricious under the APA. *See City & Cty. of San Francisco*, 349 F. Supp. 3d at 944-48, 955-66. While this appeal was pending, we upheld a preliminary injunction obtained by the City of Los Angeles against DOJ's enforcement of the Access and Notice Conditions, holding that DOJ lacked statutory authority to implement them. *See City of Los Angeles v. Barr*, 941 F.3d 931, 945 (9th Cir. 2019).

DOJ contends that Congress granted it independent authority to establish the Access and Notice Conditions under 34 U.S.C. § 10102(a)(6). This statute provides: "The Assistant Attorney General shall . . . exercise

such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." In *City of Los Angeles*, we held that when § 10102 was amended in 2006, "Congress affirmatively indicated its understanding that the Assistant AG's powers and functions could include 'placing special conditions on all grants, and determining priority purposes for formula grants.'" 941 F.3d at 939 (quoting 34 U.S.C. § 10102(a)(6)). We held, however, that the Access and Notice Conditions did not constitute "special conditions" or "priority purposes." *See id.* at 939-44. Therefore, although we agreed with DOJ that it was given independent authority in § 10102(a)(6), we held that the Access and Notice Conditions were not imposed pursuant to this authority. *Id.* at 944.

DOJ alternatively argues that the Access and Notice Conditions are authorized by provisions in the Byrne statute requiring applicants to certify that "there has been appropriate coordination" between the applicant and "affected agencies," 34 U.S.C. § 10153(a)(5)(C), and to assure that it will maintain "programmatic" information "as the Attorney General may reasonably require," *id.* § 10153(a)(4). We rejected these arguments in *City of Los Angeles*, holding that the requirements under the Access and Notice Conditions far exceed what the statutory language of these provisions require. *See* 941 F.3d at 944-45.

Other circuits have reached differing conclusions regarding DOJ's authority under § 10102(a)(6) and the

Byrne statute to impose the Access and Notice Conditions, which has resulted in a circuit split.[3] Consistent with our analysis in *City of Los Angeles*, we affirm the district court's order declaring the Access and Notice Conditions unlawful and enjoining DOJ from enforcing them against Plaintiffs.

IV. The Certification Condition and 8 U.S.C. § 1373

The district court enjoined DOJ from enforcing the Certification Condition on multiple alternative grounds. *See City & Cty. of San Francisco*, 349 F. Supp. 3d at 948-55, 957-61. Among other things, the district court declared that Plaintiffs' sanctuary laws do not violate 8 U.S.C. § 1373, which it narrowly construed, and that DOJ cannot withhold Byrne funds pursuant to the Certification Condition by asserting that Plaintiffs' laws prevent their compliance with § 1373. *See id.* at 968-70. Because we affirm on this basis, it is unnecessary for us to consider the district court's alternative grounds for enjoining the Certification Condition, including constitutional grounds, and we do not address them.

As described above, at page 11, applicants for Byrne grants are required to certify that they "will comply

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[3] To date, only the Second Circuit has held that the Access and Notice Conditions were imposed pursuant to appropriate authority. *New York v. Dep't of Justice*, 951 F.3d 84, 101-04, 116-22 (2d Cir. 2020). The First, Third, and Seventh Circuits have held to the contrary. *City of Chicago v. Barr*, 957 F.3d 772 (7th Cir. 2020); *City of Chicago v. Sessions*, 888 F.3d 272, 283-87 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276, 284-88 (3d Cir. 2019); *City of Providence v. Barr*, 954 F.3d 23, 45 (1st Cir. 2020).

with all provisions of this part and all other applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D). DOJ has identified 8 U.S.C. § 1373 as an "applicable Federal law" referenced in the statute. In relevant part, § 1373 prohibits states and local governments from restricting their officials from sharing "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with DHS.

This court recently interpreted § 1373 in *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 590 U.S. — (U.S. Jun. 15, 2020) (No. 19-532), a decision that was rendered while this appeal was pending. In *California*, we reviewed the denial of DOJ's motion for a preliminary injunction against California's implementation of several recent enactments, including the Values Act, which DOJ brought affirmative litigation to invalidate. Among other things, DOJ argued that provisions in the Values Act governing the exchange of information with federal immigration authorities, *see* Cal. Gov't Code § 7284.6(a)(1)(C)-(D),[4] are prohibited by the information-sharing requirements of 8 U.S.C. § 1373. *See California*, 921 F.3d at 886, 891-93. We disagreed. *See id.* at 893.

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[4] Cal. Gov't Code § 7284.6(a)(1)(C) prohibits California law enforcement agencies from "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities" under certain circumstances.

Cal. Gov't Code § 7284.6(a)(1)(D) prohibits the agencies from "[p]roviding personal information . . . about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public."

DOJ argued that § 1373's language referring to "information regarding . . . citizenship or immigration status" should be construed to include information that helps federal immigration authorities determine "whether a given alien may actually be removed or detained," such as information about when a person will be released from state or local custody. *Id.* at 891. We rejected DOJ's broad construction of § 1373, holding that § 1373, by its terms, only concerned "'information strictly pertaining to immigration status (i.e. what one's immigration status is).'" *Id.* (quoting *United States v. California*, 314 F. Supp. 3d 1077, 1102 (E.D. Cal. 2018)).

In November 2017, using the same broad construction of § 1373 we later rejected in *California*, DOJ informed Plaintiffs that it had identified specific laws that appeared to violate § 1373, thereby rendering Plaintiffs ineligible for FY 2017 Byrne awards. In a letter to the State, DOJ specifically identified provisions of the Values Act and suggested that additional offending laws may be identified in the future. California accordingly sought a declaratory judgment that the Values Act and other state laws related to immigration enforcement and information-sharing—the TRUST Act, the TRUTH Act, and six confidentiality statutes[5]—did not violate

[5] The TRUST Act limits the ability of state and local law enforcement officers to provide federal immigration authorities information regarding a person's release date from custody. Cal. Gov't Code §§ 7282.5(a), 7284.6(a)(1)(C). The TRUTH Act requires local officials to provide inmates in their custody a notification of rights before any interview by immigration authorities takes place regarding civil immigration violations. *Id.* § 7283.1(a). The six confidentiality laws at issue include three statutes concerning the protection of minors' personal information, *see* Cal. Welf. & Inst. Code

8 U.S.C. § 1373 or render California ineligible for Byrne funds under the Certification Condition. San Francisco requested similar relief regarding chapters 12H and 12I of the San Francisco Administrative Code, which DOJ identified as likely violative of § 1373 in a letter to San Francisco.[6]

The district court entered declaratory judgment in Plaintiffs' favor. *See City & Cty. of San Francisco*, 349 F. Supp. 3d at 966-70. It held that 8 U.S.C. § 1373 only narrowly "extends to 'information strictly pertaining to immigration status (i.e. what one's immigration status is),'" *id.* at 968 (quoting *California*, 314 F. Supp. 3d at

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§§ 827, 831; Cal. Code of Civ. Proc. § 155, and three statutes concerning California's policy of protecting the personal information of victims and witnesses of crime, *see* Cal. Penal Code §§ 422.93, 679.10, 679.11.

[6] DOJ's letter cited specific concerns with sections 12H.2 and 12I.3 of the San Francisco Administrative Code. Section 12H.2 prohibits the "use [of] any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or any such personal information as defined in Chapter 12I," except as "required by Federal or State statute, regulation, or court decision." S.F., Cal., Admin. Code ch. 12H, § 12H.2; *see id.* ch. 12I, § 12I.2 ("'Personal information' means any confidential, identifying information about an individual, including, but not limited to, home or work contact information, and family or emergency contact information."). Section 12I.3 provides that City law enforcement officials "shall not . . . provide any individual's personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws." *Id.* ch. 12I, § 12I.3(e).

1102), and concluded that Plaintiffs' respective sanctuary laws did not violate § 1373 so construed, *see id.* at 968-70. We affirm.

As noted above, while this appeal was pending, we adopted the same narrow construction of § 1373 in *California*, holding that § 1373's information-sharing requirements applied to "just immigration status" or "a person's legal classification under federal law." 921 F.3d at 891. We also held that the challenged provisions of the Values Act did not conflict with § 1373 because they restricted the sharing of release status and contact information but did not prohibit the sharing of information regarding "immigration status."[7] *See id.* at 891-93. Consistent with these holdings in *California*, we affirm the district court's decision below, applying the same narrow construction of § 1373 to the state and local laws at issue in this case.

DOJ "effectively conceded" that the TRUST Act, TRUTH Act, and confidentiality statutes do not conflict with § 1373 by not arguing otherwise on summary judgment. *City & Cty. of San Francisco*, 349 F. Supp. 3d at 968; *see Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016). DOJ now argues for the first time on appeal that these laws offend § 1373 because, "[a]s relevant here," they constrain law enforcement from sharing the release dates of people in custody.

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[7] Indeed, we noted that one provision of the Values Act expressly permits the sharing of information pursuant to § 1373. *California*, 921 F.3d at 891 (quoting Cal. Gov't Code § 7284.6(e) ("This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual . . . pursuant to Section[ ] 1373.")).

Section 1373 does not cover release dates, however. *California*, 921 F.3d at 891-92. We therefore affirm that these California laws do not conflict with § 1373.

DOJ similarly argues that San Francisco's laws conflict with § 1373 because they prohibit local officials from giving federal immigration authorities the contact information and release status of aliens and from "us[ing] any City funds or resources to assist in the enforcement of Federal immigration law." S.F., Cal., Admin. Code ch. 12H, § 12H.2; *see also id.* ch. 12I, §§ 12I.2, 12I.3. However, these prohibitions are subject to a savings clause, which requires compliance with federal law. *See id.* ch. 12H, § 12H.2. Because § 1373 does not extend to contact and release status information, *see California*, 921 F.3d at 891-92, federal law does not preclude San Francisco from prohibiting the release of such information.

DOJ claims that San Francisco, in accordance with these provisions, "provides *no information* in response to ICE requests regarding individuals in local custody." The declaration cited in the record, however, only states that "[l]ocal law enforcement officials in San Francisco, California, do not respond to any non-criminal requests from ICE, including requests for notification regarding the release of detainees. . . . " Again, such information is not within the scope of 8 U.S.C. § 1373. *See California*, 921 F.3d at 891-92. And while San Francisco prohibits the "use [of] any City funds or resources to assist in the enforcement of federal immigration law," *see* S.F. Admin. Code ch. § 12H.2, no evidence has been cited to suggest that local officials have ignored ICE requests for "immigration status" information based on this provision or on any other basis.

In sum, we affirm the ruling below holding that Plaintiffs' respective sanctuary laws comply with 8 U.S.C. § 1373. Although the laws restrict some information that state and local officials may share with federal authorities, they do not apply to information regarding a person's citizenship or immigration status, which is the only information to which § 1373 extends. We uphold the injunction barring DOJ from withholding or denying Byrne funds to Plaintiffs based on the assertion that these laws violate 8 U.S.C. § 1373 and/or the Certification Condition.

V. The Nationwide Injunction

We uphold the district court's entry of permanent injunctive relief barring DOJ from withholding or denying Plaintiffs' Byrne awards based on the Challenged Conditions. However, we vacate the district court's imposition of a nationwide injunction. The district court abused its discretion by issuing a nationwide injunction without determining whether Plaintiffs needed relief of this scope to fully recover. We do not remand to the district court for further consideration because Plaintiffs have established no nexus between their claimed injuries and the nationwide operation of the Challenged Conditions, and they advance no reason why limiting the injunction along state boundaries would not grant them full relief. Therefore, the geographical reach of the relief should be limited to California.

"Although 'there is no bar against . . . nationwide relief in federal district court or circuit court,' such broad relief must be '*necessary* to give prevailing parties the relief to which they are entitled.'" *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)). On

appeal, Plaintiffs argue that they are entitled to nationwide relief by emphasizing evidence in the record, including declarations from "all types [of] grant recipients across the geographical spectrum" about how they are affected by the Challenged Conditions. Plaintiffs argue that the "far-reaching impact" of the Challenged Conditions makes this "one of the 'exceptional cases' in which program-wide relief is necessary."

The district court agreed, basing its analysis on "recent guidance" from the Ninth Circuit "on the breadth of evidence and inquiry needed to justify nationwide injunctive relief in the context of [Executive action] attempting to place similar conditions on grant funding." *See City & Cty. of San Francisco*, 349 F. Supp. 3d at 971 (citing *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018)). In those cases, we held that nationwide injunctions against unlawful Executive action, obtained by state and municipal plaintiffs, were overbroad where, among other things, the record contained no evidence showing impact to other jurisdictions. *See Trump*, 897 F.3d at 1244 (noting that the proffered evidence was "limited to the effect of the [Executive] Order on their governments and to the State of California"); *Azar*, 911 F.3d at 584 (holding that there was no "showing of nationwide impact or [harm to other jurisdictions of] sufficient similarity to the plaintiff states"). Citing these cases, the district court reasoned that, before issuing a nationwide injunction, it must "undertake 'careful consideration' of a factual record evidencing 'nationwide impact,' or in other words, 'specific findings underlying the nationwide application of the injunction.'" *City & Cty. of San Francisco*, 349 F. Supp. 3d at 971 (quoting *Trump*, 897 F.3d at 1231, 1244).

While it was correct to state this rule, the district court erred by considering *only* this rule. This rule addresses one form of tailoring: "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." *Trump*, 897 F.3d at 1244 (quoting *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976)). However, this is not the only form of tailoring a court must do when issuing a remedy. *See, e.g.*, *Azar*, 911 F.3d at 584.

We have long held that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) (internal quotation marks omitted). Under this rule, the appropriate inquiry would be whether Plaintiffs themselves will continue to suffer their alleged injuries if DOJ were enjoined from enforcing the Challenged Conditions only in California. The district court did not make such a finding, and it is not apparent how the record would support one.

We look first to the injuries Plaintiffs claimed. By imposing the Challenged Conditions, San Francisco argued, DOJ offered "an unacceptable choice: either comply with [the Challenged Conditions] and abandon local policies that San Francisco has found to promote public safety and foster trust and cooperation between law enforcement and the public, or maintain these policies but forfeit critical funds that it relies on to provide essential services to San Francisco residents." San Francisco claimed that it faced "the immediate prospect of losing over $1.4 million" in program funds. California claimed

it was at risk of "losing $31.1 million," which would have devastating impacts on state and local law enforcement agencies, requiring many of their programs to be cut.

An injunction barring DOJ from enforcing the Challenged Conditions within California's geographical limits would resolve Plaintiffs' injuries by returning Plaintiffs to the status quo. While extending this same relief to non-party jurisdictions beyond California's geographical bounds would likely be of consequence to those other jurisdictions, it does nothing to remedy the specific harms alleged by the Plaintiffs in this case. A nationwide injunction was therefore unnecessary to provide complete relief. It was overbroad and an abuse of discretion.

We acknowledge the "increasingly controversial" nature of nationwide injunctions, *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020), and distinguish this case from recent decisions in which we upheld this form of relief. *See id.* (affirming an injunction operating in four states within three circuits); *E. Bay Sanctuary Covenant v. Barr (E. Bay Transit)*, Nos. 19-16487, 19-16773, slip. op. (9th Cir. Jul. 6, 2020) (same); *E. Bay Sanctuary Covenant v. Trump (E. Bay Port-of-Entry)*, 950 F.3d 1242 (9th Cir. 2020).

Plaintiffs here, a state and a municipality, "'operate in a fashion that permits neat geographic boundaries.'" *E. Bay Port-of-Entry*, 950 F.3d at 1282-83 (quoting *E. Bay Sanctuary Covenant v. Trump (E. Bay III)*, 354 F. Supp. 3d 1094, 1120-21 (N.D. Cal. 2018)). Because Plaintiffs do not operate or suffer harm outside of their own borders, the geographical scope of an injunction can be neatly drawn to provide no more or less relief than what is necessary to redress Plaintiffs' injuries. This

is distinguishable from a case involving plaintiffs that operate and suffer harm in a number of jurisdictions, where the process of tailoring an injunction may be more complex.

We recognized this distinction when we affirmed the nationwide injunction entered in *East Bay Port-of-Entry*:

> The Organizations . . . represent "asylum seekers" broadly. Unlike the plaintiffs in *California v. Azar*—individual states seeking affirmance of an injunction that applied past their borders—the Organizations here "do not operate in a fashion that permits neat geographic boundaries." *[E. Bay] III*, 354 F. Supp. 3d at 1120-21 . . . An injunction that, for example, limits the application of the Rule to California, would not address the harm that one of the Organizations suffers from losing clients entering through the Texas-Mexico border. One fewer asylum client, regardless of where the client entered the United States, results in a frustration of purpose (by preventing the organization from continuing to aid asylum applicants who seek relief), and a loss of funding (by decreasing the money it receives for completed cases).

950 F.3d at 1282-83 (citation omitted).

Accordingly, we vacate the nationwide reach of the permanent injunction and limit its reach to California's geographical boundaries.

VI. Conclusion

We affirm the district court's order to the extent it held that DOJ did not have statutory authority to impose the Access and Notice Conditions and declared that Plaintiffs' respective sanctuary laws comply with 8 U.S.C. § 1373, the law on which the Certification Condition is based. We uphold the permanent injunction barring DOJ from withholding, terminating, or clawing back Byrne funding based on the Challenged Conditions and statutes at issue. We also determine that the district court abused its discretion in granting nationwide injunctive relief, which was broader than warranted, and vacate that portion of the district court's order.

Each party to bear its own costs.

AFFIRMED in part; VACATED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 17-cv-04642-WHO
Re: Dkt. Nos. 99, 109, 111, 113, 128, 133, 135, 136, 137, 138

CITY AND COUNTY OF SAN FRANCISCO, PLAINTIFF

v.

JEFFERSON BEAUREGARD SESSIONS, ET AL., DEFENDANTS

Filed: Oct. 5, 2018

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

Case No. 17-cv-04701-WHO
Re: Dkt. Nos. 116, 118, 123, 124, 129, 130, 132

STATE OF CALIFORNIA, EX REL. XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

JEFFERSON BEAUREGARD SESSIONS, ET AL., DEFENDANTS

Filed: Oct. 5, 2018

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

In fiscal year 2017, defendants Attorney General Jefferson Beauregard Sessions III and the Department of Justice (collectively, the "DOJ") announced that applicants for federal grants under the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") program would need to satisfy three new conditions for funding directed at state and local governments that have adopted so-called "sanctuary city" statues and ordinances. The conditions require that grant recipients (i) provide the Department of Homeland Security's Immigration and Customs Enforcement agency ("ICE") access to their correctional facilities for immigration enforcement purposes, (ii) provide notice to ICE of the release date for detainees, and (iii) certify their compliance with 8 U.S.C. § 1373, a statute which prohibits state and local governments from restricting information-sharing with the Department of Homeland Security.

These new conditions have sparked litigation around the country. *See, e.g.*, *City of Philadelphia v. Sessions*, Case No. 17-cv-03894; *City of Chicago v. Sessions*, Case No. 17-cv-05720; *United States v. California*, Case No. 18-cv-490-JAM; *City of Los Angeles v. Sessions*, Case No. 17-cv-07215-R. In the two separate, related actions captioned above, the State of California and the City and County of San Francisco challenge the conditions requiring access, notice and compliance with Section 1373, as well as the constitutionality of Section 1373.

DOJ has lost each time these issues have been raised thus far. It continues to withhold grant funding to six states and several local jurisdictions, including California and San Francisco, which it believes do not comply with the Byrne JAG program conditions for fiscal year 2017. California requests that I enjoin DOJ from imposing the conditions, award the State the grants for which it is eligible, and declare that certain California laws identified by the State comply with the Section 1373. Alternatively, it seeks declaratory judgment finding Section 1373 unconstitutional on its face. Similarly, San Francisco requests that I enjoin enforcement of the conditions, issue declaratory judgment that San Francisco's sanctuary city laws comply with Section 1373, and issue an injunction restraining the DOJ from withholding Byrne JAG funding to San Francisco because of Section 1373. Both ask that the scope of the injunction be nationwide. DOJ responds with its own motions for summary judgment, essentially urging that I reject the requests of California and San Francisco.

In agreement with every court that has looked at these issues, I find that: the challenged conditions violate the separation of powers; Section 1373 is unconstitutional; the Attorney General exceeds the Spending Power in violation of the United States Constitution by imposing the challenged conditions; the challenged conditions are arbitrary and capricious; California's and San Francisco's laws comply with Section 1373 as construed in this Order; California is deserving of the mandamus relief it seeks; and both parties are entitled to a permanent injunction. Because the requisites for a nationwide injunction are met as a result of the unconstitutionality of Section 1373 and the uniform effect of

DOJ's conditions on Byrne JAG grantees around the country, I will follow the lead of the district court in *City of Chicago* and issue a nationwide injunction but stay its nationwide effect until the Ninth Circuit is able to address it in the normal course on appeal.

BACKGROUND

I. FACTUAL BACKGROUND

A. Section 1373 of the Immigration and Nationality Act

The Immigration and Nationality Act ("INA") granted the Executive Branch, through its Department of Homeland Security ("DHS"), DOJ, and other agencies, "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). The INA allows the Attorney General or Secretary of Homeland Security to order the removal of certain classes of immigrants from the United States. *See* 8 U.S.C. §§ 1227(a), 1228. The Attorney General is directed to take certain detainees into custody pending removal proceedings once they are released from state or local custody. *See* 8 U.S.C. § 1226(c)(1). To enforce the immigration laws, Executive Branch agencies exercise independent discretion; the INA also gives agencies tools to encourage cooperation with state and local offices to support federal policy objectives. *See, e.g.*, 8 U.S.C. § 1357(g) (authorizing state and local officers to perform functions of a federal immigration officer); 8 U.S.C. § 1324(c) (authorizing state and local officers to make arrests for INA violations); 8 U.S.C. § 1252c (authorizing state and local officers to make arrests for unlawful reentry); Homan Decl. ¶ 36 (SF Dkt. No. 113-2) (discussing Immigration

and Customs Enforcement's cooperation with state and local officers to provide uniformed presence in support of enforcement efforts).

Relevant to the present motions for summary judgment, 8 U.S.C. § 1373 prohibits restricting the communication of certain information between federal, state, and local governments. It states:

> (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.

8 U.S.C. § 1373.

B. The Office of Justice Programs and the Byrne JAG Program

The Office of Justice Programs ("OJP") was established with the passage of Title I of the Omnibus Crime Control and Safe Streets Act of 1968 and is managed by an Assistant Attorney General. *See* Pub. L. No. 90-351, 82 Stat. 197 (1968), *codified as amended at* 34 U.S.C. § 10101, *et seq*. The same statute created the precursor to the Byrne JAG program; the program's current iteration was established through the Violence Against Women and Department of Justice Reauthorization Act of 2005. *See* Pub L. No. 109-162, 119 Stat. 2960 (2006); *see also* 34 U.S.C. § 10151 (formerly 42 U.S.C. § 3750).

Under the Byrne JAG program, the Attorney General makes grants to state and local governments through the Bureau of Justice Assistance Grant Programs, a component of the OJP. *See* 34 U.S.C. § 10152. The grants support law enforcement efforts by providing additional personnel, equipment, supplies, training, and other assistance to applicants. *Id*. The Byrne JAG program is a formula grant program, meaning that it awards funding to all grantees by a statutorily prescribed formula. *See* 34 U.S.C. § 10156(d)(2)(A) (stating that "the Attorney General shall allocate to each unit

of local government" funds determined by the established formula). Grant funding derives from a state's population and violent crime rate, to be used in one of eight program areas. *See* 34 U.S.C. § 10156(a). Immigration enforcement is not listed as one of the eight program areas for use of Byrne JAG funding. *See* 34 U.S.C. § 10152(a)(1). The formula also allocates a portion of remaining amounts of state funding to units of local governments through sub-grants. *See* 34 U.S.C. § 10156(c)(2).

California uses its JAG funds to support education and crime prevention, court programs, and law enforcement programs like task forces focused on criminal drug enforcement, violent crime, and gang activities. *See* Jolls Decl. ¶ 10 (CA Dkt. No. 29-1); Caligiuri Decl. ¶ 27 (CA Dkt. No. 118-4). Under the formula, it expected to receive (through the Board of State and Community Corrections) $28.3 million in JAG funding for fiscal year 2017, including $17.7 million to the State and the remainder to local jurisdictions. *See* Jolls Decl. ¶ 5.

San Francisco has received Byrne JAG funding for over a decade; it applied again for funding in the 2017 fiscal year. *See* Chyi Decl. ¶ 4 (SF Dkt. No. 105). It was entitled to receive Byrne JAG program funds of $524,845 and Byrne JAG sub-grants equal to $923,401 under the formula. *Id.* ¶¶ 7, 16. San Francisco uses the funding across six departments and for ten full-time positions to support law enforcement programs focused on reducing drug trade and servicing individuals with substance and mental health problems. *Id.* ¶¶ 10, 17, 18. Without the Byrne JAG funds, San Francisco lacks the additional funding to support its Department of Children, Youth and their Families, including programs

like the Young Adult Court, which provides case management and support to adults fighting recidivism. *Id.* ¶¶ 11, 19.

C. New Byrne JAG Program Grant Conditions

In fiscal year 2016, the DOJ announced that Section 1373 was an "applicable law" for Byrne JAG funding, and the DOJ required grantees like California to submit a legal opinion on its compliance with Section 1373. *See* Jolls Decl. ¶ 55, Ex. B; *see also* DOJ Request for Judicial Notice ("RJN") Ex. A ¶ 55 (CA Dkt. No. 125). For the following fiscal year, in July and August 2017, the OJP posted state and local solicitations for Byrne JAG grants that formalized other conditions. *See* Lee Decl. ¶¶ 3-4, Exs. A-B (SF Dkt. No. 106-1). The solicitations included three new conditions required for funding, each relating to federal immigration enforcement.

Byrne JAG grant applicants must now provide a certificate of compliance with Section 1373, signed by the jurisdiction's chief legal officer under penalty of perjury, attesting that the applicant does not have prohibitions on information-sharing with the INS about the citizenship or immigration status of any individuals. *See* Lee Decl. ¶ 4, Ex. B at 38; CA RJN Ex. 21. California certified that it complies with Section 1373, but the DOJ has not made a final determination on California's compliance. *See* Sherman Decl. Ex. B (CA Dkt. No. 116-5). San Francisco also believes it complies with Section 1373, but the DOJ has denied this. Lee Decl. ¶ 6 Ex. D, Req. for Admission No. 1.

Grant applicants must also have policies that satisfy "access" and "notice" conditions for Byrne JAG funding. The access and notice conditions require: (i) "that

agents of the United States . . . are given . . . access" to any State or local government 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;" and (ii) that when a State or local correctional facility "receives from DHS a formal written request . . . 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." Lee Decl. Ex. E; Hanson Decl. ¶¶ 55-56, Ex. B (CA Dkt. No. 42-1); DOJ RJN Exs. B and C (CA Dkt. No. 125). The "Rules of Construction" applicable to these new grant conditions clarify that the requirements do not extend to detaining "any individual in custody beyond the date and time the individual would have been released in the absence of this condition" and do not mandate detaining non-citizens at the request of federal immigration officials. *See* DOJ RJN, Exs. B and C ¶ 55.

D. The Office of Community Oriented Policing Services

In addition to new Byrne JAG program conditions, the DOJ announced that grants issued by the Office of Community Oriented Policing Services ("COPS") would require Section 1373 compliance as well. *See* DOJ RJN, Ex. F at 1. In fiscal year 2017, access to COPS funding included the Section 1373 certification requirement. One of the programs administered by COPS is the COPS Anti-Methamphetamine Program ("CAMP"), a competitive grant. In the past, California, through its Bureau of Investigations, received CAMP funding to

support law enforcement investigations of the unlawful manufacture and distribution of methamphetamine—their work on the task force has led to seizing more than $30 million in illegal drugs since 2015. *See* Caligiuri Decl. ¶¶ 13-19. California received $1 million in CAMP funding in November 2017 but was informed it could not "draw down" the funds until an inquiry was resolved into its compliance with Section 1373. *Id.* ¶ 23.

E. California's Sanctuary State Laws and Policies

California has enacted the following statutes that are pertinent to its compliance with the access and notice conditions, the certification condition, and Section 1373: the TRUST Act, Cal. Gov. Code § 7282 *et seq.*, the TRUTH Act, Cal. Gov. Code § 7283 *et seq.*, the Values Act, Cal. Gov. Code § 7284 *et seq.*, and six confidentiality statutes. It enacted the TRUST Act in 2013, defining when local law enforcement agencies can detain individuals for up to 48 hours after an ordinary release because of a civil detainer request by DHS. *See* CA RJN Ex. 6. The TRUST Act states that local law enforcement may only comply with a DHS civil detainer if the detainer does not "violate any federal, state, or local law, or any local policy," and (1) the detainee's criminal background includes one of a delineated list of crimes, (2) the detainee was on the California Sex and Arson Registry, or (3) the detainee was held after a magistrate's finding of probable cause for a serious or violent felony. *See* Gov. Code § 7282.5(a). The purpose behind the TRUST Act, according to comments by the author, was to "establish a statewide standard for responding to ICE holds and . . . prevent the prolonged detention of people who would otherwise be released from custody if it were not for ICE's request." CA RJN Ex. 6. at 4.

in 2016, the TRUTH Act was enacted. It requires that local law enforcement agencies give notice to inmates before an interview with any immigration officials. *See* CA RJN Ex. 5. Notification includes informing the detainee that the interview is voluntary and that he has a right to seek counsel. *See* Cal. Gov. Code § 7283.1(a). The local law enforcement agency must provide the detainee with a copy of the federal immigration request to interview and inform the detainee whether it intends to comply with the request. *Id.* § 7283.1(b).

In October 2017, the Values Act expanded on the TRUST and TRUTH Acts to address the California Legislature's concern with preserving community trust between the state and local governments and California's immigrant communities. *See* Cal. Gov. Code § 7284.2. It amended the TRUST Act by imposing additional constraints on law enforcement's ability to share the release dates of individuals, but it allows law enforcement to notify federal immigration officials about an individual's release date if the individual was convicted of a wide range of specified crimes or if the information is already publicly available. *See* Cal. Gov. Code §§ 7282.5(a), 7284.6(a)(1)(C). The Values Act also prohibits law enforcement agencies from using money or personnel to provide the personal information of victims and witnesses of crime for immigration enforcement purposes unless the information was already publicly available. *See* Cal. Gov. Code § 7284.6(a)(1)(D).

That said, the Values Act does not prohibit other forms of cooperation with federal immigration authorities. It does not apply to the California Department of Corrections and Rehabilitation, which responds to notification requests by ICE and transfers individuals from

state to federal immigration custody. *See* CA RJN Exs. 12-16. It does not restrict sharing criminal-history via three state-run databases, participation in task forces with immigration officials, or federal access to jails. *See* Cal. Gov. Code § 7284.6(b); Reich Decl. ¶ 12 (CA Dkt. No. 116-3). Through a savings clause, the Values Act expressly authorizes compliance with Section 1373. *See* Cal. Gov. Code § 7284.6(e).

California's confidentiality statutes protect sensitive information of victims, witnesses, and juveniles. California Penal Code section 422.93 prohibits law enforcement from detaining hate-crime victims and witnesses who are not charged with or convicted of any state law crimes if they would be detained solely for immigration violations for transfer to federal immigration officials. *See* Cal. Penal Code § 422.93(b). California Penal Code sections 679.10 and 679.11 prohibit any state entity that certifies information for U-visa and T-visa applications from disclosing immigration status of individuals making the request "except to comply with federal law or legal process, or if authorized by the victim or person requesting [the certification form]." Cal. Penal Code §§ 679.10(k), 679.11(k); *see also* RJN Ex. 18. The California Welfare and Institutions Code also contains two confidentiality statutes, sections 827 and 831, that provides privacy for juveniles, including their immigration status, in court records. *See* California Welf. & Inst. Code §§ 831(a) and 831(e). California Code of Civil Procedure section 155 also requires "information regarding the child's immigration status . . . remain confidential" in the federal Special Immigrant Juvenile process. Cal. Civ. Proc. Code § 155(c).

The State's policies seek to use limited resources for public safety rather than immigration enforcement—the State Legislature concluded that limits on local law enforcement's involvement with immigration enforcement results in safer communities. *See* Cal. Gov. Code § 7284.2(f); CA RJN Exs. 4-6. The California Assembly Committee on Public Safety, in a hearing held on June 13, 2017, summarized a study by the University of Illinois—Chicago that found: (i) 44 percent of surveyed Latinos were less likely to contact police officers if they had been victims of a crime for fear of police inquiring into their immigration status; (ii) 45 percent were less likely to volunteer information about a crime and were less likely to report a crime for fear of police inquiring into their immigration status; (iii) 70 percent of undocumented immigrants reported they were less likely to contact law enforcement if they were victims of a crime; (iv) 28 percent of U.S.-born Latinos were less likely to contact police if they were victims of a crime for fear of police inquiring into their immigration status; and (v) 38 percent of Latinos feel like they are under more suspicion now that local law enforcement have become involved in immigration enforcement, with the figure rising to 58 percent among undocumented immigrant respondents. CA RJN Ex. 4.

California's policies are based on local law enforcement's belief that it is vital to maintain trust with immigrant communities; otherwise, immigrants will "fail to disclose crimes that they witness and/or are victims to out of fear of deportation." Hart Decl. ¶¶ 7, 9, 11-18, 21, Ex. 3 (CA Dkt. No. 116-3); Rosen Decl. ¶¶ 6-9, Ex. 5 (CA Dkt. No. 116-3); Wong Decl. ¶¶ 4, 34-38, 44, 48, 53, Ex. 10 (CA Dkt. No. 116-4). For example, in a study of

594 undocumented Mexican nationals in San Diego County, 60.8 percent of respondents were less likely to report crimes they witnessed to police, and 42.9 percent were less likely to report being a victim of a crime to police, if the police were working together with ICE. *See* Wong Decl. ¶ 35. When local law enforcement officials communicated that they were not working with ICE, 71.8 percent of respondents were more likely to report crimes they witnessed, and 70.8 percent were more likely to report being a victim of a crime to the police. *See* Wong Decl. ¶ 36. California finds that these results accord with other research on undocumented women who are victims of violent crime, sexual assault, or domestic violence, and who are less likely to report these crimes if law enforcement officers are working with federal immigration officials. *See* Wong Decl. ¶ 38.

F. San Francisco's Sanctuary City Laws and Policies

San Francisco declared itself a City and County of Refuge in 1989 and codified its Sanctuary City Laws in Chapters 12H and 12I of the San Francisco Administrative Code. *See* SF RJN Ex. A (SF Dkt. No. 107-1). Chapter 12H expressly prohibits any City or County funds or resources from being used to assist federal immigration officers to gather or share information on the release status of individuals unless required by federal or state law. *See* S.F. Admin. Code § 12H.2. Chapter 12I prohibits law enforcement in San Francisco from responding to federal immigration enforcement requests for notice of release dates for individuals in custody unless the individual meets certain criteria, such as having a recent conviction for a serious or violent felony or

three separate felonies other than domestic violence. *See* S.F. Admin. Code § 12I.3(c), (d), (e).

San Francisco's law enforcement departments have policies consistent with the Sanctuary City Laws, which it also believes are not violative of Section 1373. *See* Sainez Decl. ¶¶ 9-11 (Police Department) (SF Dkt. No. 100); Fletcher Decl. ¶¶ 6-7 (Adult Probation Department) (SF Dkt. No. 101); Hennessy Decl. ¶¶ 11, 17-18 (Sheriff's Department) (SF Dkt. No. 102). Additionally, the San Francisco Sheriff's Department has policies prohibiting employees from providing ICE or other federal immigration enforcement officials any access to San Francisco jails, computers, databases, release dates, or contact information for inmates in its custody. *See* Hennessy Decl. ¶¶ 17-18, Ex. D. San Francisco shares the views of California that its sanctuary city policies encourage individuals to be candid with law enforcement and facilitate trust between law enforcement and the community. San Francisco believes that these policies lead to greater reporting of crimes, more cooperative witnesses, and more assistance with law enforcement investigations. *See* Hennessy Decl. ¶ 8; Sainez Decl. ¶ 6.

II. PROCEDURAL BACKGROUND AND RELATED LITIGATION

California and San Francisco filed their respective lawsuits in August 2017, seeking to enjoin DOJ from requiring the three conditions on Byrne JAG program funding and to receive their grant funds. The DOJ unsuccessfully moved to dismiss both suits, arguing that the plaintiffs lacked Article III standing and that their complaints failed to state a claim. *See* Order Denying Mot. to Dismiss (SF Dkt. No. 78); Order Denying Mot.

to Dismiss (CA Dkt. No. 88). California separately moved for a preliminary injunction, which I denied because at the time there was not enough evidence to determine a likelihood of success on the merits and there was uncertainty whether California's injury was irreparable. *See* Order Denying Amended Mot. for Preliminary Injunction (CA Dkt. No. 89).

Other highly relevant lawsuits are being litigated that challenge the federal government's new conditions for Byrne JAG program funding, and the federal government initiated its own challenge to California sanctuary state laws like the Values Act. In *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017), the district court initially granted Chicago's motion for a nationwide preliminary injunction of the access and notice conditions but denied Chicago's motion to enjoin the Section 1373 certification requirement. *Id.* at 951. On appeal, the Seventh Circuit unanimously affirmed the lower court ruling that the new Byrne JAG program access and notice conditions could not be imposed, and a divided panel affirmed the nationwide injunction. *See City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018). Attorney General Sessions petitioned for a rehearing *en banc* on the scope of the injunction and the Seventh Circuit stayed the nationwide scope of the injunction while a rehearing was pending. *See* Order, *City of Chicago v. Sessions*, Case No. 17-2991 (7th Cir. June 26, 2018), Dkt. No. 134. The district court then granted in part and denied in part Chicago's motion for summary judgment, this time finding that Section 1373 was unconstitutional under the Tenth Amendment. *See City of Chicago v. Sessions*, --- F. Supp. 3d. ---, Case No. 17-5720, 2018 WL 3608564, at *5 (N.D. Ill. July 27,

2018). The court also issued a permanent nationwide injunction but stayed the nationwide scope of the injunction because the *en banc* rehearing was still pending. *Id.* at *17. The Seventh Circuit vacated its *en banc* hearing after the second district court order, allowing the stay to remain in effect until the lower court issued a proper injunction under Federal Rule of Civil Procedure 65. *See City of Chicago v. Sessions*, Case No. 17-2991, 2018 WL 4268814, at *2 (7th Cir. Aug. 10, 2018). The district court entered an order setting forth the terms of the permanent injunction under Rule 65, and the case is pending in the Seventh Circuit. *See id.*, Dkt. No. 159.

In *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 588 (E.D. Pa. 2017), appeal dismissed sub nom. *City of Philadelphia v. Attorney Gen. United States*, Case No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018), the court found that the access and notice conditions lacked statutory authority under the Administrative Procedure Act and granted Philadelphia's motion for preliminary injunction. It enjoined the federal government from denying funds to Philadelphia for fiscal year 2017. *Id.* On summary judgment, the court found that the new conditions were arbitrary and capricious, and that Section 1373 violated the Tenth Amendment's anti-commandeering principle. *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018). The court also issued a declaratory judgment that Philadelphia complied with Section 1373, and it issued a permanent injunction. *Id.* at 340-342. The Attorney General filed an appeal that is now pending in the Third Circuit. *See City of Philadelphia v. Attorney Gen. United States*, Case No. 18-2648 (3rd Cir. July 26, 2018).

In *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018), the federal government sued to enjoin California's enforcement of three state laws it believed violated the Supremacy Clause of Article VI, cl. 2. The Hon. John A. Mendez of the Eastern District of California granted in part and denied in part the federal government's motion for preliminary injunction. Relevant to this lawsuit, Judge Mendez held that the United States was not likely to succeed on the merits of its conflict preemption claim against California's Values Act because it found "no direct conflict between SB 54 and Section 1373." *United States v. California*, 314 F. Supp. 3d 1077, 2018 WL 3301414, at *15 (E.D. Cal. 2018). Judge Mendez dismissed the federal government's Supremacy Clause claim concerning the Values Act without leave to amend in a separate order. *See United States v. California*, Case No. 18-CV-490-JAM-KJN, 2018 WL 3361055, at *3 (E.D. Cal. July 9, 2018). The Attorney General appealed. *See United States v. State of California*, Case No. 18-16496 (9th Cir. Aug. 9, 2018).

LEGAL STANDARD

A party is entitled to summary judgment where it "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To prevail, a party moving for summary judgment must show the lack of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing

summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby,* 477 U.S. 242, 257 (1986).

On summary judgment, the Court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir. 1979).

DISCUSSION

Before addressing the arguments on the merits, I resolve the evidentiary disputes and administrative motions surrounding the motions for summary judgment.

I. EVIDENTIARY DISPUTES AND ADMINISTRATIVE MOTIONS

A. DOJ's Motions to Strike Exhibits

DOJ moves to strike Exhibit 42 of California's Request for Judicial Notice and Exhibits I and J of the Lee Declaration in support of San Francisco's motion for summary judgment, asserting that these exhibits are privileged. *See* Admin. Mot. to Strike (CA Dkt. No. 123); Admin. Mot. to Strike (SF Dkt. No. 109). It argues that they were inadvertently produced and notes that other copies of the same documents were properly

logged as privileged and withheld during discovery. In July 2018, it sent a clawback letter for the inadvertently released privileged documents. *Id.*, Simpson Decl. at Ex. A. California consents to striking Exhibit 42, while San Francisco has not confirmed or denied its consent to strike Exhibits I and J of the Lee Declaration. *Id.* at 2.

The deliberative process privilege applies to documents if they are predecisional (drafted before an agency adopted a given policy) and deliberative (containing opinions, recommendations, or advice while determining the agency policy). *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Exemplary predecisional documents covered by the deliberative process privilege are drafts of documents and documents fashioned as recommendations or suggestions "which reflect the personal opinions of the writer rather than the policy of the agency." *Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Predecisional documents are part of the deliberative process if disclosing the document would discourage candid discussions that undermine the agency's ability to function. *Id.*

Both documents are pre-decisional and reflect personal opinions of the personnel who drafted them as opposed to policy determinations. One is an internal memorandum between the Acting Assistant Attorney General and the Associate Attorney General, showing predecisional analysis of compliance with California laws and Section 1373. The other is a redlined draft document about the DOJ's decision and talking points. I GRANT the motion to strike Exhibit 42 of California

Request for Judicial Notice and Exhibits I and J of the Lee Declaration.

B. San Francisco's Motion to Exclude Declarations

San Francisco seeks to exclude the Madrigal and Atsatt declarations, which DOJ filed in support of its opposition and cross-motion for summary judgment. *See* Mot. to Exclude (SF Dkt. No. 128). San Francisco argues that DOJ did not comply with Federal Rules of Civil Procedure 26(a) or 26(e), and that DOJ cannot show that its failure to disclose the declarations was harmless or justifiable. *Id.* at 1. DOJ contends San Francisco cannot complain of any harm from the undisclosed declarations because it committed the same harmful conduct. *See* Opp. to Mot. to Exclude (SF Dkt. No. 131).

Federal Rule of Civil Procedure 37(c)(1) states that if a party fails to "identify a witness as required by Rule 26(a) or (e)," the party may not use the witness for "evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Evidence that applies to Rule 37 must be excluded, as this is a "self-executing, automatic sanction to provide a strong inducement for disclosure of material." *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008), as amended (Sept. 16, 2008) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). Rule 37 also imposes the burden of proof on the party whose evidence may be excluded. *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2012).

San Francisco claims that after initial disclosures and throughout discovery, DOJ never mentioned Madrigal

or Atsatt at any time and there were no references to any documents authored by them. *See* Meré Decl. ¶¶ 6, 8 (SF Dkt. No. 129). When the parties discussed limiting discovery, they agreed to declarations by a limited number of fifteen custodians of records. *Id.* ¶¶ 9-10. Madrigal and Atsatt were not on the finalized list of custodians, nor did DOJ amend or supplement its disclosures. *Id.* ¶ 13. The first time that San Francisco apparently learned of the declarants was in August 2018, when DOJ filed its opposition and cross-motion for summary judgment. *Id.* ¶ 16.

As DOJ argues, San Francisco served supplemental initial disclosures for seven new declarations the day before its opposition to the DOJ's motion for summary judgment. *See* Opp. to Mot. to Exclude at ¶ 2. However, San Francisco contends that two of those declarations were provided only to rebut arguments made by DOJ in its motion for summary judgment, and that the remaining five declarations are substantially justified because they respond to issues raised by the Ninth Circuit in *City & County of San Francisco v. Trump*, Case No. 17-17478, 2018 WL 3637911 (9th Cir. Aug. 1, 2018). *See* Reply in Supp. of Mot. to Exclude (SF Dkt. No. 132).

In contrast, DOJ has not argued or alleged that its failure to disclose the Madrigal and Atsatt declarations was substantially justified. Rule 37(c)(1) is "self-executing" and DOJ has not met its burden of proof. *Hoffman*, 541 F.3d at 1180. On this basis, I GRANT the motion to exclude the Madrigal and Atsatt declarations.[1]

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[1] They are not dispositive in any event.

C. Administrative Motions to File Under Seal

California and DOJ submitted administrative motions to file materials under seal. In July 2018, California filed its administrative motion to seal portions of the Caligiuri Declaration. *See* Admin. Mot. (CA Dkt. No. 118). That same month, DOJ filed its administrative motion to seal a document designated as "Confidential" under a Protective Order in this case and produced by San Francisco. *See* Admin. Mot. (SF Dkt. No. 111).

Given the historically recognized public right of access to judicial records, there is a "strong presumption in favor of access." *Foltz v. State Farm Mutual Auto. Insurance Company,* 331 F.3d 1122, 1135 (9th Cir. 2003). With dispositive motions, such as the present motions for summary judgment, the presumption of access can be overcome only by demonstrating a compelling reason to do so, such as an articulated interest favoring secrecy that outweighs the public interest in understanding the judicial process. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179, 1181 (9th Cir. 2006) (stating that the movant must "present articulable facts identifying the interests favoring continued secrecy."). If the court decides to seal certain documents, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

Here, there are compelling reasons to seal portions of California's Caligiuri Declaration and the document attached to the DOJ's Mauler Declaration. The subject portions of the Caligiuri Declaration contain details about ongoing and active criminal investigations. *See*

Ehrlich Decl. ¶ 4 (CA Dkt. No. 118-1). The spreadsheet attached to the Mauler Declaration also contains partially redacted confidential criminal offender record information that could be reverse engineered with extraneous data if unsealed. *See* McGrath Decl. ¶ 7 (SF Dkt. No. 112). I GRANT the administrative motions to file these materials under seal.

D. Motions for Leave to File Amicus Briefs

There are also eight motions for leave to file amicus briefs with the court. *See* Admin. Mots. for Leave (CA Dkt. Nos. 129, 130, 132; SF Dkt. Nos. 133, 135, 136, 137, 138). Because each motion complies with my prior Order Regarding Amicus Briefing, I GRANT the motions. *See* Order (CA Dkt. No. 41; SF Dkt. No. 55).

II. SEPARATION OF POWERS AND THE SPENDING CLAUSE

California and San Francisco argue that the new conditions are unconstitutional because they seek to exercise Congress's exclusive Spending Power in violation of the constitutional separation of powers and the Spending Clause. Article I of the United States Constitution specifically grants the Spending Powers to Congress. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Congress's Spending Power includes "condition[ing] the receipt of funds, by states and others, on compliance with federal directives." *State of Nev. v. Skinner*, 884 F.2d 445, 447 (9th Cir. 1989); *see also Fullilove v. Klutznick*,

448 U.S. 448, 474 (1980) ("Incident to this power, Congress may attach conditions on the receipt of federal funds.").

Congress is in control of the Spending Power to "set the terms on which it disburses federal money to the State," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), but if it intends to impose conditions on federal grants, "it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). By extension, the Executive Branch "does not have unilateral authority to refuse to spend . . . funds" already appropriated by Congress "for a particular project or program." *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013). Congress still may, consistent with the separation of powers, delegate certain authority to spend money to the Executive Branch. *See Clinton v. City of New York*, 524 U.S. 417, 488 (1998) ("Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money."). However, the Constitution evidences the "unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983). DOJ's conditions on Byrne JAG grant funding violate these constitutional principles.

A. Separation of Powers

DOJ argues that the context of the Byrne JAG program statute shows that Congress intended to delegate discretionary authority to the Attorney General. Congress expressly amended the statute to include the Assistant Attorney General's power of "placing special

conditions on all grants, and determining priority purposes for formula grants." USDOJ Reauthorization Act, § 1152(b), 119 Stat. at 3113, codified at 34 U.S.C. § 10102(a)(6).

San Francisco and California offer three generally overlapping arguments to contend that DOJ's conditions on Byrne JAG program funds violate the separation of powers. First, they contend that Congress, through the Byrne JAG program, only authorizes the Attorney General to exercise ministerial powers and not the limitless discretionary authority to impose new conditions. Second, they challenge the notion that 34 U.S.C. § 10102(a) justifies the Attorney General's authority to impose the access and notice conditions. Finally, they argue that the Byrne JAG statute does not permit the certification condition because Section 1373 is unconstitutional considering the anti-commandeering principle and the Supreme Court's recent decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). Each of these points is discussed in turn.

1. The Byrne JAG Program Does Not Grant the Attorney General Authority to Impose the Challenged Conditions

The Byrne JAG Program is a formula grant program, not a discretionary program, meaning that Congress has already determined who the recipients are and how much money they receive. *See City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) ("In the formula grant program the authorizing Act of Congress determines who the recipients are and how much money each shall receive."). The operative statute leaves it to the Attorney General to determine and make the formula grants "in accordance with the formula established

under section 10156 of this title . . . " for specified purposes such as law enforcement programs, court programs, and drug or preventative education programs. 34 U.S.C. § 10152(a)(1)(A)-(H). The question becomes to what extent Congress granted DOJ, and the Assistant Attorney General heading OJP, the power to impose its own conditions on Byrne JAG grants.

Starting with the text itself, the Byrne JAG statute contains limited discretionary authority for the Attorney General to carry out specific parts of the grant program. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue."). The statute provides discretionary authority over waiving the "program assessment component" requirement, *id.* at § 10152(c)(1)-(2), allowing prohibited uses of the funds in "extraordinary and exigent circumstances," *id.* at § 10152(d)(2), and renewing funds for four-year periods. *Id.* § 10152(f). Applicants must submit their applications to the Attorney General in a certain format, and the Attorney General has discretion related to that ministerial process. For instance, the statute requires assurances that the applicant maintains certain programmatic and financial records "as the Attorney General may reasonably require." *Id.* at § 10153(a)(4). Completed applications require a certification, "made in a form acceptable to the Attorney General," that the application contains correct information and that the funds will generally be used for the program the applicant seeks funding for. *Id.* at § 10153(a)(5). Congress provided discretion for DOJ to reserve up to five percent of funds to award to one or more states or local governments under § 10152 where

there is a special need like "extraordinary increases in crime." *Id.* at § 10157(b). Some authority to reduce the amount paid is explicit in § 10158(b)(3), stating that "the Attorney General shall reduce amounts to be provided . . . " if the recipient fails to spend the money as planned and does not repay it. *Id.* at § 10158(b)(3). None of these provisions grant the Attorney General authority to impose the challenged conditions.

Other actions or inactions of Congress do not support DOJ's position. Congress has exercised its power to impose conditions on Byrne JAG funding in the past, legislating a ten percent withholding of Byrne JAG funds for failing to implement federal Sex Offender Registration and Notification Act, 34 U.S.C. § 20927(a), a penalty for failing to implement the Death in Custody Act, *id.* § 60105(e)(2), and a penalty for failing to certify compliance with Prison Rape Elimination Standards. *See id.* § 30307(e)(2). In 2005, Congress repealed the only directly immigration-related requirement for Byrne JAG program funding. *See* Violence Against Women and Department of Justice Reauthorization Act, H.R. Rep. 109-233, 109th Cong. at 8 (2005). Several amici insist that Congress intentionally entrusted state and local jurisdictions with the discretion to tailor funds to their needs, recognizing the need for "flexibility to spend [federal] money for programs that work for them rather than to impose a 'one size fits all' solution." *See, e.g.*, Amicus Brief (CA Dkt No. 129; SF Dkt. No. 133) (quoting H.R. Rep. 109-233, at 89 (2005)).

San Francisco points out that Congress has chosen not to exercise its power to impose immigration conditions on Byrne JAG grants in the past, rejecting such

legislation several times. *See, e.g.*, Stop Sanctuary Cities Act, S. 1814, 114 Cong. § 2(b)(2) (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3(b) (2015). DOJ believes this is unpersuasive. *See FTC v. AT&T Mobility LLC*, 883 F.3d 848, 857-58 (9th Cir. 2018) ("Such proposals lack 'persuasive significance' because 'several equally tenable inferences may be drawn from [congressional] inaction, including the inference that the existing legislation already incorporated the offered change.'") (internal quotations and citations omitted). But the Ninth Circuit has found congressional inaction, or unsuccessful actions, are relevant to show Congress's lack of authorization of the Executive Branch's purported authority "to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (finding that given the "divisiveness of the policies in play," Congress did not approve of an Executive Order withholding grant funding to cities that failed to certify compliance with Section 1373.).

DOJ disagrees that a formula grant program like the Byrne JAG program is "irreconcilable" with the access and notice conditions. It relies on the single sentence, "the Attorney General *may*, in accordance with the formula . . . , make grants . . . ," to contend that there is a difference between grant eligibility discretion and fund allocation discretion. 34 U.S.C. § 10152 (emphasis added). No party disputes that the Attorney General has some discretion to make grants in the statute. The dispute is whether the text supports discretion to the degree that DOJ assumed when it created the

conditions. The text itself does not support such an exercise of power. Yet DOJ simply writes-off the lack of express authorization and instances when Congress imposed its own conditions on Byrne JAG funding as being coextensive with its own discretionary authority to determine conditions for grant eligibility.

DOJ does not offer any argument not already considered on this exact issue in the parallel cases. *See, e.g.*, *City of Chicago*, 2018 WL 3608564, at *12 (holding that the Byrne JAG statute did not grant authority to impose notice and access conditions); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d at 321 (finding that all three conditions violated the separation of powers principle); *see also City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1098 (C.D. Cal. 2018) (striking down similar conditions on COPS grants). It made no attempt to address those unfavorable cases or explain why I should depart from that authority, and I will not. It is evident from the text of the statute that the federal funds designated by Congress for the Byrne JAG program do not impose their own immigration enforcement conditions on recipients. To the contrary, "nothing in the Byrne JAG statute grant[s] express authority to the Attorney General to impose the notice and access conditions." *City of Chicago*, 888 F.3d at 280.

2. Section 10102 Does Not Grant the Attorney General Authority to Impose the Challenged Conditions

As an independent basis for imposing the conditions, DOJ relies on the authority granted in 34 U.S.C. § 10102, a statute in the subchapter creating the OJP titled "Duties and Functions of Assistant Attorney General." The statute states, "The Assistant Attorney

General shall . . . (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 (emphasis added).

The parties once again offer opposing statutory interpretations. San Francisco argues that Section 10102(a) did not give DOJ authority to impose conditions because the power of "placing special conditions" on and "determining priority purposes" of grants refers to powers that have to be vested by some other statutory authority and are not enumerated in Section 10102. California contends that the access and notice conditions are not justified by Section 10102(a)(6) because it only permits the OJP to place special conditions on all grants to "high-risk" grantees. California also asserts that Section 1373 identifies a "special award condition" to COPS grants as a "high-risk condition" but refers to other conditions as "award terms and conditions" only. CA RJN Ex. 31 at 5, 20.

DOJ counters that Section 10102(a)(6) must be interpreted to grant the Assistant Attorney General discretion to impose the conditions given that the statute was amended to add the "special conditions" and "priority purposes" language. To give the amended language no power would therefore contravene the canon of statutory construction against surplusage. S*ee, e.g.*, *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1022 (9th Cir. 2014) ("'When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'") (quoting *Stone v. INS*, 514 U.S. 386,

397 (1995)). DOJ emphasizes the absence of any language limiting "special conditions" on only "high-risk" grantees when the text grants authority to place conditions on "all grants." 34 U.S.C. § 10102(a)(6). It interprets "determine priority purposes" broadly as including the authority to prioritize federal grant funds to further federal policies.

DOJ's interpretation that Section 10102 establishes an independent grant of authority to impose the challenged conditions contradicts the plain meaning of the statute. The Seventh Circuit's decision in *City of Chicago*, 888 F.3d at 284-85, and the district court's order in *City of Philadelphia*, 280 F. Supp. 3d at 616-17, are particularly instructive. They found, and I agree, that DOJ asserts its independent authority to place "special conditions" on grants to determine "priority purposes" based on the subordinate clause in the last sentence of Section 10102. The clause begins with the word "including," conveying a reference to part of a whole. In this statute, "placing special conditions" and "determining priority purposes" refers to part of the powers that the Assistant Attorney General could have that were described earlier in the sentence. Those powers depend on the authority "vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General." 34 U.S.C. § 10102. No portion of the same chapter authorizes the conditions explicitly. The Attorney General lacks the power to impose additional conditions on Congress's exercise of the Spending Power independent of Congress.[2] Moreover, the Byrne

[2] Even if there were independent authority granted by Section 10102(a)(6), courts hearing the parallel cases found that the language "placing special conditions on all grants" is most likely a term

JAG program statute does not reference Section 10102 and does not provide the authority to impose the notice and access conditions as discussed above. *See* Sec. II.A.1.

In addition, the statutory structure of Section 10102(a)(6) does not support DOJ's broad interpretation of its power to impose the challenged conditions. Section 10102(a)(6) is in a different subchapter than the Byrne JAG statute and there is no text expressly applying it to the Byrne JAG program. *See City of Chicago,* 888 F.3d at 285 ("A clause in a catch-all provision at the end of a list of explicit powers would be an odd place indeed to put a sweeping power to impose any conditions on any grants—a power much more significant than all of the duties and powers that precede it in the listing, and a power granted to the Assistant Attorney General that was not granted to the Attorney General."). Ultimately, if such a broad power was not granted to the Attorney General under Section 10102(a)(6) or elsewhere, by the statute's plain meaning the Assistant Attorney General does not hold such power either. *See also City of Philadelphia*, 280 F. Supp. 3d at 617 ("Congress is unlikely to ground the Attorney General's authority to impose substantive conditions in a subsection dedicated to conferring power on the AAG."). Section 10102(a)(6) does not provide DOJ authority to impose the challenged conditions on Byrne JAG program funding.

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of art for the additional conditions placed on "high-risk grantees" only. *See City of Philadelphia*, 280 F. Supp. 3d at 617; s*ee also City of Chicago*, 888 F.3d at 285 n.2 (noting a possible term of art but not analyzing further).

3. Section 1373 is Not an Applicable Federal Law for Compliance with the Byrne JAG Statute

In addition to the lack of authority for the notice and access conditions, San Francisco and California assert that DOJ lacks authority to impose the Section 1373 certification condition from the text of the Byrne JAG statute. DOJ insists that language in the Byrne JAG statute supports its authority to impose the certification condition. Specifically, 34 U.S.C. § 10153(a)(5)(D) states:

> (a) 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 . . . Such application shall include the following:
>
> . . .
>
> (5) A certification, . . . that—
>
> . . .
>
> (D) the applicant will comply with all provisions of this part *and all other applicable Federal laws*.

34 U.S.C. § 10153(a)(5)(D). Although Section 1373 is a federal law, San Francisco and California argue that it cannot be broadly read as an "applicable Federal law" as stated in the Byrne JAG statute because it is unconstitutional on its face. This raises two questions: (i) whether Section 1373 is unconstitutional; and (ii) whether it applies to the Byrne JAG program statute.

a. The Tenth Amendment and Anti-Commandeering Principle

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. This 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 Supreme Court has applied the anti-commandeering principle to various claims that the federal government overstepped its bounds. *See id.* at 188 ("The Federal government may not compel the States to enact or administer a federal regulatory program."); *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."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) (applying anti-commandeering principle to "whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."). Most recently, in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), the Court applied it to the Professional and Amateur Sports Protection Act ("PASPA"), which prevented states from legalizing sports betting and from repealing existing laws that prohibited it. PASPA's provision prohibiting state authorization of sports gambling "unequivocally dictate[d] what a state legislature may and may not do." *Murphy*, 138 S. Ct. at 1478. Plaintiffs unsuccessfully

argued that PASPA differed from anti-commandeering case law since "it does not command the States to take any affirmative act." *Id.* at 1471. The Court rejected that distinction as "empty" because "the basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.* at 1478.

DOJ offers three threshold challenges to applying the anti-commandeering principle to this case. First, it asserts that the Tenth Amendment and the *Murphy* opinion are inapposite because the certification condition is for a voluntary federal grant program. It argues that applicants can simply decline to participate in the Byrne JAG program, making the Spending Clause the appropriate legal battleground as opposed to the Tenth Amendment's anti-commandeering principle. But this argument "ignores that Section 1373 is an extant federal law with which [California or San Francisco] must comply, completely irrespective of whether or not [it] accepts Byrne JAG funding." *City of Chicago*, 2018 WL 3608564, at *6. San Francisco and California challenge the certification condition because Section 1373 is unconstitutional; they do not necessarily challenge the Attorney General's power to impose other grant conditions requiring compliance with "all other applicable Federal laws" that are consistent with the Byrne JAG program statute language. For these reasons, the voluntariness of the grant program does not remove a challenge to a potentially applicable federal law, here Section 1373, from the scope of the Tenth Amendment.

Second, DOJ contends that, regardless of *Murphy*, the federal government has "broad, undoubted power" over immigration, *Arizona*, 567 U.S. at 394, and that

statutes like Section 1373 are presumed to be a constitutional exercise of that power. *Reno v. Condon*, 528 U.S. 141, 148 (2000). But *Reno* was distinguished from other commandeering cases by the Court in *Murphy* because the statute involved "did not regulate the States' sovereign authority to 'regulate their own citizens.'" *Murphy*, 138 S. Ct. at 1479 (quoting *Reno*, 528 U.S. at 151). On that basis, the Court gathered that "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. The court in *City of Chicago* directly addressed the contention that Section 1373 ought to be presumed constitutional under *Reno* as well, and I find its analysis persuasive. *City of Chicago*, 2018 WL 3608564, at *7. Section 1373 does not regulate private actor activities, nor does it regulate with equal force an activity in which state and private actors engage. This argument raised by DOJ against applying the anticommandeering principle fails.

Third, at the hearing DOJ offered a subtler distinction, that Section 1373 is a preemption provision rather than an attempt at commandeering. It insisted that the INA is a broad regulatory scheme over individuals, unlike PASPA in *Murphy* which involved direct regulation of the states to enforce a specific sports betting policy. *See* Transcript of Proceeding at 8-9 (CA Dkt. No. 136; SF Dkt. No. 144); *see also Murphy*, 138 S. Ct. at 1481 ("every form of preemption is based on a federal law that regulates the conduct of private actors, not the States."). *Murphy* explained how the Airline Deregulation Act of 1978 had a preemption provision (rather than a commandeering provision) since it "confer[red]

on private entities . . . a federal right to engage in certain conduct subject only to certain (federal constraints)." *Murphy*, 138 S. Ct. at 1480. The Court also explained how *Arizona* involved "standards governing alien registration," and in turn conferred "a federal right to be free from any other registration requirements." *Id.* at 1481.

Here, Section 1373 applies regardless of any State's attempt to regulate immigration, and in fact restricts States in unrelated criminal justice contexts completely outside the scope of the INA. Section 1373, as already discussed, does not regulate private actors or provide private actors with any additional rights in the INA's statutory scheme. DOJ's preemption argument fails on this distinction.

I turn now to analyzing Section 1373 and the anti-commandeering case law. *Murphy* provided a non-exhaustive set of three policy reasons that make adhering to the anti-commandeering principle important. First, the principle is "one of the Constitution's structural protections of liberty," dividing federal and state authority "for the protection of individuals." *Id.* at 1477 (internal quotation and citation omitted). Second, it "promotes political accountability" against the backdrop that voters are unable to place credit or blame when the roles of the State and Congress are blurred. *Id.* Finally, it prevents the federal government from "shifting the costs of regulation to the States." *Id.* These three concerns are relevant.

Section 1373 contravenes the idea that liberty is best served by the Constitution's intended division of "authority between federal and state governments for the protection of individuals." *Murphy*, 138 S. Ct. at 1477

(quoting *New York*, 505 U.S. at 181). DOJ argues that Section 1373 requires states and local governments to allow the disclosure of an immigrant's address, location information, release date, date of birth, familial status, contact information, and any other information that would help federal immigration officials perform their duties. *See* Sherman Decl. Ex. B (Defs. Interrog. Resp. 17); Ex. E (Defs. RFA Resps. 9-16). To comply with that interpretation, California and San Francisco would need to submit control of their own officials' communications to the federal government and forego passing laws contrary to Section 1373. They would also need to allocate their limited law enforcement resources to exchange information with the federal government whenever requested instead of to the essential services (like enforcing generally applicable criminal laws) they believe would most benefit their respective communities.

As DOJ interprets Section 1373 today, the statute requires communications by state and local governments in ways that create an appearance of a uniform federal/state/local immigration enforcement policy indiscernible to San Francisco or California residents. *Murphy*, 138 S. Ct. at 1477 ("When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent."). Section 1373 effectively "supplants local control of local officers" by prohibiting those jurisdictions from preventing employees from communicating with the INS. *City of Chicago*, 2018 WL 3608564, at *8; *see also United States v. California*, 314 F. Supp. 3d at 1099 ("Section 1373 does just what *Murphy* proscribes: it tells States they may not prohibit (i.e., through legislation) the sharing of information

regarding immigration status with the INS or other government entities."). The statute undermines existing state and local policies and strips local policy makers of the power to decide for themselves whether to communicate with INS. *See Printz*, 521 U.S. at 931 ("To say that the Federal Government cannot control the State, but can control all of its officers . . . merits the description 'empty formalistic reasoning of the highest order.") (internal quotations and citation omitted).

California expresses the legitimate concern that entanglement with federal immigration enforcement erodes the trust that Latino and undocumented immigrant communities have in local law enforcement, which is essential for victims and witnesses to feel they can safely report crimes. *See* Wong Decl. ¶¶ 4, 41-44, 52-53 (discussing how entanglement affects undocumented immigrants' trust in law enforcement); Hart Decl. ¶¶ 9, 11 (reiterating the Santa Cruz Sheriff's Office view that trust is essential to community-oriented policing); Goldstein Decl. ¶ 5 (summarizing California's belief, embodied in the Values Act, that trust between law enforcement and the immigrant community is central to public safety); Rosen Decl. ¶ 8 (expressing firsthand experience of immigration enforcement actions chilling voluntary reporting in domestic violence cases); *see also Chicag*o, 888 F.3d at 280 ("State and local law enforcement authorities are thus placed in the unwinnable position of either losing needed funding for law enforcement, or forgoing the relationships with the immigrant communities that they deem necessary for efficient law enforcement").

The harm that entanglement with immigration enforcement does to community trust is more than theoretical, as plaintiffs and amici have shown. To summarize just one study, the fear of police inquiring into immigration status results in a lower likelihood that Latinos will report being a victim or witnessing crimes by 44 percent, undocumented immigrants by 70 percent, and even U.S.-born Latinos by 28 percent. *See* CA RJN Ex. 4; *see also* Wong Decl. ¶¶ 35-38 (sharing similar results in a separate study); Amicus Brief (CA Dkt. No. 130; SF Dkt. No. 136-1) (providing many other studies documenting the erosion of trust in local law enforcement who implicate themselves in immigration enforcement).

Finally, Section 1373 shifts a portion of immigration enforcement costs onto the States. *Murphy*, 138 S. Ct. at 1477 (finding that Congress "is pressured to weigh the expected benefits of the program against its costs" but fails to do so if it can "compel the States to enact and enforce its program."). It compels state and local governments not to prohibit their employees from communicating with federal immigration officials. California's law enforcement agencies experienced double the detainer requests from ICE in one year—from 15,000 in fiscal year 2016 to 30,000 in fiscal year 2017. *See* TRAC Reports, Inc., Latest Data: Immigration and Customs Enforcement Detainers, California (2018). According to DOJ's broad interpretation of Section 1373, San Francisco and California must respond to each request, including release dates, no matter the burden on the law enforcement agencies or the length of the person's detainment term. *See* Hart Decl. ¶¶ 19-20 (reporting that Santa Cruz County jails are run over capacity, with staff

shortages making compliance impossible, and that 60 percent of all arrests are misdemeanors where individuals are booked and released within hours).

DOJ does not directly respond to the arguments made by San Francisco and California that track the three policy considerations supporting the anti-commandeering principle, and instead portrays Section 1373 merely as protecting the transfer of information to federal officials. It distinguishes a prohibition on states from regulating their own state citizens and a law that regulates states as "the owners of data bases." *Reno*, 528 U.S. at 151. It contends that *Murphy* supports the defense because PASPA was an effort to "regulate the States' sovereign authority to regulate their own citizens," while in contrast Section 1373 is just an information-sharing component of a larger statutory scheme to enforce immigration.

In *Printz*, the Supreme Court found that a federal statute requiring state and local law enforcement to conduct background checks on handgun license applications was unconstitutional. 521 U.S. at 935 (holding that the federal government cannot "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). DOJ relies on dicta, remarking that statutes "which require only the provision of information to the Federal Government, do not involve the precise issue [of] . . . forced participation of the States' executive in the actual administration of a federal program." *Printz*, 521 U.S. at 918; *see also id.* at 936 ("the 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.") (O'Connor, J., concurring). The Court has yet to decide the merits of that distinct issue. *Id.* (finding that those statutes requiring only information-sharing "do not involve the precise issue before us here."); *see also United States v. California*, 314 F. Supp. 3d at 1101 (finding "[t]he more critical question, however, is whether required information sharing constitutes commandeering at all. *Printz* left this question open."). *Printz's* holding, as the Court later explained in *Murphy*, applied "not only to state officers with policymaking responsibility but also to those assigned more mundane tasks." 138 S. Ct. at 1477. *Printz* does not support carving out statutes that focus on information-sharing from the anti-commandeering principle if the statutes are still characteristic of commands to States, their officers, or their political subdivisions.

There is no distinction for anti-commandeering purposes, post-*Murphy*, between a federal law that affirmatively commands States to enact new laws and one that prohibits States from doing the same. Even if the Court would recognize an exception for statutes requiring "purely ministerial reporting," *Printz*, 521 U.S. at 936, Section 1373's impact is not merely as a ministerial information-sharing statute. It prohibits state and local jurisdictions, their agencies, and officials, from preventing information-sharing with the federal government whether through ministerial reporting, local agency policymaking, or legislative rulemaking. *See* 8 U.S.C. § 1373 ("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 [INS] information regarding the citizenship or

immigration status, lawful or unlawful, of any individual."). The statute takes control over the State's ability to command its own law enforcement. This is particularly concerning given the State's and San Francisco's view of the decidedly negative impact that entanglement with federal immigration enforcement has on community trust and reducing crime. Section 1373 lacks the "critical alternative" discussed in *New York*, 505 U.S. at 176, allowing a state to decline to administer a federal program. *Id.* at 176-177.

As the court wrote in *City of Chicago*, Section 1373 "effectively thwart[s] policymakers' ability to extricate their state or municipality from involvement in a federal program." 264 F. Supp. 3d at 949. It goes beyond information-sharing to "require[] local policymakers to stand aside and allow the federal government to conscript the time and cooperation of local employees." *City of Chicago*, 2018 WL 3608564, at *11. Further, with Section 1373 imposed on states and local governments, "federal priorities dictate state action" and this inevitably reaches the state's relationship with its own citizens and undocumented immigrant communities in ways that no doubt will affect their perceptions of the state and trust in its law enforcement agencies. *United States v. California*, 314 F. Supp. 3d at 1109, Dkt. No. 193 at 50. For the reasons discussed above, I find that Section 1373 is unconstitutional.[3]

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[3] DOJ also asks the court to consider whether Section 1373's language can operate as an independent grant condition regardless of the validity of Section 1373. Because I do not find that the Byrne JAG statute or Section 10102(a)(6) provided independent authority for the Attorney General to impose the conditions, it follows that

b. Applicable Federal Laws in the Byrne JAG Statute

DOJ asserts that it has the power to condition Byrne JAG grants on any federal law as long as it gives notice that it applies, as it did for Section 1373. Given that Section 1373 is unconstitutional, "[a]s an unconstitutional law, Section 1373 automatically drops out of the possible pool of 'applicable Federal laws' described in the Byrne JAG statute" whether I interpret the statute as DOJ requests or not. *City of Chicago*, 2018 WL 3608564, at *13 (citing *Branch v. Smith*, 538 U.S. 254, 281-82 (2003) (finding that the phrase "as state law requires" does not include unconstitutional state laws)); *see also City of Philadelphia*, 2018 WL 2725503, at *32-33 ("Because the JAG Byrne Program requires compliance with an unconstitutional statute (in this case, Section 1373) in order to receive grant funds, the Certification Condition is itself unconstitutional."). DOJ has no authority to demand state and local governments certify compliance with an unconstitutional law.[4]

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there would not be authority to impose a separate grant condition identical to Section 1373's terms, without an act of Congress.

[4] In *City of Chicago*, the court also emphasized the constitutional distinction between Section 1373 and the condition that recipients must certify compliance with Section 1373. The anti-commandeering principle may invalidate an unconstitutional law, but it would not invalidate agency authority to impose federal grant conditions if it is appropriately permitted by Congress. *See S. Dakota v. Dole*, 483 U.S. 203, 210 (1987) (finding that the Tenth Amendment limits congressional regulation of state affairs, not the conditions attachable to federal grants). I agree with this distinction in reaching the conclusion here.

For completeness, though, I will address DOJ's argument on whether Section 1373 is an applicable law if it is constitutional. San Francisco makes three persuasive counterarguments based in the text, context, and legislative history of the Byrne JAG statute to interpret the "applicable Federal laws" provision as limited to federal laws about the grant-making process. *See* SF Mot. for Summ. J. at 14-15; *see also* Amicus Brief (SF Dkt. No. 135-1) (advancing similar arguments).

First, it is superfluous to interpret "all other applicable Federal laws" as "all Federal laws," especially considering that Congress explicitly imposed compliance with other conditions by implementing the Sex Offender Registration and Notification Act and the Prison Rape Elimination Act. Second, because 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. Finally, DOJ's own practice narrowly interprets "applicable laws" to the grant process, and the certification form only asks grant applicants to certify compliance with federal laws "applicable to the award." SF RJN Ex. C § 3(a).

Starting with the text, the Ninth Circuit has found that, in isolation, "the term 'applicable' has a spectrum of meanings." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1134 (9th Cir. 2009). Here, the words "all other" that precede the "applicable" term do not give me much of any guidance on the scope of the provision's application. DOJ's cases are also not determinative of the plain meaning of the text in this statute. I agree with the courts in *City of Philadelphia*, 280 F. Supp. 3d at 619, and *City of Chicago*, 264 F. Supp. 3d at 944, that "[b]oth positions are plausible" and this question is a "close

call." Because "applicable" could hold either meaning proposed by the parties based on the text alone, to determine the congressional intent of this language I turn to "the specific context in which [the term 'applicable'] is used[] and the broader context of the statute as a whole." *Ileto*, 565 F.3d at 1134 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

The statutory structure suggests "applicable" was intended to refer to laws related to grant applications. The entire sentence appears in the last of four "residual clauses" within a proviso, all of which concern the grant application. In *Republic of Iraq v. Beaty*, 556 U.S. 848, 857-58 (2009), the Court recognized that "presumptively, the 'grammatical and logical scope [of a proviso] is confined to the subject-matter of the principal clause.'" *Id.* (quoting *United States v. Morrow*, 266 U.S. 531, 534-535 (1925)); *see also Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1144-45, (2015) (finding that "the meaning of [a residual clause] is best understood by reference to the provisions that precede it."). In some instances, a proviso can state an independent rule—it "may be lazy drafting, but is hardly a novelty." *Id.* at 859. Here, the phrase "all other applicable Federal laws" refers to the preceding clause requiring grant applications to include a certification "in a *form* acceptable to the Attorney General." 34 U.S.C. § 10153(a)(5) (emphasis added). There is no indication that an acceptable form of the certification would encompass additional substantive compliance with laws not directly required by Congress. Accordingly, I would find that Section 1373 is not an applicable law regardless of its constitutionality.

B. The Spending Clause

California and San Francisco also argue that even if the Attorney General had the power to impose the conditions on grant funding delegated to him by Congress, it exceeds the constitutional limits of the Spending Power to require the new conditions. As discussed above, the Spending Power includes "condition[ing] the receipt of funds, by states and others, on compliance with federal directives." *Skinner*, 884 F.2d at 447. But this power is not absolute. Exercising the Spending Power to impose grant conditions must: (i) be in pursuit of the general welfare; (ii) be unambiguous; (iii) be reasonably related to Congress's articulated goal; and (iv) not induce the State to commit an unconstitutional action. *Id.* San Francisco and California challenge the ambiguity and relatedness of the three conditions.

1. Unambiguous Requirement

When Congress requires conditions on federal funds, "it must do so unambiguously" so that state and local governments can decide whether to accept the funds and "exercise their choice knowingly, cognizant of the consequences of their participation." *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17). Congress cannot implement new conditions after-the-fact because states must decide to opt-in to a federal program willingly and aware of the conditions. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-04 (2012). Courts tasked with determining if an exercise of the Spending Power is unambiguous must find that the underlying statute provides "clear notice" of its application. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296. San Francisco challenges all three conditions as ambiguous,

while California focuses its briefing on the access and notice conditions.

a. Access and Notice Conditions

California asserts that the access and notice conditions do not provide clear notice of what is required to comply. There is no statute providing guidance about the condition requirements, and the award letters presumably outlining the terms of compliance do not explain the requirement that a state or local statute, rule, regulation, policy, or practice, must be in place and "designed to ensure" federal agents have access to and get notice concerning individuals in correctional facilities and their release date information. *See* DOJ RJN, Ex. B ¶¶ 55, 56. California also takes issue with DOJ's lack of explanation about whether the TRUTH Act disqualifies it from satisfying the access condition, and what state entities in the California Board of State and Community Corrections, which receives the Byrne JAG funds, are included in the award letter language "program and activity." *See* Sherman Decl. Ex. E at RFA Resp. 21 & 39.

San Francisco's contentions focus on the inconsistency of the DOJ's statements and positions explaining the access and notice conditions. San Francisco asserts that the notice condition, requiring notice "as early as practicable," is unclear and that the award letter language does not acknowledge times when notice is impossible because inmates are released with little or no notice. *See* Lee Decl. ¶ 7, Ex. E at ¶¶ 55, 56; DOJ RJN, Ex. B ¶¶ 55, 56. Further, San Francisco believes it is unclear from the DOJ's briefing in *City of Philadelphia v. Sessions* and *California v. Sessions* if San Francisco must provide access to inmates who consent or if it can

decline access if the inmate is unwilling to meet with ICE. *Compare City of Philadelphia v. Sessions*, No. 2:17-cv-03894-MMB, Dkt. No. 28, at 32 (E.D. Pa. Oct. 12, 2017) (citing DOJ's argument that access conditions require access "even if the inmate refuses to answer questions"), *with California v. Sessions*, Dkt. No. 83, at 6 (N.D. Cal. Nov. 22, 2017) (arguing that the access condition does not "forbid a jurisdiction from informing detainees . . . that they may choose not to meet with immigration authorities.").

DOJ's response to San Francisco and California is nearly the same; it quotes the language of its award letters and contends that the notice and access conditions are unambiguous in their text. It also notes that to the extent grant applicants had questions, they should have contacted their respective "Grant Manager" as encouraged in the 2017 Byrne JAG solicitation. *See* Lee Decl. Ex. A & B. It pushes back against the need to specify the outer limits of its conditions, arguing that the conditions are not ambiguous even if they are indeterminate "provided that the existence of the conditions is clear, such that States have notice that compliance with the conditions is required." *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (citation omitted); *see, e.g., Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) ("Once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper.") (citation omitted). It also responds to San Francisco's focus on inconsistent statements concerning the access condition merely as "different sides of the same coin"

requiring San Francisco not to insert itself between federal immigration officials and detainees. DOJ Mot. Summ. J & Opp. at 21 n.13 (SF Dkt. No. 113).

In the case of a condition on federal funding, courts "must view the [governing 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." *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296. Beginning with the text of the statute, if the "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted).

Here, as in *City of Philadelphia*, "[w]hether Congress unambiguously imposed the Challenged Conditions (or unambiguously authorized the Attorney General so to do) entails largely the same inquiry as whether it conferred authority upon the Attorney General to impose them." 280 F. Supp. 3d at 646. I found no authority within the Byrne JAG statute to support the Attorney General's purported power to impose the new conditions, and I found no independent authority to impose the conditions based on the Assistant Attorney General's powers delineated in Section 10102. *See supra* Sec. II.A.1-2. On that basis, the notice and access conditions "cannot have been unambiguously authorized by Congress if they were never statutorily authorized." *Id.*

b. Certification Condition

The certification condition is unclear from San Francisco's perspective because DOJ has maintained different and increasingly broad interpretations of how state and local governments must comply with Section 1373. In 2007, DOJ's Office of Inspector General ("OIG") evaluated San Francisco's compliance with Section 1373 and concluded that even though ICE officials objected to its policies, there was no concern about the flow of information between the two agencies. *See* Lee Decl. ¶ 9, Ex. G at AR00010-12. However, in 2016, DOJ's OIG noted the opposite conclusion based on its interpretation of San Francisco's Sanctuary City laws' internal savings clause. *See* Lee Decl. ¶ 10, Ex. H at 5-6 n.7. San Francisco also alludes to various representations that DOJ has made throughout this litigation and in parallel cases, which offer inconsistent guidance on the scope of the certification condition. *See* SF Mot. Summ. J. at 19-20.

DOJ considers the certification condition unambiguous from the text of the award documents. The award documents in defendants' exhibits show that complying with Section 1373 entails not restricting information on citizenship or immigration status. *See* DOJ RJN, Ex. B ¶¶ 53-55. In October 2016, DOJ contends that OJP also issued "guidance" on compliance with the Section 1373 certification condition. But at no point in this guidance does the OJP clearly answer the questions raised by San Francisco about what its interpretation of compliance really means. *See* DOJ RJN, Ex. F (repeating generally that its "goal is to ensure that our JAG and SCAAP recipients are in compliance . . . ").

In C*ity of Philadelphia*, the court found that whether the certification condition was unambiguous was a "close call," just as it found it was a close call whether Section 1373 was authorized by the "all other applicable Federal laws" language in Section 10153(a)(5)(D) of the Byrne JAG statute. 280 F. Supp. 3d at 619, 646. It concluded that Philadelphia was likely to succeed on the merits of its ambiguity argument given that there were several interpretations of the "applicable Federal laws" text that did not provide clear notice of the Section 1373 certification condition. *Id.* at 646-647 ("on one hand it could signify all federal laws related to grantmaking (as the City would have it), or on the other, all federal laws related to law enforcement, or even the entire corpus of federal law codified in the United States Code.").

As discussed above, I find that the plain text was not definitive in interpreting the meaning of "all other applicable Federal laws," and the structure of the statute supported a limited interpretation encompassing federal laws related to the grant. *See supra* Sec. II.A.3.b. Congress required applications for Byrne JAG program grants to be certified in compliance with "all other applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D). However, the certification of "applicable" laws is understood in relation to the preceding language "in such form as the Attorney General may require," which I do not interpret as conferring more than ministerial powers to the Attorney General. *Id.*

DOJ's evolving interpretations of the certification condition further demonstrate ambiguities that prevent applicants from deciding whether to accept the funds "cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. &*

Hosp., 451 U.S. at 17). In September 2017, in its opposition to San Francisco's motion for summary judgment in *City and Cty. of San Francisco v. Trump*, DOJ argued that San Francisco's sanctuary city ordinances violated Section 1373 because they discouraged or restricted employees from sharing information regarding immigration status. *See* Oppo. at 14-15, Case No. 3:17-485-WHO (N.D. Cal. Sept. 27, 2017) (Dkt. No. 172). Then at the October 23, 2017 hearing, DOJ suggested that Section 1373 applies to a person's release status, identity or age, date of birth, residence, and address. Lee Decl. ¶ 13, Ex. K at 17:2-22:23. In a November 15, 2017 letter to San Francisco, DOJ expressed that it was concerned that San Francisco's sanctuary city policies violate Section 1373 since they prohibit notifying ICE of release state or personal information. *See* Lee Decl. ¶ 14, Ex. L. Now in this case, DOJ takes the expansive position that Section 1373 encompasses a detainee's release date, residential address, location information, date of birth, familial status, and contact information. *See* Lee Decl. ¶ 6, Ex. D (RFA Nos. 9-14).

2. Relatedness Requirement

In addition to being unambiguous, conditions on congressional spending must share some nexus such that they are "reasonably related to the purpose of the federal program." *See Dole*, 483 U.S. at 213 (O'Connor, J., dissenting). This means that Byrne JAG program funds conditioned on certified compliance with Section 1373 and the notice and access conditions "must have some nexus to immigration enforcement." *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 532 (N.D. Cal.), reconsideration denied, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), appeal dismissed as moot sub nom. *City & Cty. of San*

Francisco v. Trump, Case No. 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

California contends that the challenged conditions, which pertain to federal immigration enforcement, lack any reasonable relationship to the criminal justice purpose of Byrne JAG program and in fact undermine its purpose of recognizing local control over local public safety. *See* AR-992 (announcing the DOJ's new conditions so that "federal immigration authorities have the information they need to enforce immigration laws."). It also emphasizes DOJ's increasing focus on removing classes of immigrants who have incurred civil penalties but have not been convicted of any crime, which is beyond the criminal justice goals of the Byrne JAG program. Similarly, San Francisco asserts that Congress's purpose for the Byrne JAG program was to give state and local governments support for their own initiatives related to one of eight criminal justice purposes—none of which is immigration enforcement. 34 U.S.C. § 10152(a)(1)(A)-(H).

DOJ argues that the grant conditions satisfy the relatedness inquiry because the term "criminal justice" is broadly defined in the same chapter of the Byrne JAG statute as "activities pertaining to crime prevention, control, or reduction, or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, . . . activities of courts having criminal jurisdiction, and related agencies." 34 U.S.C. § 10251(a)(1). Drawing from Section 10102(a), DOJ also contends that the conditions relate to the Assistant Attorney General's responsibility to "maintain liaison with" state governments in criminal justice matters. 34 U.S.C. § 10102(a)(1), (2).

It contends that its efforts to remove immigrants convicted of serious crimes are sufficiently related to apprehending criminals and reducing crime because once removed, a criminal is no longer present to re-offend.

As I have already discussed at length, on its face the Byrne JAG program is a formula grant program for specified funds to be used by states and local law enforcement in programs related to one of eight broad program areas related to criminal justice. 34 U.S.C. § 10152(a)(1)(A)-(H); s*ee also City of Philadelphia*, 280 F. Supp. 3d at 643 ("the best reading of the Byrne statute is that Congress intended to create a formula grant program that simply provided fiscal assistance to states and localities for any of a wide variety of permissible purposes that the applicant jurisdictions, having heard from various stakeholders, were entitled to select."). The legislative history bolsters this interpretation of its purpose. *See, e.g.*, H.R. Rep. 109-233, at 89, reprinted in 2005 U.S.C.C.A.N. 1636, 1640 ("The Committee believes that these reforms will work to give State and local governments more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution."); 151 Cong. Rec. 25,919 (2005) ("Byrne grants fund local law enforcement to combat the most urgent public safety problems in their own communities.").

Congress repealed the only requirement related to immigration that existed before, and it has failed to amend the Byrne JAG statute to add similar conditions since. *See* Immigration Act of 1990, Pub. L. 101-649, § 507(a); Misc. and Tech. Immigration and Naturalization Amend. of 1991, Pub. L. 102-232, § 306(a)(6) (repealed 2006) (requiring states to provide records of the

"criminal convictions of aliens"); CA RJN Exs. 32-36 (various House and Senate bills that failed to amend the Byrne JAG statute with an immigration enforcement component); *see also* Amicus Brief at 4 n.6 (CA Dkt. No. 132; SF Dkt. No. 138-1) (summarizing failed efforts since the 1990s to impose immigration conditions on Byrne JAG grant funding). In fact, "Congress has repeatedly, and frequently, declined to broadly condition federal funds or grants on compliance with Section 1373 or other federal immigration laws," as DOJ is now attempting to do with the challenged conditions. *Cty. of Santa Clara*, 250 F. Supp. 3d at 531 (citing Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. (2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (2016)).

The Byrne JAG programs that are at risk of losing funding because of the access and notice conditions do not relate to immigration enforcement. The conditions address interviewing and accessing detained individuals for removal purposes, and as applied they "target[] for defunding grants with no nexus to immigration enforcement at all." *Cty. of Santa Clara*, 250 F. Supp. 3d at 533. As recognized in *City of Philadelphia*, criminal law is integral to federal immigration law, but it is not a two-way street; immigration law does not impact local law enforcement's administration and enforcement efforts in the criminal justice system. 280 F. Supp. 3d at 642, 642 ("Immigration law has nothing to do with the enforcement of local criminal laws."). The INA authorizes local law enforcement to cooperate with the federal government to enforce immigration laws, but it does not

require it. *See, e.g.*, 8 U.S.C. §§ 1252c, 1324(c), 1357(g) (authorizing state and local officers to arrest for INA violations, and to enter formal cooperative agreements to perform other specific functions of federal immigration officers). Relatedly, both California and San Francisco have shown that their own policies and laws respect the separation between immigration enforcement and the essential duties local law enforcement carry out with their limited resources.

California's Byrne JAG program funding is intended to support law enforcement programs like task forces focused on criminal drug enforcement, violent crime, and gang activities; none of these involve immigration enforcement. *See* Caligiuri Decl. ¶ 29. California's COPS grant funding also funds the salaries and costs of four full-time employees who work on anti-methamphetamine efforts. *Id.* ¶ 21. Likewise, San Francisco's funding goes towards at-risk youth programs to reduce recidivism, law enforcement programs aiming to reduce drug trade and servicing people with drug use and mental health problems. *See* Chyi Decl. ¶¶ 10, 17, 18. The access and notice conditions, which DOJ admits are intended to promote immigration enforcement, lack any relationship to (and in fact interfere with) the criminal justice priorities set by the plaintiffs applying for criminal justice program funding through the Byrne JAG statute. Contrary to DOJ's view, maintaining liaison with state and local governments on criminal justice matters does not justify requiring access to their detainees and notice of release dates for every individual the federal government requests.

Even if the Attorney General had the Spending Power to impose immigration enforcement on traditional criminal justice responsibilities of local law enforcement, the conditions are more substantial than the relationship between the dual sovereigns can reasonably bear. The Attorney General has made it clear that DOJ "no longer will exempt classes or categories of removable aliens from potential enforcement," yet many immigration violations do not involve criminal law and are only violations of civil penalties. *Cf.* CA RJN Ex. 37 at 2, *with* 8 U.S.C. §§ 1182(a)(6)(A) & (9)(B), 1202(g), 1227(a)(1)(B). California and San Francisco have shown that their uses of the Byrne JAG grants are much broader than preventing reoffenders, such that "adherence to the Department of Justice conditions would conflict with its justifiable policies towards non-criminal aliens." *City of Philadelphia*, 280 F. Supp. 3d at 644. In this respect, "the federal interest in enforcing immigration laws falls outside the scope of the Byrne JAG program." *Id.* at 642.

The certification condition is unrelated as well. In my prior Order on California's motion for a preliminary injunction, I found that the Section 1373 certification condition may have a sufficient nexus to the purposes of the Byrne JAG program "depending on the breadth of the federal government's interpretation of Section 1373." Order at 23 (CA Dkt. No. 89). Even though the federal government's interest in immigration enforcement extends beyond the Byrne JAG statute's goal of supporting criminal justice programming, "the Certification Condition appears to have some relationship with the JAG Program." *City of Philadelphia*, 280 F. Supp. 3d at 642, 644. But as the court in *City of Philadelphia*

found, Section 1373 by its plain terms was not limited to "aliens, criminal aliens, or even convicted criminals." *Id.* at 644. Philadelphia established that it uses Byrne JAG funds for justifiable policies related to non-criminal aliens outside just prosecuting criminals. *Id.* Based on these facts, it noted the certification condition "arguably exceeds the relatedness requirement." *Id.* (citing *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting). I agree.

The Supreme Court has required only that grant conditions "bear some relationship to the purpose of the federal spending." *New York*, 505 U.S. at 167. I have already discussed why I would have found Section 1373 is not an "applicable law" under the Byrne JAG statute regardless of its constitutionality. Requiring a certification of compliance with an inapplicable law would seem to exemplify un-relatedness. Assuming that Section 1373 was an "applicable law," according to its text it still prevents restricting "information regarding the citizenship or immigration status, lawful or unlawful, *of any individual*." 8 U.S.C. § 1373(a) (emphasis added). In turn, the Section 1373 certification condition exceeds the bounds of the Byrne JAG statute and demonstrates "an attenuated or tangential relationship" that the DOJ is not entitled to impose. *Dole*, 483 U.S. 203, 215 (1987). By its express terms it applies to "any individual," including non-criminal immigrants and United States citizens alike. *See City of Philadelphia*, 280 F. Supp. 3d at 644 (quoting 8 U.S.C. § 1373(a)). This condition, like the access and notice conditions, does not apply to the criminal justice purposes of the programs the Byrne JAG statute supports.

Accordingly, even if Congress delegated the Spending Power to the Attorney General, the challenged conditions are ambiguous and insufficiently related to the grant or the local criminal justice program purposes of the federal spending.

III. CALIFORNIA'S ARBITRARY AND CAPRICIOUS CLAIM

California argues that all three conditions for Byrne JAG program funding are "arbitrary and capricious" under the Administrative Procedure Act ("APA"). DOJ counters that there is no final agency action because it has not yet granted or denied California's fiscal year 2017 Byrne JAG application or imposed the conditions on the grant.[5] Assuming for the sake of argument that there was final agency action, DOJ contends that the conditions are not arbitrary and capricious. I address each argument below.

A. Requiring the Challenged Conditions is a Final Agency Action

An agency action is final if it "marks the consummation of the agency's decisionmaking process" and determines "rights or obligations . . . from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (internal quotations omitted). DOJ acknowledges that it has determined certain California laws violate Section 1373, as evidenced by its affirmative litigation in *United States v. California*, Case No. 2:18-cv-490, Dkt. No. 1 (E.D. Cal. Mar. 6, 2018). *See*

[5] Defendants note that their argument is unchanged from earlier in the case, when I found California demonstrated that the imposition of the certifying condition is a final agency action. *See* DOJ Mot. Summ. J & Opp. at 10 n.4 (CA Dkt. No. 124).

DOJ Mot. Summ. J & Opp. at 11 n.5 (CA Dkt. No. 124). It tries to distinguish this legal conclusion from a final factual determination on the Byrne JAG program application. But as I found in the prior Order, finding that the Byrne JAG program and COPS grants require compliance with Section 1373 is a final action, and there are clear legal consequences for California stemming from imposing the condition. *See* Order at 19-20 (CA Dkt. No. 89) (finding "the federal government has articulated that certain funds . . . will require adherence to the certification condition" and "[r]eceipt of the grants is conditioned on certifying compliance with the federal government's interpretation of Section 1373."). For the reasons expressed in the prior Order, I find that all the challenged conditions have been determined by the Attorney General as requirements for grant funding and constitute final agency action.

Courts presiding over the parallel cases agree. On a motion to dismiss in *City of Philadelphia*, the court found that the decision to impose the conditions was final since plaintiffs pleaded facts showing the conditions were required for funding, and that compliance with them would significantly alter their local policies. 309 F. Supp. 3d at 280. In *City of Chicago*, the court found DOJ's decision to impose the grant funding conditions was a final agency action, not the factual determination whether to award the funds (as DOJ argues again here). 2018 WL 3608564, at *4. Compliance with the conditions is required for grant funding based on the Byrne JAG 2017 Solicitation. *Id.* The conditions forced Chicago to decide between accepting the award at the loss of dictating its own local policy preferences or foregoing the monetary award. *Id.*

These are the same circumstances here. California has shown that the decision to impose new conditions on the Byrne JAG and COPS grants was final and will lead to significant legal consequences depending on its decision to participate as well as to certify its compliance.

B. Imposing the Challenged Conditions was Arbitrary and Capricious

The APA requires courts to "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). Actions where there is a "rational connection between the facts found and the choice made" to achieve these goals are valid. *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co*, 463 U.S. 29, 43 (1983). Agency action should be overturned when, among other things, the agency: (i) relied on factors Congress did not intend for it to consider; (ii) failed to consider important aspects of the problem it is addressing; or (iii) explained its decision counter to the evidence before it. *State Farm*, 463 U.S. at 43; *see also Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). California contends that the administrative record establishes all those problems and requires overturning the agency action.

Because California challenges grant conditions, the usual administrative procedures that show an agency's justification for its action, such as formal rules, notice and comment, or hearings, are not present here. *See* 5 U.S.C. § 553(a)(2). I did not have the complete administrative record at the time of the preliminary injunction, and in the prior Order I was not prepared to

find the certification condition was arbitrary and capricious because "the change in policy might 'be ascribed to a difference in view.'" Order at 22 (CA Dkt. No. 89).

Now I am presented with the complete administrative record of 48 documents totaling 1037 pages. *See* Administrative Record (CA Dkt. No. 96) (SF Dkt. No. 84). DOJ bases its agency action to impose the new conditions on five documents in the record: (i) a 2007 OIG Audit Report, *see id.* AR-00001-00109; (ii) a 2016 OIG Memorandum, *see id.* AR-00366-00381; (iii) a Letter from Assistant Attorney General Kadzik to Rep. Culberson, *see id.* AR-00382-00391; (iv) DOJ Press Release No. 17-826, *see id.* AR-00992; and (v) the Backgrounder on Grant Requirements, *see id.* AR-00993. These are nearly the identical records it unsuccessfully relied on in *City of Philadelphia*, 280 F. Supp. 3d at 619-625, with the addition of the Letter to Rep. Culberson. The records do not "articulate a satisfactory explanation for [DOJ's] action." *State Farm*, 463 U.S. at 43.

First, citing the 2007 OIG Audit Report, DOJ claims that the challenged conditions were arrived at understandably because they promote interests in "maintain[ing] liaison" between tiers of government in criminal justice matters. DOJ Mot. for Summ. J. at 21. The thorough analysis by the court in *City of Philadelphia* explains why this argument misses the mark. The 2007 OIG Audit Report concluded that it could not "statistically extrapolate the number of offenses committed by undocumented criminal aliens who were released from local custody without a referral to ICE" and that it "could not determine if ICE was notified before the criminal aliens in our sample were released from custody." AR-00014. As a result, DOJ cannot look to

this record to establish that it properly "examine[d] the relevant data to reach a relevant basis for its decision . . . because it failed to use the relevant data to form an opinion at all." *City of Philadelphia*, 309 F. Supp. 3d at 324 (internal quotations omitted) (identifying two more reasons the 2007 OIG Report provided no support as to the arbitrary and capriciousness of the challenged conditions).

Second, a similar issue arises with the 2016 OIG Memorandum. The Memorandum presents findings on ten state and local jurisdictions, with the express purpose of updating DOJ on steps taken to address compliance with Section 1373. *See* AR-00367. From the outset, this record comes after "OJP notified SCAAP and JAG applicants about the requirement to comply with Section 1373." AR-00374. It does not attempt to justify any of the new conditions, and instead it offers the DOJ steps to consider in light of DOJ's focus on "ensuring that grant applicants comply with Section 1373." *Id.* DOJ cannot rely on this document to establish a "rational connection between the facts found and the choice made" to impose the new conditions because the choice to impose a certification condition was already made and this record does not purport to offer any post-hoc rationalization. *State Farm*, 463 U.S. at 43.

Nevertheless, the 2016 OIG Memorandum recommends that DOJ consider providing "clear guidance" on whether Section 1373 is an applicable federal law, acknowledging that the record does not purport to provide that guidance and clarifying that DOJ has not yet confirmed Section 1373's applicability to the Byrne JAG grant statute. *See* AR-00374 at n.13. DOJ cannot justify its certification condition on this record, which did

not assess any of the reasons DOJ imposed the certification condition and which offered recommendations to DOJ specifically in response to DOJ's decision to notify applicants of the certification condition. To attempt to justify the condition on this record is an exercise in circular reasoning. *See City of Philadelphia*, 280 F. Supp. 3d at 624 ("The Attorney General cannot justify the Certification on a tautology; a report concluding that many jurisdictions are not complying with Section 1373 does not justify imposing a condition requiring those jurisdictions to certify compliance.").

Third, in fiscal year 2016 the prior administration introduced the Section 1373 certification idea and recognized Section 1373 as an applicable federal law for the Byrne JAG program. *See* Attachment to Letter from Assistant Attorney General Kadzik to Rep. Culberson, AR-00384. The attachment is a Memorandum from the Assistant Attorney General for OJP to DOJ's Inspector General, discussing OJP's determination that Section 1373 is an applicable federal law for purposes of the Byrne JAG grant program. *See id.* This document does not explain how or why the OJP reached its determination about Section 1373 either. At most it demonstrates another tautology where the DOJ is justifying its conclusion to impose the conditions in this lawsuit based on a separate document that also makes an unsupported conclusion about the Section 1373 compliance condition.

Fourth, relying on the Backgrounder on Grant Requirements, DOJ contends that the challenged conditions had a "goal of increasing information sharing between federal, state, and local law enforcement . . . to enforce the law and keep our communities safe." *See*

Backgrounder, AR-00993. I addressed the Backgrounder thoroughly in my prior Order. *See* Order at 21 (finding that it was unclear that the certification condition had the requisite rational connection to the facts in the Backgrounder). There is not a clear link, or at least the government has not been able to provide one, between localities keeping release dates or contact information confidential and more dangerous or less safe communities.

Finally, DOJ relies on a 2017 press release by the Attorney General proclaiming that sanctuary city policies "make all of us less safe because they intentionally undermine our laws and protect illegal aliens who have committed crimes." DOJ Press Release No. 17-826, AR-00992. The Attorney General contends that "[t]hese [sanctuary city] policies also encourage illegal immigration and even human trafficking by perpetuating the lie that in certain cities, illegal aliens can live outside the law." *Id.* The press release expressly communicates the DOJ's "top priority of reducing violent crime" by encouraging jurisdictions to "change their policies and partner with federal law enforcement to remove criminals." *Id.* Much of the rhetoric discussed in this document tracks with the DOJ's Backgrounder in the administrative record, such as the contentions that sanctuary city policies make communities less safe, encourage illegal immigration, and allow crimes to be committed. However, also like the Backgrounder, this press release lacks any demonstrable linkage between allowing local government to maintain immigration confidentiality and less safe communities. As noted in *City of Philadelphia*, some claims in the press release are also "factually untrue" with respect to California's laws and policies.

280 F. Supp. 3d at 624; *see also* DOJ Press Release No. 17-826, AR-00992 (claiming that sanctuary policies nationwide "perpetuat[e] the lie that in certain cities, illegal aliens can live outside the law," and "protect illegal aliens who have committed crimes.").

It is worth emphasizing that the evidence before me indicates the opposite of DOJ's rhetoric. In contrast to DOJ's unsubstantiated view, California shows that imposing the challenged conditions may damage its law enforcement efforts. In support of its sanctuary policies, the California Assembly Committee on Public Safety relied on a study finding lower likelihoods of contacting law enforcement by Latinos (44 percent), undocumented immigrants (70 percent), and U.S.-born Latinos (28 percent) who were victims of a crime, for fear of police inquiring into their immigration status. *See* CA RJN Ex. 4; *see also* Wong Decl. ¶¶ 35-38 (sharing similar results in a separate study of San Diego undocumented Mexican nationals).

This evidence is not isolated to California. A letter from the Mayor of New Orleans to the Attorney General explains the work their law enforcement does in coordination with federal officials and why the conditions and rhetoric of the Executive Branch are hindering their work to make communities safer. *See* AR-00487 ("Fear within immigrant communities pushes individuals and families, undocumented or not, into the shadows, and makes the task of protecting everyone much more difficult for law enforcement."). A second letter from the City Solicitor of Philadelphia explains its view that trust between law enforcement and residents, regardless of immigration status, leads to safer communities. *See* AR-00640 ("gain[ing] the trust and cooperation of . . .

residents, crime victims and witnesses . . . regardless of their immigration status" makes the "community stronger and . . . streets safer."). The record also includes a letter from Milwaukee County's Corporation Counsel to the Acting Assistant Attorney General, stating that its local policies make the community safer and that the conditions will undermine those policies. *See* AR-00722 (finding that its resolutions "make the community safer by fostering trust between residents and local law enforcement.").

Amici prosecutors and law enforcement leaders provide many other studies showing that interjecting federal immigration enforcement into local law enforcement weakens trust, which is vitally important to community-oriented policing and reducing crime. *See* Amicus Brief (CA Dkt. No. 130; SF Dkt. No. 136-1). Not only do Latinos and undocumented immigrants become less likely to contact law enforcement if they are victims or witnesses of a crime, but 85 percent of immigrant families are mixed-status households, meaning that the fear or lack of trust extends to United States citizens who worry about the deportation of their family members or close relatives. *See id.* (citing Anita Khashu, The Role Of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties, Police Found. (Apr. 2009), available at https://www.policefoundation.org/wp-content/uploads/2015/06/The-Role-of-Local-PoliceNarrative.pdf.).

According to a study of law enforcement officers, two-thirds expressed views that immigrants were reporting less crimes. *See id.* (citing Robert C. Davis et al., Access to Justice for Immigrants Who Are Victimized, 12 Crim. Just. Pol'y Rev. 183, 187 (2001)). These

sentiments are corroborated by a national survey evidencing declines in immigrant communities that are willing to cooperate with law enforcement. *See id.* (citing Nat'l Immigrant Women's Advocacy Project Report, at 99 (May 3, 2018), available at http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf.).

The evident consequence of a widespread fear of deportation within Latino communities is an underreporting of violent crimes such as domestic violence and gang-related violence. *See id.* (citing Michael Morris & Lauren Renee Sepulveda, *A New ICE Age*, Texas Dist. & Cty. Attorneys Ass'n, The Texas Prosecutor, Vol. 47, No. 4 (July/Aug. 2017) (finding rape reporting by the Hispanic community in Houston fell 40 percent from 2016 to 2017 despite overall increase in crime reporting city wide); James Queally, Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts, L.A. Times, Oct. 9, 2017, http://www.latimes.com/local/lanow/la-me-lnundocumented-crime-reporting-20171009-story.html. (finding similar declines in sexual assault and domestic violence reporting by the Hispanic community, but not other ethnic groups, in San Diego, Los Angeles, and San Francisco)). In another study focused on Latinas, those surveyed were increasingly unlikely to report violent crimes because of a fear of deportation and a lack of trust in the police. *See id.* (citing Jill Theresa Messing et al., Latinas' Perceptions of Law Enforcement: fear of Deportation, Crime Reporting, and Trust in the System, 30 J. Women & Soc. Work 328, 334 (2015)).

DOJ fails to explain adequately the reasons it imposed the challenged conditions. Its own justifications

cannot "be ascribed to a difference in view or the product of agency expertise;" the record demonstrates the lack of evidence supporting its position, that it failed to consider important problems with its conditions and has repeatedly offered explanations that are counter to the evidence. *State Farm*, 463 U.S. at 43. The challenged conditions are arbitrary and capricious under the APA.

IV. DECLARATORY RELIEF

California and San Francisco seek a declaratory judgment that their respective laws comply with Section 1373 so that they can complete the certification condition. On its cross motion for summary judgment, DOJ argues that the requests for declaratory relief are non-justiciable under principles of standing and ripeness. Further it asks for judgment denying declaratory relief for California's Values Act and San Francisco's Administrative Code Chapters 12H and 12I.

When a party requests declaratory judgment, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). A court can issue declaratory judgment "[i]n a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). I find that the claims are ripe for review and issue declaratory relief consistent with the forthcoming discussion.

A. Justiciability

DOJ argues that San Francisco and California's claims are not justiciable. It contends that California does not

have the injury-in-fact needed to establish standing and its claims are not ripe. This is substantially the same argument it made against California's preliminary injunction motion (pertaining to Section 1373), which I rejected in a prior Order. *See* Order (CA Dkt. No. 89). It makes a ripeness argument against San Francisco, though I also found standing and ripeness previously. *See* Order Denying Motion to Dismiss at 2 (SF Dkt. No. 78). The analysis in those Orders applies with equal force today and extends to all the challenged conditions.

California and San Francisco have demonstrated Article III standing to challenge the conditions and their claims are ripe for review. Rather than restate the reasoning here, I refer to the discussions of justiciability in my prior Orders. *See* Order at 11-19 (CA Dkt. No. 89) (finding "the State has demonstrated Article III standing" and "its claims are ripe for review."); Order at 2 (SF Dkt. No. 78) (discussing the same finding for San Francisco); *see also Cnty. of Santa Clara*, 275 F. Supp. 3d. at 1207-11 (discussing justiciability in the context of the previous Executive Order imposing a Section 1373 certification condition).

B. Interpreting Section 1373

Assuming for the moment that Section 1373 is not unconstitutional on its face, I need to consider what it requires. DOJ asserts that Section 1373, at a minimum, includes contact information and release status information for any detained immigrants. *See* DOJ Mot. for Summ. J. at 29; *see also* Sherman Decl. Ex. B (Defs. Interog. Resps. 6, 17). San Francisco and California contend that Section 1373 only extends to citizenship and immigration status inquiries. *See* SF Mot. for Summ. J. 22-24; CA Mot. for Summ. J. at 25-27. This familiar

disagreement about Section 1373 has already been analyzed and resolved by three district courts.

In *Steinle v. City & Cnty. of San Francisco*, the Hon. Joseph C. Spero found that Section 1373 was void of anything addressing inmate release dates because by its terms it only governed citizenship or immigration status information. 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017) ("no plausible reading of [Section 1373] . . . encompasses the release date of an undocumented inmate."). The court found no need to interpret legislative history because a plain reading of the statute is so clear. Following *Steinle*, in *City of Philadelphia* the court concluded that Section 1373 "does not require advance notice of an individual's release from custody." *City of Philadelphia*, 309 F. Supp. 3d at 332. The court offered two additional interpretations of Section 1373's text as well. The language "citizenship or immigration status" was limited to an individual's class of presence in the United States, such as undocumented, refugee, or United States citizen. *Id.* at 333. Further, the language "information regarding" was also limited only to information relevant to the "citizenship or immigration status" inquiry, of which release dates was not a part. *Id.* Finally, in *United States v. California*, DOJ's affirmative litigation to invalidate California's sanctuary state laws like the Values Act, DOJ argued that prohibiting release dates and addresses for detainees violated Section 1373. *United States v. California*, 314 F. Supp. 3d at 1101. But the court found "no direct conflict between SB 54 [the Values Act] and Section 1373." *Id.* Section 1373 was limited to information strictly related to immigration status and did not include information on release dates and addresses. *Id.* at 1102.

I have also discussed Section 1373 in my prior Order on California's preliminary injunction motion. *See* Order (CA Dkt. No. 89). I found that the meaning of the phrase "regarding immigration status" was ambiguous; DOJ offered no definition of the phrase. As I wrote then, "Under the INA, almost every bit of information about an individual could be relevant to status, particularly with respect to the right to asylum or as a defense to removal." *Id.* I cannot read the phrase "regarding immigration status" as broadly as the DOJ requests without inviting the same concern for ambiguity I identified before. "A contrary interpretation would know no bounds." *United States v. California*, 314 F. Supp. 3d at 1102.

San Francisco and California are also correct that if Congress intended to give Section 1373 broad enforcement application, it could have used broader language. *See Curtis v. United States*, 511 U.S. 485, 492 (1994) (finding Congress "knew how to do so" if it intended to draft a statute broadly); *see also United States v. California*, 314 F. Supp. 3d at 1103 ("If Congress intended the statute to sweep so broadly, it could have used broader language or included a list to define the statute's scope."). For example, 8 U.S.C. § 1367(a)(2) was enacted within the same bill as Section 1373 and prohibits immigration officials from disclosing "any information which relates to an alien." In other provisions of the INA, Congress used language such as "information regarding the name and address of the alien," 8 U.S.C. § 1360(c)(2), information "about the alien's nationality, circumstances, habits, associations, and activities," *id.* § 1231(a)(3)(C), "any information . . . regarding the purposes and intentions of the applicant,"

id. § 1225(a)(5), and "information concerning the alien's whereabouts and activities," *id.* § 1184(k)(3)(A).

Accordingly, I agree with the other district courts that found Section 1373 would support only a narrow interpretation that extends to "information strictly pertaining to immigration status (i.e. what one's immigration status is)." *United States v. California*, 314 F. Supp. 3d at 1102.

C. California's Sanctuary State Laws Comply with Section 1373

California asserts that its laws comply with Section 1373 as this court narrowly interprets the statute. It seeks declaratory judgment with respect to its TRUST Act, TRUTH Act, Values Act, California Penal Code Sections 422.93, 679.10, and 679.11, California Code of Civil Procedure Section 155, and California Welfare and Institutions Code Sections 827 and 831. The DOJ only requests judgment for defendants on the Values Act, effectively conceding that the other state laws would comply with Section 1373.[6] Based on the DOJ's concession, the only question remaining is whether the Values Act complies with Section 1373.

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[6] The DOJ discusses in a footnote that the other state laws that California seeks declaratory judgment for may not be implicated by Section 1373 but may still give rise to different conflicts with analogous provisions elsewhere in the INA. *See* DOJ Mot. for Summ. J at 28 n.19 ("The complexity of such an assessment is yet another reason not to evaluate these statutes where OJP has made no inquiry or allegation that they violate Section 1373.").

California relies on its interpretation that the Values Act's savings clause in subsection (e) expressly authorizes compliance with Section 1373. *See* Cal. Gov. Code § 7284.6(e). The savings clause states:

> (e) This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, *information regarding the citizenship or immigration status, lawful or unlawful, of an individual*, or from requesting from federal immigration authorities immigration status information, lawful or unlawful, of any individual, or maintaining or exchanging that information with any other federal, state, or local government entity, pursuant to Sections 1373 and 1644 of Title 8 of the United States Code.

Cal. Gov. Code § 7284.6 (emphasis added).

Given my interpretation of Section 1373, limiting it to information relevant to citizenship or immigration status not including release date information, it is clear the Values Act complies with Section 1373. Its savings clause expressly does not prohibit the state government from communicating or sharing "information regarding the citizenship or immigration status, lawful or unlawful, of an individual," exactly what Section 1373 requires. *Compare* Cal. Gov. Code § 7284.6(e), with 8 U.S.C. § 1373 (stating state and local governments "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [INS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.").

D. San Francisco's Sanctuary City Ordinances Comply with Section 1373

San Francisco also requests a declaratory judgment that its sanctuary city laws, Chapters 12H and 12I, comply with Section 1373. DOJ disputes declaratory relief because it asserts the San Francisco laws prohibit providing contact information and the release status of detainees. Because I do not interpret Section 1373 broadly to require state and local governments to share contact information and release status information with federal immigration officials, I find that San Francisco's sanctuary city laws comply with the federal statute.

Chapter 12H prohibits San Francisco employees from "disseminat[ing] information regarding release status of any individual or any other such personal information" and allows them to communicate that information if required to by federal law. SF Admin. Code § 12H.2. The term "personal information" is defined expressly in Chapter 12I as "any confidential, identifying information about an individual, including, but not limited to, home or work contact information, and family or emergency contact information." *See* SF RJN Ex. A. San Francisco's Board of Supervisors also amended this chapter in 2016, changing restrictions on communicating "immigration status" to "release status." *See* SF RJN Ex. G. Chapter 12I prohibits responding to detainer requests from federal immigration officials and allows employees to notify federal officials of inmate release status in certain limited circumstances. SF Admin. Code § 12I.3.

There is no dispute that Chapters 12H and 12I prohibit sharing contact information and release dates with ICE, but that is not a requirement of Section 1373.

Still, the DOJ interprets Chapter 12H as violating Section 1373 even under the court's interpretation, based on its language prohibiting employees from "assist[ing] in the enforcement of Federal immigration law." SF Admin. Code § 12H.2. In reply, San Francisco contends that this general prohibition should not control where elsewhere in the chapter there is specific language that only prohibits employees from sharing release status information and personal information. I agree and do not read Chapters 12H and 12I so broadly where a narrower reading harmonizes the sanctuary city laws with Section 1373.

Neither Chapter 12H or 12I concerns communications about information on an individual's immigration and citizenship status. San Francisco's six departments that received Byrne JAG funds: the Department of Children Youth & Their Families, Adult Probation, Sheriff's Department, Police Department, District Attorney's Office, and Public Defender's Office, either administer policies that are consistent with San Francisco's Sanctuary City laws or do not have policies that involve Chapters 12H and 12I. *Cf.* Fletcher Decl. ¶¶ 6-7; Hennessy Decl. ¶¶ 11, 17-18; Sainez Decl. ¶¶ 9-11 (outlining policies consistent with San Francisco's sanctuary city laws), *with* Chyi Decl. ¶ 27; DeBerry Decl. ¶ 5; Adachi Decl. ¶ 5 (describing the lack of policies related to Chapters 12H and 12I). Additionally, these departments have notified their employees that federal laws requiring information-sharing, such as Section 1373, should be followed. *See* SF RJN Ex. D; *see also* Fletcher Decl. ¶ 8; Hennessy Decl. ¶ 10; Sainez Decl. ¶ 8; Chyi Decl. ¶ 29; DeBerry Decl. ¶ 7; Adachi Decl. ¶ 7.

DOJ discusses several San Francisco documents that it believes communicate policies instructing employees to prohibit immigration status information-sharing. *See* DOJ Mot. for Summ. J. at 33-34. It also believes the City Attorney's Office's written public guidance on interacting with ICE agents give employees the impression that they should refuse to speak with federal immigration officials because it lists what employees "are not required" to do for ICE agents and italicizes negatives like the word "not." I do not agree that the format of the documents is significant or dispositive of compliance with Section 1373. What is required, and what is apparent in the documents, is that they do not prohibit information-sharing of an individual's immigration status. San Francisco's sanctuary city laws, Chapters 12H and 12I, comply with Section 1373.

V. INJUNCTIVE RELIEF

According to well-established principles of equity, a permanent injunction is appropriate when: (i) a plaintiff "suffered an irreparable injury;" (ii) available remedies at law are "inadequate;" (iii) the "balance of hardships" between the parties supports an equitable remedy; and (iv) public interest is "not disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). For all the reasons discussed above, San Francisco and California are entitled to a permanent injunction. They have demonstrated that the challenged conditions caused and will continue to cause them constitutional injury because imposing those conditions violates the separation of powers. As in *City & Cty. of San Francisco v. Trump*, DOJ "has not even attempted to argue that the injunction causes it any burden at all" and in light of the loss of Byrne JAG funding the balance of hardships tips

in favor of enjoining the enforcement of the challenged conditions against California and San Francisco. 897 F.3d at 1244. Finally, I renew my earlier observation that "the public interest would appear to be better served if the [plaintiffs] did not have to choose between the Byrne JAG Program grant funds to assist [their] criminal law enforcement efforts and the health of [their] relationship with the immigrant community." *See* Order at 27. The public interest is not disserved here because an injunction "brings clarity to all parties and to citizens dependent on public services." *City & Cty. of San Francisco*, 897 F.3d at 1244.

The remaining question is one of scope. *See Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976) ("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."). After a careful review of the record, I conclude that a nationwide injunction is the appropriate remedy in this case. That said, I will stay the effect of the nationwide scope of the injunction until the Ninth Circuit has the opportunity to review it on appeal.

A district court, pursuant to its powers in equity, "may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952); *see also United States v. Oregon*, 657 F.2d 1009, 1016 n.17 (9th Cir. 1981) ("When a district court has jurisdiction over all parties involved, it may enjoin commission of acts outside of its district."). Yet "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*

v. Yamasaki, 442 U.S. 682, 702 (1979). When considering the scope of injunctive relief, the court "must be mindful of any effect its decision might have outside its jurisdiction," and "should not award injunctive relief that would cause substantial interference with another court's sovereignty." *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008) (citing *Steele*, 344 U.S. at 289).

In *City & Cty. of San Francisco*, the Ninth Circuit discussed recent cases upholding nationwide injunctions when "necessary to give Plaintiffs a full expression of their rights." 897 F.3d at 1244 (collecting cases). Nationwide injunctions are exceptional but are "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).

The Ninth Circuit has offered recent guidance on the breadth of evidence and inquiry needed to justify nationwide injunctive relief in the context of the Trump Administration's Executive Order attempting to place similar conditions on grant funding. *See City & Cty. of San Francisco,* 897 F.3d at 1245 (vacating nationwide injunctive relief when "the record is insufficiently developed as to the question of the national scope of the injunction" and lacks "a more searching inquiry into whether this case justifies the breadth of the injunction imposed."). Granting a nationwide injunction requires me to undertake "careful consideration" of a factual record evidencing "nationwide impact," or in other words, "specific findings underlying the nationwide application

of the injunction." *Id.* at 1231, 1244.[7] The Ninth Circuit cited *City of Chicago*, 888 F.3d at 292-93, for a point of comparison where the Seventh Circuit affirmed a nationwide injunction in part because the statute "interconnects" all recipients of Byrne JAG grants. *Id.* at 1244. The Seventh Circuit's decision has now been vacated, but the district court's ruling remains.

California offers three reasons why a nationwide injunction is needed here: (i) it protects California's interest in its Byrne JAG funding because there is a limited annual fund; (ii) it is the most equitable response to Section 1373's unconstitutionality; and (iii) it addresses constitutional deficiencies not geographically limited to California. San Francisco reiterates that nationwide injunctive relief is appropriate when a federal law is invalid, adding that the new conditions for Byrne JAG

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[7] At the hearing, California also argued that Ninth Circuit precedent compels a nationwide injunction when there is a violation of the APA, as here, because the agency action is necessarily set aside. *See* Transcript at 27 (citing *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), (rev'd in part on other grounds), ("The nationwide injunction . . . is compelled by the text of the Administrative Procedure Act . . . "). This line of reasoning was followed in *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1101 (C.D. Cal. 2018), and the permanent injunction is currently on appeal in the Ninth Circuit. Yet even *Earth Island Inst.* recognized that a nationwide injunction is discretionary relief that the Ninth Circuit reviews under an abuse of discretion. *See* 490 F.3d at 699. Here, I follow the Ninth Circuit's guidance in *City & Cty. of San Francisco*, 897 F.3d at 1245, which more thoroughly addressed how district court's exercise discretion and dealt specifically with conditions placed on the Byrne JAG grant program.

funding do not vary in their application or the legal issues presented for the hundreds of jurisdictions that also apply for the grants.

As in *City of Chicago*, I find that this case presents a narrow issue of law that does not vary from one jurisdiction to the next. 888 F.3d at 290-91. The court there explained how grant recipients were interconnected because "[t]he conditions imposed on one can impact the amounts received by others." *Id.* at 292. It continued to specify that the funding the Attorney General allocates under the Byrne JAG program is directly affected by the money distributed to other applicants, because the amount withheld or penalized for non-compliance with other Congressional statutory requirements is then reallocated to other recipients. *See id.* (citing 34 U.S.C. § 10156(f) ("If the Attorney General determines . . . that a State will be unable to qualify or receive funds . . . 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 . . . "); § 20927 ("Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated . . . "); § 30307(e) ("any amount that a State would otherwise receive for prison purposes . . . shall be reduced by 5 percent, unless the chief executive officer of the State submits to the Attorney General proof of compliance with this chapter.")). The structure of the grant program supports nationwide relief.

California contends that it will be unable to fund critical public safety programs if the federal government continues to cut it off from funding it is allocated by the

Byrne JAG program. *See* Jolls Decl. ¶ 19 ("a substantial number of local programs funded by the BSCC are funded entirely or in large part by JAG" and California will not be able to continue funding them); Caligiuri Decl. ¶¶ 23, 31, 32 (explaining the amount of CAMPgrant funding at issue and what programs it funds); McDonnell Decl. ¶¶ 8-9, 15 (discussing the programs the Byrne JAG program helps fund and the impact that lack of funding will have on them) (CA Dkt. No. 31). DOJ has withheld $56.6 million nationwide and issued $197.3 million in Byrne JAG funding that California was excluded from after the Seventh Circuit partially stayed its injunctive relief. *See* CA RJN Exs. 27, 28. California's funding also affects San Francisco's sub-grant funding. *See* 34 U.S.C. § 10156(c)(2) (allocating a portion of state funding to local governments); *see also City of Chicago*, 888 F.3d at 292 (finding it noteworthy that "the City is obligated to apply for Byrne JAG funds not only for itself but for eleven neighboring localities.").

San Francisco offers five declarations from municipal jurisdictions across the country, similarly demonstrating the far-reaching impact that the Byrne JAG conditions and distributions have on all types grant recipients across the geographical spectrum. *See* Jerzyk Decl. ¶ 9 (SF Dkt. No. 123) (stating Central Falls, Rhode Island is presented with a Hobson's Choice of declining funding to protect its citizens or agreeing to the conditions at the expense of its longstanding policies); Pittman Decl. ¶¶ 8, 10 (SF Dkt. No. 126) (stating the same Hobson's Choice for Seattle and the King County, Washington consortium of cities); Maesta Decl. ¶ 17 (SF Dkt. No. 127) (stating the same Hobson's Choice for Denver, Colorado); Hansen Decl. ¶ 5 (SF Dkt. No. 124)

(stating a nationwide injunction would make it possible for Montgomery County, Maryland to accept Byrne JAG funding); Wright Decl. ¶ 8 (SF Dkt. No. 125) (stating that filing a lawsuit for Somerville, Massachusetts is not feasible since the litigation costs outweigh the amount of funding it would receive).

DOJ counters that nationwide injunctive relief is overbroad. It contends that a nationwide injunction would violate Article III standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (rejecting standing for a statewide gerrymandering challenge because a plaintiff's remedy must be limited to his injury); s*ee also Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 729 n.1 (9th Cir. 1983) (finding that class action plaintiffs were not entitled to relief for those they did not represent outside of class certification). It also invokes the principle that injunctive relief should be limited only to the relief needed for the plaintiffs before the court. *See Los Angeles Haven Hosp. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) ("injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court."). During the hearing, it argued that nationwide injunctive relief should be limited to class actions.

I am not persuaded that DOJ's Article III standing argument should prevent a nationwide injunction if it is evidently needed to provide complete relief from a facially unconstitutionally and uniformly applied law. Like the Ninth Circuit, I disagree with DOJ's wholesale arguments against nationwide injunctions; the scope of nationwide injunctive relief is not limited to class actions. *See, e.g.*, *Bresgal*, 843 F.2d at 1170-71 (determining over-breadth by the relief the parties are entitled to,

not by the threshold issue of whether there is a certified class action).

DOJ expressed additional concern that nationwide injunctions prevent "legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). I share that concern. Indeed, the issues in this case are the same issues before the Third and Seventh Circuits. *See* DOJ. Mot. for Summ. J. at 40 (noting that granting a nationwide injunction would authorize relief that the *en banc* Seventh Circuit might itself reject). DOJ called nationwide injunctions a "one-way-ratchet" that allows plaintiffs to have relief on behalf of all others, while the government cannot preclude all plaintiffs' claims. *City of Chicago*, 888 F.3d at 298 (Manion, J., dissenting in part). That is also a fair point.

Amici assert, on the other hand, that because there is a narrow constitutional issue in dispute with little variance in the DOJ's arguments and defenses, this does not appear to be the type of situation in which allowing more cases to percolate in federal courts would be of much benefit. *See* Amicus Brief at 11 (SF Dkt. No. 137-1). In addition, a nationwide injunction would not implicate some of the other concerns raised in the DOJ's briefing. In *L.A. Haven Hospice, Inc.*, the Ninth Circuit held that "a nationwide injunction would not be in the public interest because it would significantly disrupt the administration of the Medicare program . . . and would create great uncertainty." 638 F.3d at 665. A nationwide injunction would not disrupt the administration of the Byrne JAG program, a formula grant program that

does not independently give the Attorney General authority to impose additional conditions not conferred by Congress. Public interest would be served, as I stated earlier, because an injunction would bring "clarity to all parties and to citizens dependent on public services." *City & Cty. of San Francisco*, 897 F.3d at 1244. Without a nationwide injunction when the court finds a constitutional violation, there is even greater likelihood that relief limited to the parties "would not cure the constitutional deficiency, which would endure in all [its] applications." *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017).

California and San Francisco have shown that Section 1373 is unconstitutional and that the challenged conditions violate the separation of powers. In consideration of the factual record, including the structure of the Byrne JAG program and the harm to jurisdictions across the country, I find that this case justifies nationwide relief under *City & Cty. of San Francisco*, 897 F.3d at 1231. That said, this Order alternatively relies on my narrow interpretation of Section 1373 as it applies to California's and San Francisco's "sanctuary" laws and practices. If the Ninth Circuit agreed with those alternative findings, but disagrees about the constitutionality of Section 1373, a nationwide injunction would be inappropriate because the laws and practices of each "sanctuary" jurisdiction differ. Accordingly, I grant the injunction in favor of California and San Francisco and stay its nationwide scope until the Ninth Circuit has the opportunity to consider it on appeal.

VI. MANDAMUS RELIEF

California also seeks a writ of mandamus compelling the Attorney General to disburse Byrne JAG and COPS

grant funding because the challenged conditions are unlawful under the APA. The APA authorizes the court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Ninth Circuit evaluates mandamus under the so-called *TRAC* factors. *See Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *Telecommc'ns. Research & Action v. FCC* (TRAC), 750 F.2d 70, 79-80 (9th Cir. 1984)).

> (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.

750 F.2d at 80 (citations and internal quotation marks omitted). The first factor, the "rule of reason," is the most important but is not determinative. *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). The court is still required to consider all factors. *See In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017).

Each factor supports mandamus relief for the Byrne JAG grant and COPS grant funding. 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. *See City of Philadelphia*, 309 F. Supp. 3d at 343 ("it 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."). The Byrne JAG program is a formula grant that requires the Attorney General to disburse funds annually, and the COPS grant is a competitive program California applies for and has traditionally received each year.

Factor three favors relief because the delay impacts human health and welfare, particularly for California as the COPS and Byrne JAG funds aid task forces aimed at stopping illicit drug trafficking and go towards funding court programs to reduce recidivism of at-risk youth. *See* Jolls. Decl. ¶ 10; Caligiuri Decl. ¶¶ 23-25. Similarly, factor five supports relief because the human welfare and community safety concerns that California's grant funding addresses 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, if it has any weight at all here, would favor relief because DOJ is withholding grant funding based on conditions that violate the separation of powers. I will GRANT California's request for mandamus relief.

CONCLUSION

For the reasons stated, California and San Francisco's motions for summary judgment are GRANTED

and the DOJ's motions for summary judgment are DENIED.[8] Judgment will be entered accordingly.

IT IS SO ORDERED.

Dated: Oct. 5, 2018

/s/ WILLIAM H. ORRICK
WILLIAM H. ORRICK
United States District Judge

[8] The parties requested judicial notice of various public records and government documents in support of their motions for summary judgment, with no opposition or dispute to their accuracy or authenticity. To the extent I rely on those documents, the requests are GRANTED. *See* CA Dkt. Nos. 117, 125, 128; SF Dkt. Nos. 107, 115. All other requests for judicial notice are DENIED AS MOOT.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 17-cv-04642-WHO

CITY AND COUNTY OF SAN FRANCISCO,
PLAINTIFF

v.

JEFFERSON BEAUREGARD SESSIONS, ET AL.,
DEFENDANTS

Filed: Oct. 5, 2018

JUDGMENT AND ORDER

On October 5, 2018, I granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 58, I hereby ENTER judgment in favor of plaintiff and against defendants, and grant the following relief as set forth below.

DECLARATION

I find declaratory relief under 28 U.S.C. § 2201 is appropriate in this case. It is hereby DECLARED that:

1. The 8 U.S.C. § 1373 certification condition and the access and notice conditions for Byrne JAG grant funding are unconstitutional because they: (i) exceed the congressional authority conferred to the Executive Branch; and (ii) they exceed the

Congress's spending powers under Article I of the Constitution to the extent Congress conferred authority to the Attorney General.

2. San Francisco's Chapters 12H and 12I of the San Francisco Administrative Code comply with 8 U.S.C. § 1373.

3. San Francisco does not have in place a prohibition or restriction that applies to any program or activity funded under the Byrne JAG program, and which deals with sending to, receiving from, or requesting immigration status information with the federal government, or maintaining such information.

PERMANENT INJUNCTION

I also find a permanent injunction is appropriate in this case for the reasons stated in the October 5, 2018, Order granting plaintiff's motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 65, it is now ORDERED that defendants ARE HEREBY RESTRAINED AND ENJOINED from committing, performing, directly or indirectly, the following acts:

1. Using the Section 1373 certification condition, and the access and notice conditions ("Challenged Conditions") as funding restrictions for any Byrne JAG awards.

2. Denying or clawing back San Francisco Byrne JAG funding on the basis of alleged noncompliance with Section 1373.

Consistent with my October 5, 2018 Order granting plaintiff's motion for summary judgment, it is now ORDERED that the nationwide aspect of the permanent injunctive relief set forth above is STAYED until the Ninth Circuit has the opportunity to consider it.

IT IS SO ORDERED.

Dated: Oct. 5, 2018

/s/ WILLIAM H. ORRICK
WILLIAM H. ORRICK
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:17-cv-04701-WHO

STATE OF CALIFORNIA, EX REL. XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Filed: Nov. 20, 2018

AMENDED JUDGMENT AND ORDER

On October 5, 2018, I granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment, and I entered a corresponding Judgment and Order on the same date. Dkt. No. 138. Defendants have filed a motion to alter or amend that judgment in certain respects. Dkt. No. 139. Upon consideration of defendants' motion and of all materials submitted in relation thereto, defendants' motion to alter or amend is hereby GRANTED. Pursuant to Federal Rules of Civil Procedure 58, I hereby ENTER this amended judgment in favor of plaintiff and against defendants, and grant the following relief as set forth below.

DECLARATION

I find declaratory relief under 28 U.S.C. § 2201 is appropriate in this case. It is hereby DECLARED that:

1. The 8 U.S.C. § 1373 certification condition, and the access and notice conditions for Byrne JAG grant funding are unconstitutional because they: (i) exceed the congressional authority conferred to the Executive Branch; (ii) they exceed the Congress's spending powers under Article I of the Constitution to the extent Congress conferred authority to the Attorney General; and (iii) they violate the Administrative Procedure Act.
2. The State's TRUST, TRUTH, Values Act, and Shield Confidentiality Statutes comply with 8 U.S.C. § 1373.
3. 8 U.S.C. § 1373 is unconstitutional on its face under the Tenth Amendment of the United States Constitution.

PERMANENT INJUNCTION

I also find a permanent injunction is appropriate in this case for the reasons stated in the October 4, 2018, Order granting plaintiff's motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 65, it is now ORDERED that defendants ARE HEREBY RESTRAINED AND ENJOINED from committing, performing, directly or indirectly, the following acts:

1. Using the Section 1373 certification condition, and the access and notice conditions ("Challenged Conditions") as requirements for Byrne

JAG grant funding for any California state entity, any California political subdivision, or any jurisdiction in the United States.

2. Withholding, terminating, or clawing back JAG funding from, or disbarring or making ineligible for JAG, any California state entity, any California political subdivision, or any jurisdiction in the United States on the basis of the Challenged Conditions.

3. Withholding, terminating, or clawing back JAG or COPS funding from, or disbarring or making ineligible for JAG or COPS, any California state entity or any California political subdivision on account of any grant condition challenged in this lawsuit and based on the TRUST Act, Cal. Gov't Code §§ 7282-7282.5; the TRUTH Act, Cal. Gov't Code §§ 7283-7283.2; the California Values Act, Cal. Gov't Code §§ 7284-7284.12; California Penal Code §§ 422.93, 679.10, or 679.11; California Code of Civil Procedure § 155; or California Welfare and Institutions Code §§ 827 or 831, or based on policies implementing these statutes.

4. Withholding, terminating, or clawing back JAG or COPS funding from, or disbarring or making ineligible for JAG or COPS, any California state entity or any California political subdivision on account of the entity or jurisdiction spending its own money on the program or activity that JAG or COPS would be funding during the period under which Defendants withheld awards or funding from that entity or jurisdiction.

5. Enforcing 8 U.S.C. § 1373's statutory obligations against any California state entity or political subdivision.

6. Requiring compliance with 8 U.S.C. § 1373 as a grant condition against any California state entity or political subdivision based on 34 U.S.C. § 10102(a)(6) or 34 U.S.C. § 10153(A)(5)(D), on the basis of 8 U.S.C. § 1373 being an "applicable Federal law," or on the basis of 8 U.S.C. § 1373's independent statutory obligations.

Consistent with my October 5, 2018 Order granting plaintiff's motion for summary judgment, it is now ORDERED that the nationwide aspect of the permanent injunctive relief set forth above is STAYED until the Ninth Circuit has the opportunity to consider it.

MANDATORY INJUNCTION

As set forth in my October 5, 2018 Order I found all the necessary elements for issuing California mandamus relief are met. I hereby ORDER defendants to issue without further delay the fiscal year 2017 JAG awards, without enforcement of the enjoined conditions, and JAG funding, upon a jurisdiction's acceptance of the award, to the California Board of State and Community Corrections, and all California political subdivisions that applied for JAG. Acceptance of the FY 2017 awards by the California Board of State and Community Corrections or any California political subdivision shall not be construed as acceptance of the enjoined conditions. After the jurisdiction or entity accepts the fiscal year 2017 award, defendants are further ORDERED to process and approve the jurisdiction's requests for drawdowns of the jurisdiction's fiscal year 2017 JAG funds as

it would in the ordinary course, and without regard to the enjoined conditions, compliance with 8 U.S.C. § 1373, or if the jurisdiction spent its own money on the program or activity funded during the period under which defendants withheld awards and funding.

Defendants are further ORDERED to permit without further delay, the California Bureau of Investigation within the California Department of Justice to drawdown its fiscal year 2017 COPS grant award upon the Bureau of Investigation's acceptance of its fiscal year 2017 COPS grant. After the Bureau of Investigation accepts its fiscal year 2017 COPS award, defendants are further ORDERED to process and approve the Bureau of Investigation's requests for drawdowns of the fiscal year 2017 COPS funds as it would in the ordinary course, and without regard to the enjoined conditions, compliance with 8 U.S.C. § 1373, or if the Bureau of Investigation spent its own money on the program or activity funded during the period under which defendants withheld funding.

IT IS SO ORDERED.

Dated: Oct. 5, 2018

/s/ WILLIAM H. ORRICK
WILLIAM H. ORRICK
United States District Judge

APPENDIX E

1. 8 U.S.C. 1373 provides:

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.

2. 34 U.S.C. 10102 provides:

Duties and functions of Assistant Attorney General

(a) Specific, general and delegated powers

The Assistant Attorney General shall—

(1) publish and disseminate information on the conditions and progress of the criminal justice systems;

(2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice;

(3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice;

(4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice;

(5) coordinate and provide staff support to coordinate the activities of the Office and the Bureau of Justice Assistance, the National Institute of Justice,

the Bureau of Justice Statistics, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention; and

(6) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants.

(b) Annual report to President and Congress

The Assistant Attorney General shall submit an annual report to the President and to the Congress not later than March 31 of each year.

3. 34 U.S.C. 10109(a) provides:

Office of Audit, Assessment, and Management

(a) Establishment

(1) In general

There is established within the Office an Office of Audit, Assessment, and Management, headed by a Director appointed by the Attorney General. In carrying out the functions of the Office, the Director shall be subject to the authority, direction, and control of the Attorney General. Such authority, direction, and control may be delegated only to the Assistant Attorney General, without redelegation.

(2) Purpose

The purpose of the Office shall be to carry out and coordinate program assessments of, take actions to ensure compliance with the terms of, and manage information with respect to, grants under programs covered by subsection (b). The Director shall take special conditions of the grant into account and consult with the office that issued those conditions to ensure appropriate compliance.

(3) Exclusivity

The Office shall be the exclusive element of the Department of Justice, other than the Inspector General, performing functions and activities for the purpose specified in paragraph (2). There are hereby transferred to the Office all functions and activities, other than functions and activities of the Inspector General, for such purpose performed immediately before January 5, 2006, by any other element of the Department.

4. 34 U.S.C. 10152 provides:

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.

5. 34 U.S.C. 10153(a) provides:

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

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

120 days after the date on which funds to carry out this part are appropriated for a fiscal year, in such form as the Attorney General may require. Such application shall include the following:

(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.

6. 34 U.S.C. 10154 provides:

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.

7. 34 U.S.C. 10155 provides:

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.

8. 42 U.S.C. 3712 (2000) provides:

Duties and functions of Assistant Attorney General

(a) Specific, general and delegated powers

The Assistant Attorney General shall—

(1) publish and disseminate information on the conditions and progress of the criminal justice systems;

(2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice;

(3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice;

(4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice;

(5) 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, and the Office of Juvenile Justice and Delinquency Prevention; and

(6) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General.

(b) Annual report to President and Congress

The Assistant Attorney General shall submit an annual report to the President and to the Congress not later than March 31 of each year.