

No. 17-2991

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Illinois, No. 17-cv-5720 (Hon. Harry D. Leinenweber)

**BRIEF OF AMICI CURIAE COUNTY OF SANTA CLARA, 23 ADDITIONAL
CITIES, COUNTIES, AND MUNICIPAL AGENCIES, THE U.S. CONFERENCE OF
MAYORS, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION, AND THE INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION**

**IN SUPPORT OF PLAINTIFF-APPELLEE CITY OF CHICAGO
AND AFFIRMANCE OF DISTRICT COURT'S JUDGMENT**

James R. Williams
Greta S. Hansen
Kavita Narayan
Laura S. Trice
OFFICE OF THE COUNTY COUNSEL
70 W. Hedding St., East Wing, 9th Floor
San José, CA 95110
(408) 299-5900

Brian C. Hausmann
John M. Fitzgerald
Katherine M. O'Brien
TABET DIVITO & ROTHSTEIN LLC
209 S. LaSalle St., 7th Floor
Chicago, IL 60604
(312) 762-9450

*Attorneys for Amicus Curiae County of Santa Clara
[Complete Listing of Amici Curiae on Next Page]*

Complete Listing of Amici Curiae

County of Santa Clara, California	National League of Cities ⁴
City of Cambridge, Massachusetts	City of New York, New York
City of Chelsea, Massachusetts	City of Northampton, Massachusetts
International City/County Management Association ¹	City of Oakland, California
International Municipal Lawyers Association ²	City of Portland, Oregon
City of Iowa City, Iowa	City of Providence, Rhode Island
City of Ithaca, New York	City of Rochester, New York
King County, Washington	City and County of San Francisco, California
City of Los Angeles, California	City of San José, California
City of Madison, Wisconsin	County of Santa Cruz, California
City of Menlo Park, California	City of Seattle, Washington
Metropolitan Area Planning Council ³	City of Somerville, Massachusetts
City of Minneapolis, Minnesota	City of Tucson, Arizona
County of Monterey, California	The United States Conference of Mayors ⁵

¹ The International City/County Management Association (“ICMA”) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA’s mission is to create excellence in local governance by advocating and developing professional management of local governments throughout the world.

² The International Municipal Lawyers Association (“IMLA”) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

³ The Metropolitan Area Planning Council is the public Regional Planning Agency serving the people who live and work in the 101 cities and towns of Metropolitan Boston. *See* Massachusetts General Laws Ch. 40B Section 24. The agency provides extensive technical assistance to cities and towns in the Greater Boston region, and supports the ability of cities and towns to adopt and implement best practices for maintaining a productive relationship with all residents of their communities, regardless of their immigration status.

⁴ The National League of Cities (“NLC”) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

⁵ The U.S. Conference of Mayors (“USCM”), founded in 1932, is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

Appellate Court No: 17-2991

Short Caption: City of Chicago v. Jefferson B. Sessions, III

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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The County of Santa Clara; The United States Conference of Mayors;

International City/County Management Association; National League of Cities

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Tabet DiVito & Rothstein LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Brian C. Haussmann

Date: January 4, 2018

Attorney's Printed Name: Brian C. Haussmann

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 209 South LaSalle Street, 7th Floor
Chicago, IL 60604

Phone Number: 312 / 762-9450 Fax Number: 312 / 762-9451

E-Mail Address: bhaussmann@tdrlawfirm.com

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ John M. Fitzgerald Date: January 4, 2018

Attorney's Printed Name: John M. Fitzgerald

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 209 South LaSalle Street, 7th Floor
Chicago, IL 60604

Phone Number: 312 / 762-9450 Fax Number: 312 / 762-9451

E-Mail Address: jfitzgerald@tdrlawfirm.com

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Katherine M. O'Brien Date: January 4, 2018

Attorney's Printed Name: Katherine M. O'Brien

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 209 South LaSalle Street, 7th Floor
Chicago, IL 60604

Phone Number: 312-762-9450 Fax Number: 312-762-9451

E-Mail Address: kobrien@tdrlawfirm.com

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International Municipal Lawyers Association

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

N/A

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- i) Identify all its parent corporations, if any; and

N/A

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Charles Thompson Date: 1-2-2018

Attorney's Printed Name: Charles Thompson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

Address: International Municipal Lawyers Association
51 Monroe Street, Suite 404, Rockville, MD 20850

Phone Number: 202-466-5424 X7110 Fax Number: 202-785-0152

E-Mail Address: cthompson@imla.org

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INTEREST OF AMICI CURIAE

Amici are 24 cities, counties, and municipal agencies, and four major associations of local governments and their officials: The United States Conference of Mayors, the National League of Cities, the International Municipal Lawyers Association, and the International City/County Management Association. Local governments, including amici cities and counties, bear responsibility for providing essential services to the residents of our communities and safeguarding their health, safety, and welfare. Our law enforcement officials patrol our streets, operate our jails, investigate and prosecute crimes, and secure justice for victims. To fulfill these responsibilities, amici cities and counties must build and maintain the trust of our residents, regardless of their immigration status, and must be able to adopt policies that meet our communities' unique needs.

Amici represent a broad spectrum of localities with diverse populations and varying approaches to local policy. In creating the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") program to provide states and localities with a steady source of federal funding for law enforcement policies and programs, Congress expressly recognized the importance of tailoring those policies and programs to local needs. Amici and the organizational amici's members, which are in nearly every state and territory, have a shared interest in ensuring that congressional intent is not overridden by unconstitutional executive branch interference.

The parties have consented to the filing of this amici curiae brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed

money that was intended to fund preparing or submitting the brief. No person, other than amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Since January 2017, President Trump and his administration have targeted local officials and jurisdictions, like amici cities and counties, that have decided that public safety in their communities is best served by limiting local involvement with enforcement of federal immigration law. In one of his first acts upon taking office, President Trump issued an Executive Order directing his Administration to deny federal funds to so-called “sanctuary” jurisdictions. Executive Order 13768, §§ 2(c), 9(a). Three months later, a judge of the Northern District of California granted a nationwide preliminary injunction barring enforcement of the key provision of that Executive Order. *Cty. of Santa Clara v. Trump, City & Cty. of San Francisco v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).⁶ The injunction was made permanent in November 2017. *Santa Clara*, 2017 WL 5569835, at *1-2 (N.D. Cal. Nov. 20, 2017). Nonetheless, the Department of Justice (“DOJ”) has continued its efforts to deny federal funds to localities that choose to limit their participation in immigration enforcement.

DOJ’s new conditions on Byrne JAG program funding violate the Constitution, usurp local control over public safety policies, erode the community trust on which local law enforcement depends, and pose serious operational challenges for local

⁶ The remainder of this brief cites the court orders and opinions issued jointly in these related cases using the shorthand *Santa Clara*.

governments. Recognizing this, the district court preliminarily enjoined enforcement of two of these conditions on a nationwide basis. *See City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 2017 WL 4081821, at *14 (N.D. Ill. Sept. 15, 2017). Affirmance of the nationwide injunction is required to protect Chicago and localities throughout the United States from irreparable harm to their law enforcement efforts and, in turn, to protect public safety in local communities.

BACKGROUND

Hundreds of cities and counties around the country – urban, suburban, and rural; large, medium, and small; and in both blue and red states – have decided that the safety and well-being of their communities is enhanced by limiting local involvement in immigration enforcement. *See, e.g.,* Jasmine C. Lee, *What Are Sanctuary Cities*, N.Y. Times (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?mcubz=1>. Although these jurisdictions are just as safe as, if not safer than, those that devote local resources to enforcing federal immigration law, *see infra* at 11, President Trump has blamed them for “needless deaths” and promised to “end . . . [s]anctuary” jurisdictions by cutting off federal funding. *Transcript of Donald Trump’s Immigration Speech*, N.Y. Times (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>.

On January 25, 2017, President Trump issued Executive Order 13768 (“Order”), which directed the Attorney General and the Secretary of Homeland Security to ensure that so-called “sanctuary jurisdictions” do not receive any “[f]ederal funds.” Executive Order 13768, §§ 2(c), 9(a). The White House made clear that the Order aimed to “end[]

sanctuary cities” by stripping them of *all* federal funding. *See, e.g.,* The White House, *Press Briefing by Press Secretary Sean Spicer* (Feb. 1, 2017), archived at <https://perma.cc/KD8J-E64E>. Shortly thereafter, the County of Santa Clara and the City and County of San Francisco filed related lawsuits in the Northern District of California challenging the Order, and moved for a preliminary injunction barring enforcement of the key provisions of the Order. At this point, DOJ began what became a months-long process of spreading confusion and contradictions. At oral argument on the preliminary injunction motions, DOJ lawyers attempted to walk back the Order’s sweeping language by arguing that it was merely intended to place political pressure on localities, and applied narrowly to only three grants (including Byrne JAG). *See Santa Clara*, 250 F. Supp. 3d at 507-08. The California district court rejected this interpretation, finding it irreconcilable with the plain language of the Order, and issued a preliminary injunction blocking the Order’s broad funding ban. *Id.* at 516-17, 540.

Then, in May 2017, the Attorney General issued a memorandum that purported to “conclusive[ly]” interpret the Order, but merely restated the reading DOJ lawyers had offered at oral argument. *See Santa Clara*, 2017 WL 3086064, at *2 (N.D. Cal. July 20, 2017). DOJ attempted to rely on this memorandum to seek reconsideration of the preliminary injunction, and again to oppose Santa Clara’s and San Francisco’s motions for summary judgment and a permanent injunction. *See Santa Clara*, 2017 WL 5569835, at *1-2. The California district court found that “[t]he AG Memorandum not only provides an implausible interpretation of Section 9(a),” but also “amounts to ‘nothing more than an illusory promise to enforce the Executive Order narrowly.’” *Id.* at *2-4. In

November 2017, the court permanently enjoined the Order on the grounds that it violates separation of powers principles, the Spending Clause, and the Fifth and Tenth Amendments. *Id.* at *10-16. The court granted a nationwide injunction because the Order “is unconstitutional on its face, and not simply in its application to the plaintiffs.” *Id.* at *17.

Meanwhile, the Attorney General shifted to a grant-by-grant approach. In April 2017, as it became increasingly likely that the Order would be enjoined, DOJ took action to require grant recipients to certify their compliance with 8 U.S.C. § 1373, which prohibits restrictions on sharing of citizenship and immigration status information. *See* ECF No. 44 at 53-55. On July 25, 2017, the Attorney General announced two additional conditions that require recipients to: (1) “permit personnel of [DHS] to access any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States” (“access condition”); 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” (“notice condition”). *See* ECF No. 44 at 84-129.

Chicago filed a lawsuit challenging the Byrne JAG conditions in August 2017. After Chicago moved for a preliminary injunction, DOJ again changed course and represented that the conditions announced in July – and subsequently included in the FY 2017 Byrne JAG solicitations – were not “actual” conditions, but “only advised prospective applicants regarding the *general tenor* of the conditions.” ECF No. 44 at 426 (emphasis added). In two grant award letters that purportedly contained the “actual”

conditions, the condition requiring 48 hours' notice to DHS before an inmate is released from local custody was modified to require notice "as early as practicable." ECF No. 44 at 489-90, 510-11. DOJ modified the access condition to require a local policy or practice designed to ensure that federal agents "in fact" are given access to correctional facilities for the purpose of meeting with individuals believed to be aliens and inquiring into their right to remain in the country. *Id.*

On September 15, 2017, the district court issued a nationwide injunction prohibiting enforcement of the notice and access conditions.⁷ *Chicago*, 264 F. Supp. 3d 933, 2017 WL 4081821, at *14. The district court denied DOJ's motion to stay the nationwide scope of the injunction, ECF No. 44 at 1221-33, and on November 21, 2017, this Court did the same, ECF No. 33.⁸

Congress has allocated approximately \$257 million for Fiscal Year 2017 Byrne JAG recipients. *See* ECF No. 44 at 1079. Even though DOJ previously announced that it "expects to issue award notifications by September 30, 2017," ECF No. 44 at 1185, following the district court's ruling it has continued to withhold all awards so that it can retain the right to impose the challenged conditions. *See* ECF No. 44 at 1078-80. DOJ has also made clear that if the Court were to lift the nationwide injunction, it would issue

⁷ The district court left in place the certification condition, which is not at issue in this appeal.

⁸ In addition to *Chicago*, the City of Philadelphia, City and County of San Francisco, City of Los Angeles, and State of California have filed lawsuits challenging the Byrne JAG conditions. *See City of Philadelphia v. Sessions* (No. 17-3894, E.D. Pa.); *City & County of San Francisco v. Sessions* (No. 17-4642, N.D. Cal.); *City of Los Angeles v. Sessions* (No. 17-7215, C.D. Cal.); *State of California v. Sessions* (No. 17-4701, N.D. Cal.). In November 2017, the Eastern District of Pennsylvania granted a preliminary injunction as to the City of Philadelphia. *See City of Philadelphia v. Sessions*, No. 17-3894, 2017 WL 5489476 (E.D. Pa. Nov. 15, 2017).

the grant awards immediately. *See id.* DOJ would then give amici cities and counties only 45 days within which to accept the awards with all conditions or to forego receipt of Byrne JAG funds. ECF No. 44 at 1488, 1502, 1528.

ARGUMENT

I. Congress Created the Byrne JAG Program to Support and Promote Local Discretion and Flexibility.

In creating the Byrne JAG program, Congress recognized the critical importance of local control over law enforcement policy. To promote this local control and discretion, Congress structured the grant program to maximize each state and local recipient's flexibility to meet the needs of diverse communities across the country. As Chicago has explained, the Byrne JAG program is a formula grant,⁹ available for use in eight broad areas: law enforcement; prosecution and courts; prevention and education; corrections and community corrections; drug treatment and enforcement; planning, evaluation, and technology improvement; crime victim and witness programs; and mental health. *See* 42 U.S.C. § 3751(a)(1). Congress set up the grant in this manner 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." H.R. Rep. No. 109-233, at 89 (2005). Empowering states and localities to make their own policy choices is thus a central purpose of the Byrne JAG program.

Local jurisdictions, including many amici, put Byrne JAG funds to diverse uses,

⁹ A formula grant is a non-competitive grant in which funds are allocated based upon a statutory formula, without a competitive process. *See* Office of Justice Programs, *OJP Grant Process*, archived at <https://perma.cc/U5AA-FRYL>.

reflecting the varied law enforcement needs of different communities. For example:

- Iowa City, Iowa (population 74,398) has used Byrne JAG funds to promote traffic safety; establish a search and rescue program aimed at individuals at risk for wandering; partially fund a drug task force; and purchase equipment.
- Monterey County, California (population 435,232) has used Byrne JAG funds to launch a Day Reporting Center that provides moderate-to-high-risk probationers with services designed to increase employment rates and reduce recidivism.
- Philadelphia, Pennsylvania (population 1,567,872) uses Byrne JAG funds to improve courtroom technology; invest in training programs for prosecutors; and support juvenile delinquency programs, reentry programs, and indigent defense services.
- Portland, Oregon (population 639,863) has used Byrne JAG funds to support its New Options for Women (NOW) program, which provides services to women who have experienced sexual exploitation while working in the commercial sex industry.
- Sacramento, California (population 493,025) uses Byrne JAG funds to support ongoing maintenance and operation of its Police Department's helicopter program.
- San Francisco, California (population 870,887) uses Byrne JAG funds to operate a Youth Adult Court aimed at reducing recidivism for youth ages 18-25 by providing case management and other services that account for young adults' unique developmental needs.

The district court's preliminary injunction protects local governments from having to choose between losing critical funding for these diverse programs or giving up control over inherently local law enforcement policy. Such a result would not only undermine Congress's intent to support cities and counties in developing and implementing policies tailored to the needs of their communities, but would also allow the executive branch to wield powers vested exclusively in Congress. Under the Spending Clause, only Congress – whose members are elected by and accountable to local communities – can place substantive conditions on federal funds. *South Dakota v.*

Dole, 483 U.S. 203, 206 (1987). DOJ has no authority to upend Congress’s plan to preserve and promote local discretion through the Byrne JAG program.

Indeed, our constitutional structure is premised on the notion that states and localities nationwide, as the governments closest to the people, bear primary responsibility for protecting the health and safety of their residents. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Leaving these matters in the control of states and localities ensures that matters which “concern the lives, liberties, and properties of the people” are determined “by governments more local and more accountable than a distant federal bureaucracy.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). The duty to protect residents from crime lies at the heart of the police power vested in states and localities. *See United States v. Morrison*, 529 U.S. 598, 618 (2000). In carrying out this duty, cities and counties possess – and must be allowed to exercise without federal interference – broad discretion to develop and implement law enforcement and public safety policies tailored to the needs of their communities.

This is a matter not only of constitutional law, but of sound policy. Police chiefs and sheriffs across the country agree that “decisions related to how local law enforcement agencies allocate their resources, direct their workforce and define the duties of their employees to best serve and protect their communities” – including decisions about whether to devote local law enforcement resources toward immigration enforcement – “must be left in the control of local governments.” Major Cities Chiefs Ass’n, *Immigration Policy*, 2 (2013), archived at <https://perma.cc/JV3FT9UH>; see also Int’l Ass’n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law*

Enforcement, 1, 5 (2005), archived at <https://perma.cc/M2J2-LDSL> (“[L]ocal law enforcement’s participation in immigration enforcement is an inherently local decision that must be made by a police chief, working with their elected officials, community leaders and citizens,” and attempts to coerce participation by withholding federal funds are “unacceptable.”).

II. Policies Restricting Local Involvement in Immigration Enforcement Protect Public Safety.

In exercising its discretion over local law enforcement policy, Chicago has decided that devoting its resources to immigration enforcement would be detrimental to community safety. Compl. ¶¶ 2, 25, ECF No. 44 at 31, 39. Chicago is not alone in this judgment. More than 600 counties and numerous cities – including many amici – have opted to limit their involvement in federal immigration enforcement efforts. See Tom K. Wong, Ctr. For Am. Progress, *The Effects of Sanctuary Policies on Crime and the Economy*, ¶ 12 (2017) (hereinafter “*Effects of Sanctuary Policies*”), archived at <https://perma.cc/42JG-Q2UD>; see also Immigrant Legal Resource Center, *Detainer Policies* (2015), <https://www.ilrc.org/detainer-policies>. The policies of these counties and cities are themselves diverse, reflecting the varied needs and judgments of each jurisdiction.¹⁰

Policies that restrict local entanglement with U.S. Immigration and Customs

¹⁰ See, e.g., County of Santa Clara, Bd. of Supervisors Policy No. 3.54, <https://www.sccgov.org/sites/bos/legislation/bos-policy-manual/documents/bospolicychap3.pdf>; King County Code § 2.15.010-2.15.020, http://aqua.kingcounty.gov/council/clerk/code/05_Title_2.pdf; Tucson Police Dep’t Gen. Orders, Gen. Order 2300, <https://www.tucsonaz.gov/files/police/general-orders/2300IMMIGRATION.pdf>; USCM Reso. Opposing punitive Sanctuary Jurisdiction Policies, Jan. 26, 2017, ECF No. 44 at 1147-49, 1151-52, 1154-55.

Enforcement (“ICE”) reflect local judgments that community trust is vital to the work of public safety. Local law enforcement agencies rely on *all* community members – regardless of immigration status – to report crimes, serve as witnesses, and assist in investigations and prosecutions. *See, e.g.,* Police Exec. Research Forum, *Advice from Police Chiefs and Community Leaders on Building Trust: “Ask for Help, Work Together, and Show Respect”* (2016), archived at <https://perma.cc/66PN-SULW> (emphasizing the importance of community trust to effective policing). Notwithstanding President Trump’s beliefs, empirical evidence indicates that immigrants to the United States are less likely to commit crimes than native-born residents. *See, e.g.,* Cato Institute, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, 1-2 (2017), archived at <https://perma.cc/VDU9-R9V6>. But “[t]he moment [immigrant] victims and witnesses begin to fear that their local police will deport them, cooperation with their police then ceases.” *Border Insecurity: The Rise of MS-13 and Other Transnat’l Criminal Orgs.*, Hearing before the S. Comm. on Homeland Sec. and Govt. Affairs, 115th Cong. (2017) (statement of J. Thomas Manger, Chief of Police, Montgomery County, Maryland). Local police chiefs attribute this deterioration to community members’ fear that interactions with police could lead to their deportation or the deportation of a family member. *See* Rob Arthur, *Latinos In Three Cities Are Reporting Fewer Crimes Since Trump Took Office* (2017), archived at <https://perma.cc/3ZFX-4HRK>.

Recent data bear out this concern. Since President Trump took office and promised to ramp up deportations, Latinos have reported fewer crimes relative to reports by non-Latinos. *See id.* Fifty percent of foreign-born individuals and sixty-seven

percent of undocumented individuals surveyed report that they are less likely to offer information about crimes to police for fear that officers will inquire about their or others' immigration status. See Nik Theodore, Univ. of Ill. at Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, 5-6 (2013), archived at <https://perma.cc/SMV7-FZGA>. Especially disturbingly, "reporting of crimes like sexual assault and domestic violence are down by one-quarter in immigrant communities" in some localities. CNN Wire, *ICE Agents Will Continue to Make Arrests at Courthouses, Trump Administration Says*, KTLA 5 (Mar. 31, 2017), archived at <https://perma.cc/5U5K-K2UY>.¹¹

In amici cities and counties' experience, even the *perception* that local law enforcement is assisting with immigration enforcement can create fear that erodes trust, disrupts lines of communication, and makes law enforcement's job more difficult. For these reasons, DOJ's assertion that Byrne JAG recipients should be willing to accede to supposedly "minimal" cooperation with federal immigration enforcement efforts in exchange for grant funds, see Brief for Appellant 11, is misguided at best, and highlights the need to leave local officials in charge of setting policies to keep their communities safe. DOJ fails to appreciate that once lost, community trust in local law enforcement is difficult to regain. See Nat'l Immigration Law Ctr., *Austin Police Chief: Congress Should Consider Good Policy, Not Politics* (2013), archived at <https://perma.cc/TJ9R-HTNS>

¹¹ See also Brooke A. Lewis, *HPD chief announces decrease in Hispanics reporting rape and violent crimes compared to last year*, Houston Chron. (Apr. 6, 2017), archived at <https://perma.cc/U5WP-GYSA>; James Queally, "Latinos are reporting fewer sexual assaults amid a climate of fear in immigrant communities, LAPD says," Los Angeles Times (Mar. 21, 2017), archived at <https://perma.cc/S765-HYEZ>.

("[I]mmigrants will never help their local police to fight crime once they fear [local police] have become immigration officers.").

In contrast, local policies that limit entanglement with ICE help mitigate community members' fear, facilitate engagement between immigrant communities and law enforcement, and ultimately improve public safety by ensuring that those who commit crimes are brought to justice. Contrary to President Trump and Attorney General Sessions' unsupported rhetoric, research has shown that policies limiting cooperation with federal immigration authorities are associated with *lower* crime rates: 35.5 fewer crimes per 10,000 people on average; and as many as 65.4 fewer in counties with large urban centers. See *Effects of Sanctuary Policies*, ¶¶ 15-16.

Even localities that previously engaged in extensive cooperation with ICE enforcement efforts, such as the City of Louisville, Kentucky, have since determined that permitting police to assist with immigration enforcement undermines community trust to the detriment of local public safety, and have discontinued the practice except in limited circumstances. See Kate Howard, *Louisville Police Don't Enforce Immigration – But Help the Feds Do It*, Ky. Ctr. for Investigative Reporting (Sept. 17, 2017), archived at <https://perma.cc/CLR9-USQ9>; Darcy Costello, *New LMPD policy: No working with immigration officials to enforce federal laws*, The Courier-Journal (Sept. 22, 2017), archived at <https://perma.cc/89BG-7JQD>.

III. A Nationwide Injunction is Necessary Because the Byrne JAG Conditions Have Created Nationwide Uncertainty and Harm.

The Byrne JAG FY 2017 Local Solicitation indicated that DOJ expects to make

approximately 1,000 grant awards to local jurisdictions. *See* ECF No. 44 at 99. Because the new Byrne JAG conditions are facially unconstitutional as to every one of these 1,000 localities – and not simply in their application to Chicago – only the nationwide injunction ordered by the district court can provide complete relief.

Numerous courts have granted nationwide injunctions in the context of federal actions relating to immigration, both by the current administration and its predecessor. *See, e.g., Santa Clara*, 2017 WL 5569835, at *17; *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (hereinafter *IRAP*); *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015). These decisions emphasize that a nationwide injunction is appropriate – and indeed necessary – where, as here, the action is facially unconstitutional and its harm is widespread. *See IRAP*, 857 F.3d at 605 (nationwide injunction is appropriate when the “challenged conduct caused irreparable harm in myriad jurisdictions across the country” and “enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all [its] applications”) (citation omitted); *see also Santa Clara*, 2017 WL 5569835, at *17. Nationwide injunctions are “especially appropriate in the immigration context,” where national uniformity is a paramount goal. *IRAP*, 857 F.3d at 605; *Texas*, 809 F.3d at 187-88.

The Byrne JAG conditions do not merely impose “minimal” obligations as DOJ claims, *see* Brief for Appellant 11, or affect only a few grant applicants. Instead, they strike at the core of cities’ and counties’ responsibility to operate effective and fair criminal justice agencies, and affect all potential grant applicants that choose to exercise their local policymaking discretion in a manner that DOJ dislikes. Around 1,000

localities are expected to receive Byrne JAG awards this fiscal year, and already five lawsuits have been filed challenging the Byrne JAG conditions.¹² Without a nationwide injunction barring enforcement of these conditions, numerous additional jurisdictions would be required to litigate – and courts would be required to manage – lawsuits challenging and seeking to enjoin the same conditions based on the same constitutional deficiencies already identified in this case. For some JAG grant recipients, the cost of litigation would outweigh the small amount they receive in grant funds, but choosing instead to forego the grant may deprive them of a source of support for critical local programming. The drain on judicial resources from these needless individual lawsuits would be significant as well.

Moreover, the uncertainty surrounding these conditions and the day-to-day operational challenges they pose compound the national scope of the harm. DOJ's position on immigration-related grant funding conditions has continually shifted since the President's Executive Order punishing sanctuary jurisdictions was issued in January 2017, leaving localities across the country mystified about the local policies DOJ is actually targeting and alarmed about the burdens the conditions may impose.

Notice Condition. As originally announced, the notice condition required Byrne JAG recipients to “provide *at least* 48 hours’ advance notice to DHS regarding the

¹² See *supra* at 6 n.8. Additionally, amicus USCM, which includes among its membership dozens of FY 2017 Byrne JAG recipients, sought leave to intervene in this action to foreclose DOJ's argument that Chicago lacked “standing” to seek nationwide injunctive relief. In so moving, USCM emphasized that if the nationwide injunction were lifted, many of its members would be forced to acquiesce to DOJ's unlawful conditions to secure essential law enforcement funding. See ECF No. 44 at 1487-88. The district court denied intervention, but acknowledged the substantial interest of USCM and its members. ECF No. 44 at 1582-86.

scheduled release date and time of an alien in the jurisdiction's custody." Compl., Ex. C, Ex. D at 30 (emphasis added), ECF No. 44 at 87, 118. This sowed alarm among localities, including Chicago and some amici, that operate detention facilities whose populations primarily or exclusively consist of *unconvicted* individuals who are detained pending resolution of criminal charges or transfer to another facility.¹³ See Bureau of Justice Statistics, *Jail Inmates in 2015*, 5 tbl. 4 (2016), archived at <https://perma.cc/G6R2-BPYQ> (63% of jail inmates nationwide are unconvicted). These pretrial inmates often do not have a "scheduled release date and time" that can be determined in advance—let alone 48 hours in advance—and many are in custody for very short durations before they post bail or are ordered released.

When the notice condition was announced, many localities feared they would have to continue to detain unconvicted inmates after they would otherwise be released so that the locality could provide ICE with the required notice. DOJ now represents that this condition requires notice only "as early as practicable," and does not require any locality to hold an inmate for additional time. Brief for Appellant 5. Even assuming DOJ adheres to this latest articulation of the condition, it nonetheless presents a foundational operational concern that DOJ fails to acknowledge: for agencies that detain unconvicted individuals, there are likely to be many instances in which giving *any* advance notice is impracticable. Thus, the current iteration of the notice condition is hardly a "minimal"

¹³ In its brief to this Court, DOJ misleadingly refers to even these unconvicted, pretrial-status inmates as "criminal aliens." See Brief for Appellant 4, 7, 15. But ICE defines a "criminal alien" as "an alien with a *known criminal conviction*." ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, 3 (2017), archived at <https://perma.cc/M8VM-NLW2> (emphasis added).

burden. And given DOJ's inconsistent positions, many amici and localities across the country remain legitimately concerned about how it will be enforced in practice.

Access Condition. In its current form, the access condition requires Byrne JAG recipients to have a policy or practice in place to ensure that federal agents "in fact are given access" to a local "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." See Brief for Appellant 6. But the award letters by which DOJ notified Byrne JAG recipients of this condition does not explain what "access" "in fact" means, leaving localities to guess at what they must do to comply. The access condition appears to overrule some localities' judgment that permitting ICE to operate in local detention facilities interferes with correctional operations – for example, by increasing fear among inmates and decreasing their trust of correctional staff – and is not in the best interests of staff, inmates, or the broader community.¹⁴ But local agencies are responsible for maintaining order and security within jails and other detention facilities, and they must retain the discretion to decide how that responsibility is best fulfilled.

In addition, the access condition causes some localities to wonder whether compliance would be consistent with state law. California law, for example, requires local agencies to provide a written consent form prior to any interview with ICE explaining the purpose of the interview and that the inmate may decline to be

¹⁴ See, e.g., Cook County Code § 46-37(b); County of Santa Clara, Bd. of Supervisors Policy No. 3.54, <https://www.sccgov.org/sites/bos/Legislation/BOS-Policy-Manual/Documents/BOSPolicyCHAP3.pdf>; Rev. Municipal Code of the City & County of Denver, § 28-252.

interviewed or choose to be interviewed only with his or her attorney present. Cal. Gov't Code § 7283.1(a). In other jurisdictions, inmates must be permitted to have an attorney present during any interview with federal immigration officials. *See* D.C. Code § 24-211.07(d)(1).¹⁵ Because it is unclear how DOJ will ultimately decide to enforce or interpret the access condition, the condition creates concern and confusion for localities that wish to receive Byrne JAG funding while complying with state law.

CONCLUSION

Congress created the Byrne JAG program specifically to support state and local governments' "flexibility" in designing public safety programs and policies for their jurisdictions. The conditions imposed by the Attorney General upend congressional intent and violate foundational constitutional principles favoring local control. Instead of preserving flexibility for local law enforcement operations, the new Byrne JAG conditions constrain localities' policy choices and require them to adopt federally mandated policies that will make local communities across the country *less safe*. And instead of preserving a reliable stream of funding, DOJ's shifting positions force localities nationwide to guess at whether DOJ will deem them eligible for funding – and whether they will be able to comply with the conditions on that funding if they accept it. A nationwide injunction is needed to halt DOJ's unlawful efforts.

¹⁵ Other state laws prohibit additional forms of involvement with immigration enforcement. *See e.g., Lunn v. Commonwealth*, 78 N.E. 3d 1143 (Mass. 2017) (Massachusetts law prohibits detaining an individual otherwise subject to release on the basis of an ICE detainer request).

Additional Counsel for Amici Curiae

Nancy E. Glowa
City Solicitor, City of Cambridge
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

*Attorney for the City of Cambridge,
Massachusetts*

Brian C. Hausmann
John M. Fitzgerald
Katherine M. O'Brien
TABET DIVITO & ROTHSTEIN LLC
209 S. LaSalle St., 7th Floor
Chicago, IL 60604

*Attorneys for the International City/County
Management Association, the National League
of Cities, and The U.S. Conference of Mayors*

Eleanor M. Dilkes
City Attorney, City of Iowa City
410 E. Washington St.
Iowa City, IA 52240

Attorney for the City of Iowa City, Iowa

Dan Satterberg
King County Prosecuting Attorney
516 Third Avenue, W400
Seattle, WA 98104

Attorney for King County, Washington

Michael P. May
City Attorney, City of Madison
210 Martin Luther King Jr. Blvd, Room 401
Madison, WI 53703

Attorney for the City of Madison, Wisconsin

Cheryl Watson Fisher
City Solicitor
City of Chelsea Law Department
500 Broadway, Room 307
Chelsea, MA 02150

Attorney for the City of Chelsea, Massachusetts

Charles W. Thompson, Jr.
Executive Director, General Counsel
International Municipal Lawyers
Association
51 Monroe Street, Suite 404
Rockville, MD 20850

*Attorney for the
International Municipal Lawyers Association*

Aaron O. Lavine
City Attorney, City of Ithaca
108 E. Green St.
Ithaca, NY 14850

*Attorney for Svante L. Myrick,
Mayor of Ithaca, New York*

Michael N. Feuer
City Attorney, City of Los Angeles
200 N. Main Street, 800 CHE
Los Angeles, CA 90012

Attorney for the City of Los Angeles, California

William L. McClure
City Attorney, City of Menlo Park
1100 Alma Street, Suite 210
Menlo Park, CA 94025

Attorney for the City of Menlo Park, California

Jennifer R. García
General Counsel
60 Temple Place, 6th Floor
Boston, MA 02111

*Attorney for the Metropolitan Area
Planning Council*

Charles J. McKee
County Counsel, County of Monterey
168 West Alisal St, 3rd Floor
Salinas, CA 93901

*Attorney for the County of Monterey,
California*

Alan Seewald
City Solicitor, City of Northampton
71 King Street
Northampton, MA 01060

*Attorney for the City of Northampton,
Massachusetts*

Tracy Reeve
City Attorney, City of Portland
430 City Hall, 1221 SW 4th Avenue
Portland, OR 97204

Attorney for the City of Portland, Oregon

Timothy R. Curtin
Corporation Counsel, City of Rochester
30 Church St., Room 400A
Rochester, NY 14614

Attorney for the City of Rochester, New York

Susan L. Segal
City Attorney, City of Minneapolis
350 S. 5th Street, Room 210
Minneapolis, MN 55415

*Attorney for the City of Minneapolis,
Minnesota*

Zachary W. Carter
Corporation Counsel, City of New York
100 Church Street
New York, NY 10007

Attorney for the City of New York, New York

Barbara J. Parker
City Attorney, City of Oakland
One Frank H. Ogawa Plaza, Sixth Floor
Oakland, CA 94612

*Attorney for the City of Oakland, California
and Oakland Mayor Libby Schaaf*

Jeffrey Dana
City Solicitor, City of Providence
444 Westminster Street, Suite 220
Providence, RI 02903

*Attorney for the City of Providence,
Rhode Island*

Dennis J. Herrera
City Attorney,
City and County of San Francisco
City Hall Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

*Attorney for the City and County of San
Francisco, California*

Richard Doyle
City Attorney, City of San José
200 East Santa Clara St., 16th Floor
San José, CA 95113

Attorney for the City of San José, California

Dana McRae
County Counsel, County of Santa Cruz
701 Ocean Street, Room 505
Santa Cruz, CA 95060

*Attorney for the County of Santa Cruz,
California*

Peter S. Holmes
City Attorney, City of Seattle
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097

Attorney for the City of Seattle, Washington

Francis X. Wright, Jr.
City Solicitor, City of Somerville
93 Highland Avenue
Somerville, MA 02143

*Attorney for the City of Somerville,
Massachusetts*

Michael Rankin
City Attorney, City of Tucson
P.O. Box 27210
Tucson, AZ 85726-7210

Attorney for the City of Tucson, Arizona

CERTIFICATE OF COMPLIANCE

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By: /s Brian C. Hausmann
Brian C. Hausmann

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I hereby certify that on January 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Brian C. Hausmann