UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

THE CITY of PHILADELPHIA, Plaintiff, v. JEFFERSON BEAUREGARD SESSIONS III, in his official capacity as Attorney General of the United States, Defendant.	Case No. 2:17-cv-03894-MMB

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Department of Justice has backed the City of Philadelphia into a corner: It is demanding that the City either abandon policies carefully developed over time to ensure the safety and well-being of all its residents—immigrant and non-immigrant alike—or forgo nearly $1.6 million in critical criminal justice funding. Philadelphia should not have to make this impossible choice, as a matter of law. The Attorney General lacks the authority to impose these conditions on Philadelphia, under both the relevant federal statutes and the United States Constitution. And had Congress given the Attorney General power to demand these concessions from the City—which it did not—that too would run afoul of the Constitution. While the federal government has considerable latitude to disburse grants to localities and to ask that they accept certain conditions, that power has limits. Neither Congress nor *especially* an executive official acting without delegation from Congress can mandate that localities relinquish their autonomy, be commandeered as federal agents, and agree to policy demands that will undermine police on the street, in exchange for a grant that was designed to *enhance* public safety. Whatever "respect for . . . [the] policy judgments" of Congress or the Executive is due, it "can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 538 (2012).

The federal actions that the City is challenging may at first blush seem banal or even supportive of law enforcement. They are not. The Attorney General has decreed that Philadelphia must accept three new conditions pertaining to federal immigration enforcement in order to receive its FY 2017 allocation of the Edward Byrne Memorial Justice Assistant Grant ("Byrne JAG" or "JAG"): (1) allow federal agents unfettered access to its prisons; (2) provide the Department of Homeland Security advance notice before releasing persons of interest; and (3) certify that it complies with a federal statute that deals with the sharing of immigration-status

information. These demands are extraordinary; if not enjoined, they will have severe consequences for the City. The new conditions are also riddled with ambiguities, and the Department of Justice (the "Department") has failed to provide meaningful guidance as to how it will enforce them. But if they are applied in their most extreme light—a possibility that looks increasingly likely—the City will be forced to abandon policies that have reduced its crime rate by at least 17% and its violent crime rate by 20%, and are essential to its residents' health and well-being. Meanwhile, if the City rejects the new grant terms, it must forgo formula grant funding that it has received every year since 2005 for critical crime-fighting initiatives.

The harms to the City will be significant and immediate. They can, and should, be prevented. The City respectfully requests that this Court enjoin the Department from imposing its three new conditions on the City as part of the FY 2017 Byrne JAG award, as they are unlawful, unconstitutional, and arbitrary and capricious. If the Court determines that the new condition of certification of compliance with 8 U.S.C. § 1373 can be attached to the City's FY 2017 JAG award, the City requests that the Court enjoin the Attorney General from rejecting Philadelphia's application or withholding any funds on account of that provision, because the City complies with it as lawfully and constitutionally construed.

BACKGROUND

A. The Byrne JAG Statute and Program.

Congress created the modern-day Byrne JAG program in 2005 as a formula grant, merging two prior criminal justice assistance grant programs. *See* Pub. L. No. 109-162, 119 Stat. 2960 (2005) (codified at 34 U.S.C. § 10151 *et seq.*, formerly codified at 42 U.S.C. § 3750 *et seq.*).[1] The formula allocates funds to States and localities according to their populations and

[1] Since the filing of Philadelphia's Complaint on August 30, 2017, the statutory authorization for the Byrne JAG program has been recodified from Title 42 to Title 34.

rates of violent crime, 34 U.S.C. § 10156(a)-(d). The purpose of the Byrne JAG program is to give financial assistance to States and localities so that they can strengthen their criminal justice systems according to local priorities and needs—whether that means additional support for law enforcement, prosecutors and courts, or preventative and educational programs. *Id.* § 10152. Applicants must submit a plan to the Department of Justice detailing how they will use their awards in one or more of eight enumerated programmatic areas, *id.* § 10152(a)(1), and also submit a series of statutorily prescribed assurances and certifications, *see id.* § 10153(a). In the Department's own words, the Byrne JAG program is today the "primary provider of federal criminal justice funding to state and local jurisdictions."[2]

Although the Byrne JAG authorizing statute permits the Attorney General to exercise discretion over limited tasks in implementing the grant program, *i.e.*, specifying the "form" of the application or designating financial information grantees must report, *see id.* § 10153(a)(4)-(5), the statute does not authorize the Department to invent and impose new substantive conditions on grant recipients. *See* Compl. ¶¶ 63-68. As the text of the statute and its legislative history make clear, Congress's intention was *not* to create a new vehicle for federal control over state and local law enforcement; quite to the contrary, Congress sought to give "flexibility to [States and localities to] spend money for *programs that work for them.*" *See* H.R. Rep. No. 109-233, at 89 (2005) (emphasis added). Today, Byrne JAG awards are distributed by the

[2] U.S. Dep't of Justice, Bureau of Justice Assistance, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program Fiscal Year (FY) 2016 Local Solicitation* (May 16, 2016), https://goo.gl/cQuuRR.

Bureau of Justice Assistance ("BJA"), which is part of the Office of Justice Programs ("OJP") within the Department of Justice.[3]

Philadelphia has applied for and received Byrne JAG funding every year since the program's inception. Over the past eleven years, Philadelphia's cumulative Byrne JAG allocation totals over $26 million, and its annual award has averaged $2.17 million. Decl. of Julie Wertheimer ¶ 5 ("Wertheimer Decl.") [attached hereto as Exhibit A]. The City also has previously been awarded competitive subgrants from the annual Byrne JAG award to the State of Pennsylvania. Wertheimer Decl. ¶ 6.

Philadelphia has relied on Byrne JAG funding for a range of projects that have strengthened and modernized its criminal justice system. In recent years, the Philadelphia Police Department ("PPD") has used JAG awards to invest in new technology, enhance equipment, and train and pay overtime to officers on the street. Other City departments have relied on the funding to upgrade courtroom technology, support juvenile delinquency programs for the City's youth, and operate rehabilitation and reentry programs. Philadelphia has even relied on JAG funds to revitalize blighted communities with Clean and Seal teams. Compl. ¶ 62; Wertheimer Decl. ¶ 7.

In FY 2017, Philadelphia has applied for almost $1.6 million in JAG funding. If awarded, the money will be used by the Philadelphia Police Department, the Managing Director's Office, the District Attorney's Office, and the Defender Association of Philadelphia. Wertheimer Decl. ¶ 11. Among other things, the FY 2017 award will support Philadelphia's Police Commissioner's "Crime Fighting Strategy," including overtime funding for "Quality of

[3] *See generally* U.S. Dep't of Justice, Bureau of Justice Assistance, *Welcome to BJA's Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, https://www.bja.gov/jag/ (last visited Sept. 26, 2017).

Life" police initiatives; the enhancement of a Reality Based Training Unit to emphasize best practices on the use of force; and to procure supplies for a citywide collaboration to support inner-city youth. Wertheimer Decl. ¶ 11. Philadelphia also intends to use its FY 2017 funding to purchase naloxone for Philadelphia police officers responding to opioid overdoses. Wertheimer Decl. ¶ 11. Without hyperbole: These projects save lives.

Philadelphia's anticipated FY 2017 JAG funding is marked in the Philadelphia budget under the "unanticipated grants fund." If a grant is not awarded, no City money will be appropriated for that spending. Wertheimer Decl. ¶ 10.

B. The Department's New Conditions for JAG Funding.

Over the past few months, the Department has stated that new conditions will affect FY 2017 Byrne JAG awards. In April 2017, the Department sent letters to Philadelphia and eight other jurisdictions "alert[ing]" each recipient that it is "required to submit documentation to [the Office of Justice Programs] that validates your jurisdiction is in compliance with 8 U.S.C. § 1373," a statute which bars states and localities from adopting policies that restrict immigration-related communications between state and local officials and the federal government. Compl. ¶ 78. The Department threatened that "[f]ailure to comply with this condition could result in the withholding of grant funds, suspension, or termination of the grant, ineligibility for future OJP grants or subgrants, or other action, as appropriate." Compl. ¶ 78. These letters referred to a new "certification" condition inserted into the jurisdictions' FY 2016 Byrne JAG awards in or around September 2016. But, until April 2017, the Department had not threatened to withhold any specific Byrne JAG funding from grantees without the certification.[4]

[4] As the City's Complaint explains in greater detail, in the spring of 2016, the Department of Justice's Office of Inspector General ("OIG") conducted a brief investigation into—and submitted a report to the Assistant Attorney General of the Office of Justice Programs discussing—whether a group of State and local jurisdictions that receive funding from OJP had

Philadelphia certified its compliance with Section 1373 on June 22, 2017. *See* Compl. ¶ 79 & Ex. 14. The City explained how its policies—by their text and in operation—comply with the lawful application of Section 1373, and it raised statutory and constitutional concerns with the Department's plans to condition JAG funding on compliance with Section 1373. Compl. ¶¶ 79-85. Several other recipients of the April 2017 letters also certified their compliance with Section 1373 in submissions to the Department by the June 30 deadline.

The Department responded with an ominous and opaque press release. It stated that it was "in the process of reviewing" the certifications and that, although several jurisdictions had made "bol[d] assert[ions]" in their letters regarding compliance, "[i]t is not enough to assert compliance, the jurisdictions must *actually be* in compliance." Compl. ¶ 85 (emphasis added). The Department of Justice has since approved the certifications of at least two jurisdictions (Miami-Dade County, Florida and Clark County, Nevada), but not Philadelphia's.

Without resolving the confusion over Section 1373, the Department announced two *more* conditions on July 25, 2017. *See* Compl. ¶¶ 86-91. It proclaimed that beyond certifying compliance with 8 U.S.C. § 1373 (the "Section 1373 condition"), JAG recipients must also allow officials from the Department of Homeland Security ("DHS") access to any detention facility

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policies that conflict with Section 1373. *See* Compl. ¶¶ 69-71. The OIG reported that some jurisdictions' policies may be in tension with Section 1373, but that it was not clear whether Section 1373 was an "'applicable federal law' that recipients would be expected to comply with in order to satisfy relevant grant rules" for JAG funding. *See* Memorandum from Michael E. Horowitz, Inspector General, to Karol V. Mason, Assistant Attorney General for the Office of Justice Programs, at 9 & n.13 (May 31, 2016) ("Horowitz Memorandum"), https://goo.gl/VhHrqA. After receiving the report, Assistant Attorney General Mason issued a memorandum announcing that OJP had "determined that Section 1373 is an applicable federal law for the purposes of the [JAG] program." Compl. ¶ 72. In a July 7, 2016 release, OJP instructed grantees that when they receive their FY 2016 awards, they must now "assure and certify compliance with . . . Section 1373." Compl. ¶ 73. In further guidance provided on October 6, 2016, OJP clarified that the Section 1373 certifications would not affect grantees' FY 2016 or prior JAG awards. Compl. ¶ 74.

they maintain to meet with persons of interest to DHS (the "jail access" condition); and must provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an inmate for whom DHS requests such notifications (the "advance notification" condition).

C. The Status Quo in Philadelphia: Policies to Welcome and Protect its Immigrant Communities.

Since its founding by William Penn in 1682, Philadelphia has been a haven for those seeking sanctuary from persecution.[5] Indeed, its very name, Philadelphia, derives from the Greek words "philos," meaning love or friendship, and "adelphos," meaning brother. Today, as the sixth largest city in the United States, Philadelphia boasts a foreign-born population of 200,000, including approximately 50,000 undocumented immigrants.[6] Immigrants contribute immensely to the City's economy, educational institutions, and arts and culture. Of the nearly one billion dollars in earnings generated by small business owners in the City of Philadelphia each year, immigrant entrepreneurs earn $295 million (almost a third);[7] and, between 2000 and 2013, immigrants were responsible for 96% of the growth in Main Street small business ownership.[8]

Philadelphia believes that when any of its residents—including those who happen to be immigrants—remain in the shadows of society, too afraid to participate in public life or even report crimes, the City's social fabric breaks down. It is not just Philadelphia's immigrant communities that suffer; the City as a whole suffers. Accordingly, Philadelphia developed a set of policies to avoid such outcomes and to address the needs of its growing immigrant

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[5] *See generally* Marie Basile McDaniel, *Immigration & Migration (Colonial Era)*, The Encyclopedia of General Philadelphia, https://goo.gl/eZXjFJ (last visited Sept. 26, 2017).
[6] Larry Eichel & Thomas Ginsberg, *Unauthorized Immigrants Make Up a Quarter of Philadelphia's Foreign-Born*, Pew Charitable Trusts (Feb. 15, 2017), http://goo.gl/6tbNeg.
[7] Americas Society/Council of The Americas and Fiscal Policy Institute, *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow*, p. 16 (Jan. 2015), https://goo.gl/TJ8hG7.
[8] *Id.* at 7.

community. Today, Philadelphia has four policies relevant to the present suit, each of which engenders trust with the City's immigrant community and brings individuals from that community into the fold of City life.

1. Philadelphia's Police Department Policy

For many years, the Philadelphia Police Department had a longstanding practice of not asking for persons' immigration status when investigating crimes or conducting routine patrols. Compl. ¶ 23. This practice was based on the recognition that a resident's immigration status was irrelevant to effective policing and—if anything—asking about status could undermine trust and hamper investigations. In May 2001, then-Police Commissioner John F. Timoney formalized those practices by issuing Memorandum 01-06, entitled "Departmental Policy Regarding Immigrants" ("Memorandum 01-06"). Its broad instruction is that Philadelphia police officers avoid unnecessarily disclosing individuals' immigration-status information to other entities, unless the subject authorizes the disclosure, it is required by law, or the subject is suspected of criminal activity. Compl. ¶ 25. Notwithstanding that general directive to "safeguard" immigrants' confidential information, Memorandum 01-06 directs police officers to continue adhering to typical law enforcement protocols for the reporting and investigating of crimes. Compl. ¶ 26.

2. Philadelphia's Confidentiality Order

The City's hallmark policy in building trust with the immigrant community and promoting broad-based use of City services is Executive Order No. 8-09, signed by then-Mayor Michael Nutter in November 2009 ("Confidentiality Order"). Compl. ¶ 31. The Confidentiality Order has two key features. First, it directs City officers and employees—including police officers—to refrain from affirmatively collecting information about individuals' immigration statuses, unless that information is necessary for the determination of benefits or services

eligibility or for the officer's investigation, or unless the collection is otherwise required by law. Compl. ¶¶ 33-34. The Order affords specific protection to victims of and witnesses to crimes, instructing law enforcement officers categorically never to elicit information about their immigration statuses. Compl. ¶ 34. Second, the Order requires City officers and employees to avoid making unnecessary disclosures of any immigration-status information that inadvertently comes into their possession. Compl. ¶ 35. There are some exceptions—the Order permits disclosure when it "is required by law" as well as when the subject individual "is suspected . . . of engaging in criminal activity." Compl. ¶ 35. And like Police Memorandum 06-01, the Confidentiality Order instructs law enforcement officers to "continue to cooperate with state and federal authorities in investigating and apprehending individuals who are suspected of criminal activity." Confidentiality Order § 2(C).

3. Policies on Detainer and Notification Requests

The City's mayors have issued multiple executive orders bearing on the City's responses to detainer and notification requests by U.S. Immigration and Customs Enforcement ("ICE"). In April 2014, then-Mayor Nutter issued the first executive order covering detainers ("Detainer Order I"), and in January 2016, Mayor Kenney issued a revised order ("Detainer Order II"). *See* Compl. ¶¶ 38-43. Detainer Orders I and II place the burden of federal immigration enforcement where it belongs: on the federal government. Detainer Order II, which is currently in effect, directs Philadelphia police officers and prison officials "not [to] comply with detainer requests unless they are supported by a judicial warrant and they pertain to an individual being released after conviction for a first or second degree felony involving violence." Compl. ¶ 42. As a result of Detainer Orders I and II, from April 2014 through the present date, Philadelphia prison authorities have stopped notifying ICE of the forthcoming release of inmates unless ICE

provides a notification request that is accompanied by a judicially authorized, criminal warrant. Compl. ¶¶ 44-45.

4. Philadelphia Prisons' Interview Request Protocol

The City of Philadelphia's Department of Prisons operates six facilities whose inmate population is roughly 6,700. Approximately 83 percent are in either a pre-trial posture (78 percent), pre-sentencing posture (about 2 percent), or some other form of temporary detention (about 3 percent). Comp. ¶ 49. Of the remaining 17 percent who are serving sentences, all are serving sentences of 23 months or less. *Id.* In May 2017, the Department of Prisons implemented a new protocol providing that ICE may only interview an inmate in one of the City's facilities if the inmate consents in writing to that interview. To implement this protocol, the Department of Prisons created a "consent form" to be provided to any inmate whom ICE seeks to interview. The consent form informs the individual that "[ICE] wants to interview you" and that "[y]ou have the right to agree or to refuse this interview." Compl. ¶ 50.

* * *

Philadelphia's policies have been remarkably successful. The City's confidentiality practices have led immigrants to feel that by applying for City services, enrolling their children in school, or seeking necessary healthcare services, they are not subjecting themselves or their families to adverse immigration consequences. Decl. of Eva Gladstein ¶¶ 5-8 ("Gladstein Decl.") [attached hereto as Exhibit B]. Its law enforcement protocols, together with its policies on ICE notification and interview requests, have led the City's immigration population to trust Philadelphia's police officers, to believe that reporting a crime will not result in that individual or his family being turned over to ICE, and to view Philadelphia's law enforcement personnel not as extensions of ICE, but as persons whose primary jobs is to keep their own families and communities safe from crime. Decl. of Brian Abernathy ¶¶ 7-9 ("Abernathy Decl.") [attached

hereto as Exhibit C]. Overall, the policies have forged greater trust with the City's immigrant population, encouraged persons of all backgrounds to access the City services to which they are entitled, and fostered effective community policing.

The proof is in the data: Since the enactment of the Confidentiality Order in 2009, crime has decreased across the City by 17%, with violent crime decreasing by 20%. Compl. ¶ 37; Abernathy Decl. ¶ 5. Property crimes are at their lowest since 1971, robberies are at their lowest since 1969, and violent crime is at its lowest since 1979. Compl. ¶ 3. Philadelphia's experience is not unique; it has been the experience of law enforcement across the country that reporting on the immigration status of residents, or even asking about status, deters persons of foreign backgrounds from reporting crimes or cooperating with law enforcement while declining to do so strengthens community policing. Compl. ¶¶ 28-29. Philadelphia has also seen continued, robust access among its immigrant populations to basic services such as education, healthcare, housing support, and assistance for persons with mental health and addiction needs since the enactment of its policies. Gladstein Decl. ¶¶ 5-8, 10. The City is proud of the relationship its agencies have built, particularly the Philadelphia Police Department, with its immigrant communities. It is a relationship of mutual respect, understanding, and communication. Abernathy Decl. ¶ 5.

D. Procedural History

Philadelphia filed its Complaint in this action on August 30, 2017, challenging the Department's authority to impose the Section 1373, jail access, and advance notification conditions, and seeking a declaratory judgment that the City complies with Section 1373 if it can lawfully be imposed as a condition of JAG funding. Dkt. 1. On September 5, 2017, the City submitted its application with the Office of Justice Programs for its FY 2017 Local Byrne JAG allocation of roughly $1.6 million. Along with the application, City Solicitor Sozi Pedro Tulante

submitted a declaration again certifying that the City complies with Section 1373, as lawfully construed, and attaching the City's June 22, 2017 submission. A week later, this Court held a status conference, during which time the City informed the Court that it would likely seek a preliminary injunction at the end of the month—if and when the new funding conditions are, in fact, included in the City's FY 2017 Local Byrne JAG award. *See* Dkt. 17.

Three other lawsuits challenging the Department's new funding conditions are currently pending. The City of Chicago filed suit in the U.S. District Court for the North District of Illinois in early August, challenging the new conditions and seeking declaratory relief that the city complies with Section 1373. *See* Complaint, *City of Chicago v. Sessions* ("*Chicago*"), No. 1:17-cv-05720 (N.D. Ill. Aug. 7, 2017), ECF No. 1. It then moved for a preliminary injunction against the imposition of all three conditions, requesting as-applied and facial relief. *See* Mot. for Prelim. Inj., *Chicago*, (N.D. Ill. Aug. 10, 2017), ECF No. 21. On September 15, 2017, the court granted Chicago's motion with respect to the jail access and advance notification conditions, finding that Chicago has established a likelihood of success on the merits and enjoining the Department from imposing those conditions nationwide. *See City of Chicago v. Sessions*, --- F. Supp. 3d ----, 2017 WL 4081821, at *14 (N.D. Ill. Sept. 15, 2017). On September 26, the Department of Justice filed an appeal and motion for a stay of the nationwide scope of the preliminary injunction pending appeal to the Seventh Circuit. *See Chicago* (N.D. Ill. Sept. 26, 2017), ECF Nos. 79-85.

The State of California and the City and County of San Francisco have sued the Department of Justice in the U.S. District Court for the Northern District of California. Both are challenging the jail access and notification conditions, and California seeks a declaratory judgment that it complies with Section 1373. *See* Complaint, *California ex rel. Becerra v.*

Sessions, No. 3:17-cv-04701-WHO (N.D. Cal. Aug. 14, 2017), ECF No. 1; Complaint, *City & County of San Francisco v. Sessions*, No. 3:17-cv-04642-WHO (N.D. Cal. Aug. 11, 2017) ("*San Francisco*"), ECF No. 1.[9] Neither plaintiff has sought injunctive relief at the time of this filing.

In the Chicago litigation, the Department of Justice made several representations that—combined with other recent developments—have convinced the City that the appropriate time to seek preliminary relief is now. First, the Department stated that "OJP's aim is to issue [FY 2017 JAG] award notifications by September 30, 2017," and that "the actual language and detailed contours of the [new] conditions" will be contained within those "award document[s]." Def.'s Opp. to Mot. to Expedite at 2-3 & n.2, *Chicago*, (N.D. Ill. Aug. 14, 2017), ECF No. 28. Second, the Department informed the court that "OJP [had already] issued Byrne JAG Program grant award documents to certain local units of government, and those documents contain the precise text of the conditions" that Chicago was challenging. Def.'s Opp. to Mot. for Prelim. Inj. at 9, *Chicago*, (N.D. Ill. Aug. 24, 2017), ECF No. 32. The Department filed copies of the FY 2017 JAG award letters to the County of Greenville, South Carolina and the City of Binghamton, New York, and submitted an affidavit by Acting Assistant Attorney General Alan Hanson stating that the conditions in those awards "are identical" to one another "and are being included in each award document being generated within OJP for awards under the FY 2017 Byrne JAG – Local Solicitation." Decl. of Alan Hanson ¶ 6, *Chicago*, (N.D. Ill. Aug. 24, 2017), ECF No. 32-1. Notably, the jail access and advance notification conditions in the Greenville and Binghamton award documents are somewhat different from what had been announced in the Department's July 25 press release. For jail access, the Department is requiring that recipients have in place a

[9] The City of Los Angeles moved to intervene in the San Francisco suit, but the district court denied the motion. *See* Order Denying Mot. to Intervene, *San Francisco* (N.D. Cal. Sept. 11, 2017), ECF No. 39.

"local ordinance, -rule, -regulation, -policy, or -practice . . . that is designed to ensure that [any, not just DHS] agents of the United States . . . are given access [to] a local-government . . . correctional facility" to meet with individuals believed to be aliens and question them. *Id.*, Ex. A, at 19 (Special Condition 56.1.A).[10] For advance notification, recipients must have in place a "local ordinance, -rule, -regulation, -policy, or -practice . . . that is designed to ensure that, when a local-government . . . correctional facility receives from DHS a formal written request . . . [for] advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and—as early as practicable . . . provide the requested notice to DHS." *Id.* (Special Condition 56.1.B).

As a result of these representations, the City's understanding is that it is likely to receive its FY 2017 Byrne JAG award letter in the very near future; that its letter will include the same text that appears in Greenville and Binghamton's awards; and that it will then have 45 days either to accept the new conditions or to forgo its allocation. Meanwhile, Philadelphia still has not received a response from the Department about its Section 1373 certification, and it could be conceivably denied an award at any time if the Department rejects its Section 1373 submission. To protect its legal rights and to give this Court an adequate opportunity to confront the weighty statutory and constitutional claims at issue, the City has determined it must seek relief now. The preliminary injunction issued in the Chicago litigation will not protect the City because it does not cover all of Philadelphia's claims, because Philadelphia's arguments and factual specifics are not identical to those in Chicago, and because the Department is currently seeking a stay and filing an appeal of that ruling. Philadelphia must pursue its own case.

[10] The text of the Greenville award, filed in the *Chicago* docket, is attached hereto as Exhibit D.

ARGUMENT

To obtain a preliminary injunction, a plaintiff must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities, considering the harm to be suffered by the other party if relief is granted, tips in its favor; and (4) preliminary relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In the Third Circuit, "[a] movant for preliminary equitable relief must meet the threshold for the first two 'most critical' factors"—that is, "it must demonstrate that it can win on the merits" and "that it is more likely than not to suffer irreparable harm in the absence of preliminary relief"—before the court moves on to the final two. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). If both of "these gateway factors are met," the court will "consider the remaining two . . . and determin[e] in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

Each factor weighs in favor of granting relief here.

I. PHILADELPHIA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

Philadelphia asserts that the Attorney General acted unlawfully in imposing the three new conditions on the City's FY 2017 Byrne JAG award, but that, even if the Section 1373 condition is permitted to stand, the City is in compliance with the Section 1373 condition. Philadelphia is likely to succeed on the merits of its claims for three reasons.

First, Philadelphia is likely to show that the Attorney General's imposition of the FY 2017 Byrne JAG conditions violates the Administrative Procedure Act: The Attorney General acted "in excess of [his] statutory . . . authority" as well as "contrary to" the authorizing federal statute, 5 U.S.C. § 706(2)(A), (C); he violated the Constitution's separation of powers, *id.* § 706(A); and he deviated from past agency practice with no reasoned explanation, therefore

epitomizing "arbitrary" and "capricious" agency action, *id* § 706(2)(A). This unlawful, unconstitutional, and irrational agency conduct threatens critical programming in the City, affronts Philadelphia's autonomy, and asks the City to abandon policies that enhance public safety and well-being. It can and must be enjoined.

Second, Philadelphia is likely to show that the Attorney General's imposition of its new conditions on Byrne JAG funds—even if Congress *had* intended to authorize such conduct—runs afoul of a separate constitutional provision: the Spending Clause.

Third, Philadelphia is likely to succeed in its request for injunctive relief from any denial of funds pursuant to the Section 1373 condition, because, under clear legal principles and incontrovertible (even undisputed) facts, Philadelphia's policies are consistent with Section 1373 as constitutionally and lawfully construed.

A. The Department's Imposition Of The Conditions Is Unlawful.

1. The Imposition of the Conditions Is "Contrary to" the JAG Statute.

In creating the Byrne JAG program, Congress had a clear objective: to create a reliable, dedicated stream of funding that States and localities can draw upon each year to support and enhance their criminal justice systems. *See* 34 U.S.C. § 10152(a)(1); H.R. Rep. No. 109-233, at 89. Congress chose to structure Byrne JAG funding as a formula grant, allocating money among jurisdictions according to settled formulas that depend on population counts and crime levels. *See* 34 U.S.C. § 10156 (a), (d). Congress opted *not* to use a discretionary grant model for Byrne JAG funding, which might have given the administering entity more authority in selecting grantees. *See City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) ("formula grants," unlike discretionary ones, "are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula"); *U.S. ex rel. Bauchwitz v. Holloman*, 671 F. Supp. 2d 674, n.16 (E.D. Pa. 2009) ("Unlike discretionary grants that are awarded on a

competitive basis, mandatory grants are given to all who qualify for them." (citations omitted)). As a result, States and local governments are entitled to their share of the Byrne JAG allocation each year, as long as their proposed programs fall within the statute's eight broadly defined areas, each of which pertain to aspects of a locality's criminal justice system. *See* 34 U.S.C. §§ 10152(a)(1)(A)-(H).

The statute's text and purpose, its legislative history, and its implementation history all confirm that Congress did not intend to vest in the Attorney General the authority he now claims.

a. ***Text.*** The statute creating the Byrne JAG program contemplates the role that the Attorney General will play in administering the program and prescribes to him a narrow one. Namely, it authorizes the Attorney General only to collect applications for and then disburse annual Byrne JAG awards, and to impose a limited set of statutorily enumerated conditions on applicants. Those conditions fall into three buckets. *First*, the Attorney General can require that applicants supply information about their intended use of the grant funding, and demonstrate that they will spend the money on the purposes envisioned by the statute. *See* 34 U.S.C. § 10153(a)(2) & (a)(5)(A)-(C). *Second*, the Attorney General can require that applicants provide information to demonstrate financial and programmatic integrity. *Id.* § 10153(a)(4). *Third*, the Attorney General can demand that localities "certif[y]," in conjunction with their applications, that they "will comply with all provisions of this part and all other applicable Federal laws." *Id.* § 10153(a)(5)(D).[11]

[11] While the statute also includes an allowance for the Attorney General to "issue Rules to carry out this part," 34 U.S.C. § 10155, that provision has no relevance here. It is not relevant first and foremost because it refers to "Rules," and the Attorney General did not seek to impose the Department's three new conditions by engaging in any form of rulemaking. In addition, the provision grants the Attorney General no additional authority beyond what is provided for already in the statute; it simply refers to the demarcated grants of authority set forth, and allows

The above delegations are notably silent on one critical thing: They do *not* include a general grant of authority to the Attorney General to impose obligations on grantees that he unilaterally deems worthy—unless, again, they pertain to the program requirements of "this part," deal with budget protocols and the accounting of grant funds, or refer to "applicable Federal laws." *See id.* §§ 10153(a)(2), (a)(4) & (a)(5).

None of the Attorney General's three new conditions for FY 2017 Byrne JAG fall into any of these three statutorily established buckets of authority. None pertain to Byrne JAG program requirements, or even to the use of Byrne JAG funds. *See id.* §§ 10153(a)(2), 10153 (a)(5)(A)-(C). None pertain to budgetary protocols or financial integrity. *See id.* § 10153(a)(4). And none trace to an "applicable Federal law." *See id.* § 10153(a)(5)(D). The jail access and advance notification provisions are not based in *any* federal law, let alone an "applicable" one. And while Section 1373 is in fact a federal law, it is not an "applicable Federal law[]" under Section 10153(a)(5).

Although the phrase "applicable Federal laws" is not defined within the Byrne JAG statute, the most reasonable interpretation is that it refers to federal laws that, by their terms, are "applicable" to federal grant-making—*i.e.*, to statutes that directly speak to recipients of federal funds. *See, e.g.*, 42 U.S.C. § 2000d (condition of nondiscrimination on the basis of race, color or national origin applies to "any program or activity receiving Federal financial assistance"); 42 U.S.C. § 6102 (same, as to age discrimination). The exact wording of the statutory language is critical: Section 10153 authorizes the Attorney General to require that applicants certify compliance "with all provisions of this part *and all other* applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D) (emphasis added). It thus contains a specific term ("all provisions of this

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the Attorney General to exercise those powers through rulemaking—*i.e.*, to execute his authority to collect and review Byrne JAG applications through promulgating "Rules." *Id.* § 10155.

part'), followed by a general, residual term ("all other applicable Federal laws"). When the Supreme Court has encountered similar phrasing in a federal statute, it has interpreted the residual term to be limited by the qualities of the specific term. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (finding that term "any other class of workers" should be "controlled and defined by reference to" the preceding terms, "seamen" and "railroad employees" (internal quotation marks omitted)). Here, that counsels reading "all other applicable Federal laws" in light of "all provisions of this part," and as therefore referring to *other* federal statutes that, similarly, impose requirements on federal grantees.

At the very least, the phrase "*applicable* Federal laws" in Section 10153(a)(5)(D) must be understood to refer to existing federal laws that, in some substantive manner, are "applicable" to the grant program Congress spelled out in the Byrne JAG statute. Any other reading raises constitutional doubts; not even *Congress* could impose capacious and free-ranging conditions on federal grantees that were not "reasonably calculated to address th[e] particular . . . purpose for which the funds are expended." *South Carolina v. Dole*, 483 U.S. 203, 209 (1987); *see infra* pp. 34-42 (discussing this issue in detail). Construing Section 10153 to be a limitless grant of authority to the Attorney General to pick and choose any provision from the U.S. Code that he decides should be "applicable" to a JAG award would exceed even the "outer limits of Congress' power" under the Spending Clause, and should be rejected. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). "Applicable" requires a substantive relationship, and Section 1373 lacks one to Byrne JAG grants: It deals with federal immigration enforcement, and has nothing to do with either federal grant eligibility or distribution, or with Byrne JAG's programmatic purpose of enhancing local criminal justice systems.

Congress' decision *not* to delegate to the Attorney General a broader scope of authority to impose his own, substantive conditions on recipients of Byrne JAG awards—unconnected to the program requirements of "this part" and untethered to other federal laws that "appl[y]" to Byrne JAG's purpose—is further evidenced by reviewing the Byrne statute in comparison to others. Time and time again, Congress has demonstrated that it knows how to confer executive discretion to add substantive conditions to federal grants or establish criteria for grant distribution that go beyond the stated text or purpose of the statute, when it wants to. *See, e.g.*, 25 U.S.C. § 4152 (a) (delegating HUD the authority to establish a block grant formula); 22 U.S.C. § 2151b(c) (authorizing the President "to furnish assistance, on such terms and conditions as he may determine, for health programs" in developing countries). Indeed, Congress made those sorts of delegations to the Department of Justice for *other* grant programs codified in the very same Chapter as the Byrne JAG program (Byrne JAG is codified at Subchapter V of Chapter 101 of Title 34, and other grant programs administered by OJP are codified different subchapters of Chapter 101). *See* 34 U.S.C. § 10446(e)(3) (authorizing the Attorney General to "impose reasonable conditions on grant awards" in a program for combatting violence against women, codified in Subchapter XIX of Chapter 101); 34 U.S.C. § 40701 (c)(1) (providing that the Attorney General shall "distribute grant amounts, and establish grant conditions " for a program supporting DNA indexes, codified in Subchapter IV of Chapter 101). Congress made no such delegation here. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("[O]ur reluctance" to "assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply" is "even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest"); *see also Chicago*, 2017 WL 4081821, at **5-6 (comparing the broader scope of authority given to the

Director of the Bureau of Justice Assistance to disburse discretionary (as opposed to formula) BJA grants in Subchapter V, and finding this indicative of "the ostensibly clear decision by Congress to withhold comparable authority in the Byrne JAG provisions").

Finally, reading Section 10153 to allow the Attorney General to create conditions at his choosing, or to condition funds on his preferred parts of the U.S. Code, would upend the formula approach that Congress created for distributing Byrne JAG funds based on jurisdictions' populations and rates of violent crime. It would permit the Attorney General to substitute his own invented criteria for the express statistical criteria Congress intended and established. Where Congress means to include such discretionary determinations in formula grants, it says so. *Cf. Fort Peck Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 367 Fed. App'x 884, 890 (10th Cir. 2010) (analyzing a statute in which "Congress set forth criteria to act as the formula's basis" but included as a factor "'objectively measurable conditions as the Secretary and the Indian tribes may specify'"). It did not say so here. *See, e.g.*, *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1112-14 (8th Cir. 1973) (rejecting the Secretary of Transportation's conditions on funding because where the Federal-Aid Highway Act "set[] out detailed considerations designed to guide the Secretary's approval" of state projects, it was "impossible to find from these specific grants of authority discretion in the Secretary to withhold approval . . . because of a system of priorities the Executive chooses to impose"). *See generally Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) ("Where Congress prescribes the form in which an agency may exercise its authority, . . . we cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.").

b. ***Legislative History.*** The legislative history of the Byrne JAG statutes, as well as Section 1373, confirms that the new conditions exceed the Attorney General's authority.

i. Congress's intent in fashioning the Byrne JAG program was to empower localities to make their own criminal justice policies, not to empower the Attorney General to override local objectives. The current Byrne JAG program is the product of two predecessor grants. One was the Edward Byrne Memorial Formula Grant Program, created in 1988 to "assist States and units of local government in carrying out specific programs which offer a high probability of improving the functioning of the criminal justice system." Pub. L. No. 100-690, § 6091, 102 Stat. 4181 (1988). The other was the Local Law Enforcement Block Grant Program ("LLEBG Program"), set forth in the Local Government Law Enforcement Block Grants Act of 1995 and enacted in 1996 as part of an appropriations bill. The conference report accompanying the 1995 Act stated that the LLEBG Program "repudiated the 'Washington knows best' mindset that has too often characterized federal efforts to assist localities" in confronting crime and avoided "prescribing the specific programs that localities must implement in order to receive funding." H.R. Rep. No. 104-24, at 8-10 (1995). Rather, Congress recognized:

> The overwhelming majority of crime falls within state and local jurisdictions. As a result, it falls preeminently to states and localities to combat crime. The federal government's challenge, therefore, is to assist localities [in] fight[ing] crime without getting in their way.

Id. at 9; *see also Harris County v. Gist*, 976 F. Supp. 601, 605-606 (S.D. Tex. 1996) ("Under the [LLEBG] program, local governments [would] receive federal funds to supplement their law enforcement budgets and ha[d] broad control over the decision how to use the funds."). When Congress merged the two predecessor grants in 2005, its conference report echoed the same principles: Congress explained that it was combining the grants "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.

This history illustrates that Congress did not intend to authorize the Attorney General to override States' and localities' determinations about what will best strengthen their criminal justice systems, as the Department's new conditions do. Whatever authority the Attorney General enjoys under the Byrne JAG statutes, it does not include authority to impose federally preferred practices on local officers.

ii. Subsequent legislative history for the Byrne JAG statute as well as for Section 1373 reinforces that the Attorney General lacks the power he now asserts. These histories show that time and again, Congress has considered—and then refused—to make Byrne JAG funds conditioned on localities' immigration oversight or actions, or to make Section 1373 a condition of federal funds to State or local governments.

Starting with the Byrne JAG statute, Congress has rejected several attempts to withhold JAG funding from jurisdictions that do not "cooperate" with federal immigration enforcement efforts.[12] For instance, the Enforce the Law for Sanctuary Cities Act proposed to direct the Attorney General to withhold Byrne JAG grant awards from any jurisdiction that "ha[d] in effect" a policy "in contravention of" Section 1373. H.R. 3009, 114th Cong. § 3(b) (2015). Likewise, the Stop Sanctuary Cities Act introduced in 2015 proposed to declare jurisdictions that either violate Section 1373 or fail to comply with ICE detainer or notification requests "[in]eligible to receive a grant under the Byrne Memorial Justice Assistance Grant Program" following a 180 period to remedy non-compliance. S. 1814, 114th Cong. (2015).[13] Some members of Congress have also tried to add provisions in appropriations bills prohibiting the use

[12] All of the rejected legislation discussed herein is collected and attached hereto as Exhibits E-1, E-2, E-3, E-4 (Exhibit E had to be broken into four segments given filing size restrictions).

[13] *See also, e.g.*, Repeal Executive Amnesty Act of 2015, H.R. 191, 114th Cong. § 506 (2015) (House Version); Repeal Executive Amnesty Act of 2015, S. 129, 114th Cong. § 506 (2015) (Senate Version).

of Byrne JAG funds (or other OJP grants) "in contravention" of Section 1373. *E.g.*, Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, H.R. 2578, 114th Cong. § 572 (2015).[14] All of these attempts failed.

Other unsuccessful bills have more broadly targeted Department of Justice or "law enforcement" funding, and sought to link it to localities' immigration activities. In 2015, then-Senator Sessions introduced S. 1640, the Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act, which sought to make jurisdictions which do not comply with Section 1373 "[in]eligible to receive" "any . . . law enforcement or Department of Homeland Security Grant." S. 1640, 114th Cong. § 114 (2015). An identical bill was introduced in the House. *See* H.R. 1148, 114th Cong. § 114 (2015). Neither passed.[15] Congress also considered, and then rejected, an attempt to give the Attorney General authority to determine what funds *could* be conditioned on compliance with cooperation with immigration authorities. The Improving Cooperation with States and Local Governments and Preventing the Catch and Release of Criminal Aliens Act of 2015 proposed making a jurisdiction that "does not cooperate with Federal officials," including "by refusing . . . to notify a Federal law enforcement agency, upon request, of the release of such aliens," ineligible to receive "any . . . law enforcement related grants or contracts awarded by . . . the Department of Justice," and provided that such grants or contracts would be "designated by . . . the Attorney General." S. 1812, 114th Cong. § 3 (2015). That bill did not pass either.

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[14] *See also, e.g.*, Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 4660, 113th Cong. § 564 (2014); Departments of Commerce and Justice, Science, and Related Agencies Appropriations Act, H.R. 3093, 110th Cong. § 703 (2007).

[15] *See also, e.g.*, SAFE Act of 2013, H.R. 2278, 113th Cong. (2013); Loophole Elimination and Verification Enforcement ("LEAVE") Act of 2011, H.R. 1196, H.R. 1196, 112th Cong. § 921 (2011); LEAVE Act of 2009, H.R. 994, 111th Congress § 921 (2009); LEAVE Act of 2008, H.R. 6789, 110th Congress (2008).

Not only has Congress repeatedly declined to tie Byrne JAG funds—or DOJ funds more broadly—to States and localities' immigration efforts, it has also declined to add funding-related enforcement mechanisms to Section 1373 itself. By its terms, Section 1373 does not condition any federal funding on compliance with the statute. *See* 8 U.S.C. § 1373. The statute's only effect is to preempt contrary state or local legislation, as the Department itself has asserted. *See* Br. for United States at 51-52, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182), 2012 WL 939048 ("Congress enacted Section 1373 to preempt various state and local laws and policies that, at the time, precluded officials from sharing information with federal immigration authorities."); U.S. Dep't of Justice, Office of Legal Counsel, *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information* at 12 n.10 (May 18, 1999), https://goo.gl/ZoGdSU ("[I]t is clear that Congress intended for 8 U.S.C.A. § 1373(a) to displace state or local provisions that specifically targeted disclosures to the INS for special prohibition.").

The lack of funding conditions in Section 1373 has been a topic of frequent, but universally unsuccessful, legislative proposals. In 2003, one member of Congress introduced an amendment to withhold Homeland Security funds from jurisdictions that did not comply with Section 1373. Speaking about Section 1373, the member explained:

> There are no sanctions, there are no provisions for a penalty if localities, in fact, violate the law.
> . . .
> [T]he original law[, Section 1373,] did not apply to the transfer of any funds. It was simply a law making it illegal for any city to restrict the flow of information to or from the Department of the Immigration and Naturalization Service[.]

149 Cong. Rec. H5,791 (daily ed. June 24, 2003) (statements of Rep. Tancredo). And the TRUE Enforcement and Border Security Act of 2005 proposed amending Section 1373 (adding a sub-section entitled "Enforcement") to direct the Attorney General to withhold from any jurisdiction

deemed to be in violation of Section 1373 "any law enforcement grant program carried out by any element of the Department of Justice." H.R. 4313, 109th Cong. § 233 (2006). Then-Senator Sessions' recent proposal had a similar structure. S. 1640, 114th Cong. § 114 (2015) (adding a section entitled "Compliance" to Section 1373 and tying DHS and DOJ funding). Obviously, these efforts all failed and Section 1373 today stands bare of any enforcement mechanism.

The Sisyphean history of congressional proposals to condition Byrne JAG or other funding on Section 1373 makes clear: The Department cannot use Byrne JAG as "a means for the executive branch to achieve a legislative goal that Congress has considered and rejected." *In re Apple, Inc.*, 149 F. Supp. 3d 341, 360 (E.D.N.Y. 2016); *see also Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921, 935-936 (N.D. Miss. 2016) (finding history of rejected legislation "particularly strong . . . in determining whether a federal agency which asserts extraordinarily broad powers . . . actually had the authority it claims to have had").

c. ***Implementation History.*** Finally, the Attorney General's lack of statutory authority to impose the type of grant conditions at issue is also evidenced by historical practice. From the time Byrne JAG funds were created in 2005 until today, the Attorney General has never insisted that applicants accept conditions that fall outside of the three buckets enumerated in the statute—again, requirements that either (1) relate to the disbursement of the grants themselves, to ensure they meet the requirements of "this part" (*i.e.*, the statute); (2) pertain to the accounting of that spending; or (3) reflect "applicable Federal laws," which in turn refer to statutes that apply to federal grantees or that are at least substantively relevant to Byrne JAG's purpose. The FY 2016 JAG award received by Philadelphia on August 23, 2016 is indicative; Philadelphia agreed to 53 "special conditions" as part of that award, including certifying that it:

- complies with the Department of Justice's "Part 200" Uniform Administrative Requirements, Cost Principles, and Audit Requirements;

- adheres to the "DOJ Grants Financial Guide";
- will "collect and maintain data that measure the performance and effectiveness of activities under this award";
- recognizes that federal funds "may not be used by the recipient, or any subrecipient" on "lobbying" activities;
- "agrees to assist BJA in complying with the National Environmental Policy Act (NEPA) . . . in the use of these grant funds"; and
- will ensure that any recipient or subrecipient will "comply with all applicable requirements of 28 C.F.R. Part 42" (pertaining to civil rights and non-discrimination).[16]

Philadelphia has catalogued these conditions—and indeed, all of the 53 special conditions printed in the FY 2016 award—in a chart attached to this motion.[17] As that analysis shows, the majority of the conditions relate to the administration and expenditure of the grant itself or to accounting of the expenditure. The few conditions that apply to the general conduct of the recipient or subrecipient are expressly made applicable to federal grantees by other federal statutes. In other words, *every condition the Attorney General has historically imposed upon Philadelphia falls into one of the three buckets of authority explicitly delegated to the Attorney General in the Byrne JAG statute.* The Department's new conditions are different: They do not apply to the expenditure of JAG funding; they are not programmatic or financial integrity requirements; neither the jail access nor the advance notification conditions invoke an existing federal law; and while Section 1373 is a federal statute, it is not one that imposes conditions on federal grantees nor is it substantively "applicable" to the Byrne JAG program's focus on strengthening criminal justice systems. There is simply no precedent for the type of condition that the Department of Justice has sought to add to Byrne JAG awards here. *Cf. State Highway Comm'n*, 479 F.2d at 1114 ("To reason that there is implicit authority within the Act to [deny

[16] *See* Compl. Ex. 9.
[17] *See* Exhibit F.

funds] for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make").

Put bluntly, the Department "claims to discover" in the Byrne JAG statutes "an unheralded power" to impose substantive conditions on grantees. *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Its new interpretation "would bring about an enormous and transformative expansion" in the Department's authority "without clear congressional authorization." *Id.* In light of the text, purpose, legislative history of the Byrne JAG statute, plus the "rejected bills" discussed above, the Department's efforts cannot stand. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (1999).

d. ***The Department's Baseless Claim of Authority***. The Department says that it does, in fact, have authority to impose its three new grant conditions, pointing not to the Byrne JAG statute itself but to a statutory provision that defines the "powers and duties" of the Assistant Attorney General ("AAG") of the Office of Justice Programs. *See* Def.'s Opp. to Mot. for Prelim. Inj. at 2, *Chicago* (N.D. Ill. Aug. 24, 2017), ECF No. 32. The provision the Department relies upon—34 U.S.C. § 10102(a)(6)—was added to the Omnibus Crime Control and Safe Streets Act in a 1984 appropriations bill, in which Congress created the Office of Justice Programs and provided for it to be directed by an Assistant Attorney General. *See* Pub. L. No. 98-473, 98 Stat. 1837 (1984). The provision the Government hangs its authority upon states: "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." *Id.* § 10102(a)(6) (emphasis added).

But Section 10102(a)(6) cannot possibly bear the weight the Department places on it. That provision merely empowers the AAG for OJP to exercise "powers and functions" either set forth in "this chapter" (*i.e.*, Section 10102) or that the Attorney General has given to him "by delegation," either of which may include the power to place "special conditions" on grants. Section 10102 does not *itself* endow the AAG with any authority to impose "special conditions" on grants, *see* § 10102(a)(1)-(5), and the Attorney General could only "delegate" that kind of authority to his subordinate if he *himself* possessed it pursuant to an underlying delegation. That is precisely the problem: The statute creating the Byrne JAG program does *not* vest the Attorney General with authority to impose "special conditions" on local awards at his choosing, it instead constrains him to impose the types of requirements expressly set forth in the statute.

The Department's contrary reading of Section 10102(a)(6) defies basic principles of statutory interpretation. In effect, the Department would have this Court construe an ancillary provision governing a sub-cabinet post to confer unlimited discretion on an agency to impose "special conditions" or "determin[e] priority purposes" for various grants, irrespective of the express terms of the *statutes creating those grants*. That cannot be. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It defies logic to think that Congress intended to vest the Attorney General with unbridled authority to alter its finely reticulated schemes for disbursing grants across any and all statutes, through a provision defining the duties of the AAG of OJP. *See also Chicago*, 2017 WL 4081821, at *6 (rejecting this argument about Section 10102(a)(6)).

2. The Imposition of the Conditions Violates the Separation of Powers.

By imposing conditions on Byrne JAG recipients that are not reflected in the authorizing statute and are in fact "contrary to" its purpose and text, the Attorney General has not only

violated that statute but run afoul of the Constitution's separation of powers between the Executive and Legislative Branches. The Constitution vests Congress, not the President or his appointees, with the power to appropriate funding to "provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Neither the President nor his Attorney General nor Assistant Attorney General can amend or cancel an appropriation that Congress has duly enacted. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998). Likewise, executive officials cannot choose to spend less than the full amount of funding Congress has authorized under a statute. *Train v. City of New York*, 420 U.S. 35, 44 (1975); *see also In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (the President cannot "refuse to spend . . . funds" that Congress appropriated "for a particular project or program"); *Dabney v. Reagan*, 542 F. Supp. 756, 764-768 (1982) (officials at HUD could not decide unilaterally not to "mak[e] available" statutorily "appropriated funds"). The President's constitutional duty, and that of his appointees, is to "take Care that the Law be faithfully executed." U.S. Const. art. II, § 3, cl. 5. It is not to change the law unilaterally or ignore it altogether. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (to allow the President to ignore a federal statute "would be clothing the President with a power to control the legislation of congress").

The Supreme Court's decision in *Train* is instructive. There, the EPA Administrator had attempted to issue a regulation providing that the EPA would allot only $2 billion in annual spending on a water pollution abatement program, created by Congress to extend federal financial assistance to localities, even though the statute had appropriated a sum "'not to exceed $5 billion.'" *Train*, 420 U.S. at 38, 40. The Court held that the Administrator lacked the authority to withhold the fully authorized amount. *Id.* at 40. The statute had not "confer[red] . . . discretion on the Executive to withhold funds from the program," and the Court identified no

other source of authority that would permit an Executive Branch official to negate "a firm commitment" of funds by Congress "to achieve" its objective. *Id.* at 46. Numerous courts have similarly held that the expenditure of appropriated funds is mandatory, and that the President has no inherent or residual constitutional authority to "refuse to spend" such funds. *Nat'l Council of Cmty. Mental Health Ctrs., Inc. v. Weinberger*, 361 F. Supp. 897, 903 (D.D.C. 1973); *see also Dubose v. Hills*, 405 F. Supp. 1277, 1287-88 (D. Conn. 1975) (Secretary lacked "the authority not to spend the reserve fund" created by Congress); *Guadamuz v. Ash*, 368 F. Supp. 1233, 1243-44 (D.D.C. 1973) ("the Executive has no residual constitutional power to refuse to spend th[e] appropriations").

That Congress has expressly rejected funding conditions like those the Department seeks to impose, *supra* pp. 23-26, as well as legislation that would have given the Department the kind of authority it claims, *supra* p. 24, underscores the separation-of-powers violation. In *Youngstown*, the Supreme Court concluded that President Truman lacked the seizure power he claimed because "[w]hen the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); *accord id.* at 663 (Clark, J., concurring); *id.* at 599 (Frankfurter, J., concurring). The same reasoning applies here.

The Constitution's separation-of-powers principles are not to be lightly dismissed; they protect against the concentration of too much power in any one Branch and thereby "preclude the exercise of arbitrary power" by the federal government. *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (internal quotation marks and citation omitted). On numerous occasions, the Supreme Court has explained how these structural provisions of our Constitution both secure individual

liberty and protect States and localities from the enactment of laws that they have no opportunity to influence through representative participation. *Compare NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("the separation of powers . . . serve[s] to safeguard individual liberty"); *and Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (similar), *with Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551, 550-556 (1985) ("the structure of the Federal Government itself" was designed to protect "the interests of the States"). These principles are undermined when a Presidential appointee attempts to override laws enacted by the People. The "preserv[ation of] free government" demands that the "the Executive be *under* the law[s]" that Congress made, not that he be given free rein to ignore those laws. *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring) (emphasis added). By exercising authority not delegated to him within the JAG statute, the Attorney General has run afoul of the constitutional restrictions on his powers.

3. The Imposition of the Conditions Is Arbitrary and Capricious.

The Attorney General's imposition of the new conditions was also arbitrary and capricious. The Department departed from past practice without explanation, failed to rely on reasoned decisionmaking and, to the extent it cited reasons at all for its new conditions, those reasons are contradicted by the available evidence.

First, the imposition of the new conditions is arbitrary is because the Department deviated from its prior practice of granting JAG awards without any requirements of this type and provided no sound reason or explanation. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (an "agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy'" (citations omitted)); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (an "unexplained inconsistency" in an agency's policy is "a reason for holding an interpretation to be an arbitrary

and capricious change"); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (same). "[S]ince 1996, the United States government has never sought to enforce [Section 1373] against a state or local government," and neither the Department of Justice nor any other agency has made compliance with Section 1373 a requirement of receiving a federal grant.[18] Likewise, no grant-making arm of the government, including the Department of Justice, has ever sought to impose a requirement like the jail access or advance notification conditions on grantees.

The Department of Justice departed from those practices without "articulating] a satisfactory explanation" for its policy shift. *State Farm*, 463 U.S. at 43. It released no reports, studies, or analysis whatsoever alongside its July 25, 2017 announcement of the new grant conditions, or alongside the posting of the FY 2017 Local Solicitation in August 2017, explaining why the Department has now determined that these conditions further Byrne JAG's purpose of keeping cities safe. *See* Compl. ¶¶ 86-91. Especially given the public attention that this issue has received in recent months, the agency's "failure to offer an explanation . . . for the change in its policy" is particularly inexcusable. *Comite' De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 188 (3d Cir. 2014); *accord CBS Corp. v. FCC*, 663 F.3d 122, 152 (3d Cir. 2011) (holding that the FCC's "depart[ure] from its prior policy excepting fleeting broadcast material" from sanction without any explanation was arbitrary and capricious).

The Memorandum by the DOJ's Office of Inspector General in May 2016 provides nothing close to a sufficient explanation for the Department's policy shift. *See* Compl. ¶ 71. As an initial matter, that document did not even address the Attorney General's new jail access and advance notification conditions. And while it purported to study whether various jurisdictions

[18] Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 Lewis & Clark L. Rev. 165, 170 (2016).

have policies that may conflict with Section 1373, it did not engage in any analysis about whether DOJ grant funding that is intended to bolster cities' criminal justice systems should be made contingent on the contours of a locality's information-sharing protocols. For instance, the Memorandum did not find—or even discuss the notion—that local policies which protect the confidentiality of individuals' immigration-status information result in a greater incidence of crime. Indeed, Philadelphia, like most other major U.S. cities that have considered the issue, has determined just the opposite. Compl. ¶¶ 3, 28, 37.

Moreover, not only did the Department fail to provide a sufficient explanation on the record for its deviation from past practice, but the justifications that the Attorney General has offered in public statements suggest that the Department's policy conclusions "ru[n] counter to the evidence before the agency." *State Farm*, 463 U.S. at 44. For instance, several of the nine jurisdictions that submitted Section 1373 certification letters to the Department this past summer provided the Department evidence and testimonials conveying that policies which build trust with the immigrant community promote rather than detract from effective policing. Philadelphia's certification letter contained such material. *See* Compl. ¶¶ 79-83 & Ex. 14. Additionally, there have been several studies and reports published concluding that localities with "sanctuary-type" policies have seen drops in rates of crime. *See* Compl. ¶¶ 29-30. The Department has not paid heed or responded to any of this evidence.

B. The Conditions Violate The Spending Clause.

Even if Congress had authorized the Department's action, it would still be unlawful, as it runs afoul of limits on Congress's Spending Clause authority. Congress's Spending Clause power is "not unlimited, but is instead subject to several general restrictions." *Dole*, 483 U.S. at 207 (citations omitted). As the Third Circuit has explained, Congress can only impose conditions on federal funds that are "related to federal interests in the program." *Koslow v.*

Pennsylvania, 302 F.3d 161, 175 (3d Cir. 2002). Moreover, any conditions must be "unambiguous." *Id.* The Department's new conditions fail both requirements.

1. Each Condition Is Unrelated to the Purpose of the JAG Program.

Although "Congress may attach appropriate conditions to federal . . . spending programs to preserve its control over the use of federal funds," "'[t]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *NFIB*, 567 U.S. at 577, 579 (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)). To maintain this limit on Congress's Spending Clause power, "conditions on federal grants" must be "reasonably calculated to address th[e] particular . . . purpose for which the funds are expended." *Dole*, 483 U.S. at 207; *accord Massachusetts v. United States*, 435 U.S. 444, 461 (1978). This requirement is crucial: Without "some relationship" between spending conditions and "the purpose of the federal spending," "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

There is no such relationship here. The conditions the Department seeks to impose are divorced from Byrne JAG's purpose, if not antithetical to it.

a. First and foremost, the new conditions are not "related to [the] federal interests in the [Byrne JAG] program" because they are aimed at immigration enforcement, not at "improv[ing] the administration of the criminal justice system." 34 U.S.C. § 10153(a)(6); *see Koslow*, 302 F.3d at 175. Although the Department trumpets the new conditions as necessary to "keep our communities safe," it has stated that the conditions are aimed at "ensur[ing] that federal

immigration authorities have the information they need to enforce immigration laws."[19] Enforcing immigration laws is not "administ[ering] . . . the criminal justice system," 34 U.S.C. § 10153(A)(6); deportation and removal proceedings are "civil in nature." *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010); *see also Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."); Br. for United States at 52, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182), 2012 WL 939048 ("Section 1373 is intended to assist the 'Federal regulation of immigration' . . . ." (quoting S. Rep. No. 249, 104th Cong. 2d Sess. 19-20 (1996))). The Department cannot use criminal justice funding to further goals of another federal program. *See Texas v. United States*, No. 7:15-cv-00151-O, 2016 WL 4138632, at **16-17 (N.D. Tex. Aug. 4, 2016) (sustaining Spending Clause relatedness challenge to Medicaid condition requiring states to reimburse fee paid by health plans, because "the purpose of the [fee] is to generate revenue due to expected enrollment in [non-Medicaid] insurance programs, rather than to generate revenue related to the federal interest in advancing Medicaid services").

Furthermore, Congress made clear when it created the modern Byrne JAG program in 2005 that it sought to maintain flexibility for States and localities in determining how best to use their awards to enhance public safety. It expressly wanted to *avoid* thrusting a "one size fits all" federal solution upon localities, *see supra* p. 22, or to demand that they adopt particular policies. Yet that is precisely what the Attorney General aims to do here. The three conditions he has imposed prescribe *specific* policies that States and cities must implement in order to receive their funds: The Section 1373 condition tells localities how their line-level officers should

[19] Press Release, U.S. Dep't of Justice, *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs* (July 25, 2017), https://goo.gl/KBwVNP.

communicate with federal agencies; the jail access condition tells States and cities they must enact a "local ordinance, []rule, []regulation, []policy, []or practice" allowing federal agents to access their correctional facilities; and the notification condition tells States and cities they must enact a "local ordinance, []rule, []regulation, []policy, []or practice" to communicate information regarding prisoners to federal officers. *See* Ex. D, at 19 (Special Conditions 56.1.A, 56.1.B). Each condition applies regardless of the impact on prison administration or other law enforcement goals, and scores of States and cities have determined that these policies do *not* "work for them." H.R. Rep. No. 109-233, at 89. By insisting that localities agree to terms they renounce as enhancing public safety, the Department has run afoul of the JAG program's purpose, not come up with conditions "reasonably related" to it. *Dole*, 483 U.S. at 207.

b. The rift between Byrne JAG's goals and the Department's conditions sets this Spending Clause case apart from others. Unlike past cases in which courts have upheld spending conditions, there is no text or legislative history demonstrating that the Byrne JAG statute, or its predecessor statutes, was enacted to encourage immigration enforcement. In *Koslow*, for instance, the Third Circuit concluded that conditions requiring waiver of sovereign immunity were related to the goals of the Rehabilitation Act because Congress's "interest in eliminating disability-based discrimination in state departments" was "reflected in the legislative history" of that statute. 302 F.3d at 175-176; *accord Arbogast v. Kan., Dep't of Labor*, 789 F.3d 1174, 1187 (10th Cir. 2015). Likewise, in *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000), the Tenth Circuit rejected Kansas's challenge to provisions conditioning TANF/AFDC funds on recipients establishing child support enforcement systems, because relying on legislative history and the fact that the "AFDC/TANF and the child support programs are both set forth in the same subchapter of the Social Security Act," the court found "child support enforcement was

conceived of as a related component of the AFDC system." *Id.* at 1200. Courts have also rejected challenges to conditions imposed by Congress under Religious Land Use and Institutionalized Persons Act ("RLUIPA") based on similar evidence. *See Cutter v. Wilkinson*, 423 F.3d 579, 587 (6th Cir. 2005).

The Byrne JAG statute and its predecessors, in contrast, were enacted without any mention of federal immigration enforcement. Byrne JAG funds are available for eight enumerated program areas; none involve immigration. *See* 34 U.S.C. § 10152(a)(1)(A)(H); *accord id.* § 10156 (setting the State and local allocation formulas as a function of rates of violent crime, not anything pertaining to immigration).

Moreover, unlike other conditions that courts have approved under the Spending Clause, the Department's conditions reach activities wholly unrelated to those funded through the Byrne JAG program. The Third Circuit's decision in *Koslow* rested heavily on the fact that the condition being attached to federal funds—the requirement that recipients waive sovereign immunity—extended only to those departments or agencies that actually received the federal funds. 302 F.3d at 176. As then-Chief Judge Scirica explained: "This limitation helps ensure the waiver accords with the 'relatedness' requirement articulated in *Dole*." *Id.* Other courts have adopted *Koslow*'s reasoning wholesale. *See, e.g.*, *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 350 (5th Cir. 2005); *see also Madison v. Virginia*, 474 F.3d 118, 126 (4th Cir. 2005) (applying similar reasoning in upholding RLUIPA's spending conditions). .

The Department's conditions are not so limited. The notification and jail access conditions are imposed on a grantee regardless of whether it intends to spend its Byrne JAG money on operations at its jails or detention facilities. Similarly, the Section 1373 condition purports to govern information-sharing between the federal government and "*any* government

entity or official," 8 U.S.C. § 1373(a) (emphasis added), not just those officials who work in City departments or programs benefitting from Byrne JAG funds. *See* McCormick, *supra*, at 198-199 (Section 1373 purports to reach everyone from "a registrar at a local elementary school" to "a records clerk at a public hospital emergency room"). It is hard to see how controlling the immigration-related communications of a city's parks and recreation employees, hospital staff, or sanitation workers is "reasonably calculated" to furthering the criminal justice goals of the Byrne JAG program.

2. The Conditions Are Ambiguous.

A second reason that the conditions run afoul of the Spending Clause is that, as is evident from the growing number of challenges to the Department's new conditions, they are highly ambiguous. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "The legitimacy of Congress's exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB*, 567 U.S. at 577. Grantees "cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006).

The Department's conditions fail this test. Despite invoking an existing statute, the Section 1373 condition provides anything but "clear notice" about what the Department intends to require of Byrne JAG applicants. *Arlington Central*, 548 U.S. at 296. Until the Department's recent expeditions involving the statute, "the United States government ha[d] never sought to enforce [Section 1373] against a state or local government, or to invalidate a sub-federal sanctuary law or practice based on these provisions." McCormick, *supra*, at 170. Decisions analyzing Section 1373 have analyzed, at most, what Section 1373 does *not* require of states and

cities. *See, e.g.*, *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017) ("Nothing in 8 U.S.C. § 1373(a) addresses information concerning an inmate's release date."); *Doe v. City of New York*, 860 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 2008) (holding that Section 1373 "does not impose an affirmative duty" to report immigration status). Neither the statute nor case law explains what kinds of local policies will be found to run afoul of the Section 1373 condition.

The Department's mixed messages only make matters worse. On some occasions, the Department has stated that Section 1373 requires no affirmative action by States and local governments.[20] On others, it has stated that States and local governments must simpy "ma[ke] employees explicitly aware" that they are allowed to respond to ICE requests to be in adherence.[21] On still other occasions, the Department has issued foreboding press releases hinting that, in the Department's view, jurisdictions like Philadelphia are violating Section 1373 despite their careful efforts to comply with the statute as lawfully construed.[22] Meanwhile, the Department has yet to rule on Philadelphia's certification from June 2017 or from its recent FY 2017 application, or to indicate what factors it will deem most important in assessing compliance. In short: Philadelphia has no way of "voluntarily and knowingly accept[ing] the terms of the 'contract'" as to the Section 1373 condition because it has no clarity on what the Department will require. *NFIB*, 567 U.S. at 577 (internal quotation marks omitted).

The notification and jail access conditions are also ambiguous. The notification condition commands grantees to provide "advance notice of the scheduled release date and time" for inmates of interest to ICE, but does not define the term "scheduled release date." This leaves

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[20] U.S. Dep't of Justice, *Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373*, at 1 (2016), https://goo.gl/ht5eQP.
[21] Horowitz Memorandum, *supra* note 4.
[22] *See* Compl. ¶ 85.

grantees like Philadelphia only guessing about whether the condition is intended to apply to detainees who have no "scheduled release date," such as individuals who are awaiting preliminary hearings, trials, or sentencing. Over 80% of inmates detained in Philadelphia's jails are in such postures.

On the one hand, the City would have valid reasons to assume that the notification condition does *not* apply to detainees without convictions and formal sentences. In normal parlance, "scheduled" means "entered on a schedule or list" or "included in a schedule." The Oxford English Dictionary (2d ed. 1989). Moreover, criminal statutes often define a prisoner's "date of release" as the "date of the expiration of the prisoner's *term of imprisonment*," 18 U.S.C. § 3624(a) (emphasis added), and courts routinely adjudicate disputes governing calculations of a prisoner's "scheduled release date." *E.g.*, *Rios v. Wiley*, 29 F. Supp. 2d 232, 233 (M.D. Pa. 1998). These authorities suggest that the term "scheduled release date and time" should refer only to those prisoners who have been convicted of crimes and sentenced, not to inmates in a pre-trial or pre-sentencing posture. *See generally Arlington Central*, 548 U.S. at 295-296 (spending conditions that employ a "term of art" should be read as incorporating the meaning given to that term by convention and practice). But, at the same time, the Department has instructed grantees to provide "as much advance notice as practicable," *see* Ex. D, at 18-19 (Special Condition 56.4.B, incorporating by reference Special Condition 55.4.B), suggesting it may wish grantees to apply this condition to inmates even without a "scheduled" date for their release. This is hardly "clear notice" of what the Administration intended. *Arlington Central*, 548 U.S. at 300.

As for the jail access condition, the Department has not indicated whether policies like Philadelphia's—that allow ICE agents to interview inmates, as long as they consent—will be

deemed compliant. The Department's new condition says nothing about situations where inmates refuse to speak with ICE, leaving grantees no guidance as to whether the Department will, nonetheless, expect them to allow ICE agents to visit such an inmate's cell even while an inmate refuses to answer questions. This again is "a far cry from the clarity [the Supreme Court] demands of Spending Clause legislation." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 675 (1999) (Kennedy, J., dissenting).

C. Philadelphia Complies With Section 1373 As Lawfully Construed.

Philadelphia is also likely to succeed on the merits of its arguments concerning the City's compliance with Section 1373. Should this Court deem Section 1373 to be an "applicable Federal law" for Byrne JAG awards—which it is not—Philadelphia plainly complies with all of the obligations the statute can be read to impose upon the City as a recipient of the grant. Therefore, the Department should be enjoined from withholding funds based on the Section 1373 condition.

1. Philadelphia's Non-Collection Policy Is Consistent with Section 1373.

Philadelphia's policies direct City officials to refrain from affirmatively collecting immigration-status information except where necessary or otherwise required by law. *See* Compl. ¶¶ 23, 33-34. But there is no conflict between these policies and Section 1373, because Section 1373 does not impose any duty on the City to collect immigration or citizenship status information in the first place.

"Start, as [courts] always do, with the statutory language." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017). Section 1373 provides that a "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, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual." 8 U.S.C. § 1373(a)

(emphases added); *see also id.* § 1373(b) (forbidding "prohibit[ions]" or "restrict[ions]" on the "[s]ending," "requesting," "receiving," "[m]aintaining," or "[e]xchanging" of immigration-status information). The statute indicates nothing about how or when state and local officials should collect such information.

This Court's inquiry into Section 1373 should start and end with the unambiguous terms of the statutory text. *See United States v. Woods*, 134 S. Ct. 557, 567 n.5 (2013). Still, the legislative history reinforces what the text demonstrates: While Congress wished to preserve voluntary lines of communication between the federal government and localities about immigration-status information, it had no intent to take the prior step of regulating information collection. All of the congressional reports discussing this provision speak solely to prohibitions and restrictions on information exchange, not to any affirmative collection requirement. *See* H.R. Conf. Rep. No. 104-828, at 249 (1996); S. Rep. No. 104-249, at 19 (1996); H.R. Rep. No. 104-469, at 277 (1996). The scope of Section 1373 is decidedly narrow: It issues a negative command, not a positive one.

Courts have consistently found that Section 1373 imposes no affirmative requirement on States or localities to collect immigration-status information. *See, e.g.*, *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 731 (Ct. App. 2009) ("[Section 1373] addresses only communications with ICE. . . . [I]f Congress had wanted to prohibit restrictions on local entities *obtaining* such information, it could have expressly so legislated."); *Doe*, 860 N.Y.S.2d at 844 ("[W]hile [Section 1373] prohibits state and local governments from placing restrictions on the reporting of immigration status, it does not impose an affirmative duty to make such reports."), *aff'd*, 890 N.Y.S.2d 548 (App. Div. 2009). This Court should do the same.

2. Philadelphia's Disclosure Policies Are Consistent with Section 1373.

Philadelphia has several policies that instruct City employees and officials to make disclosures of immigration-status information only where necessary or otherwise required by law. Confidentiality Order § 3B; Memorandum 01-06, ¶ 3. As an initial matter, it is important to observe that the City's disclosure policies hold little practical consequence when it comes to compliance with Section 1373. That is due to the City's non-collection policies: Whether it is employees of City-run health clinics, officials in Philadelphia's public schools, administrators of the City's social service programs, or Philadelphia police officers and Assistant District Attorneys, City officials are rarely in active possession of information about persons' immigration or citizenship status because they are instructed not to collect it in the first place (save for in a narrow set of circumstances). *See* Gladstein Decl. ¶ 5; Abernathy Decl. ¶ 4.

Nonetheless, Philadelphia's policies regarding the disclosure of immigration-status information are carefully structured, in several respects, to ensure compliance with Section 1373 to the extent it can be made applicable to a JAG award.

a. Perhaps most importantly, Philadelphia's disclosure policies contain clear exceptions for the sharing of information-status information with federal authorities about criminal suspects, arrestees, or detainees. Both the Confidentiality Order and Memorandum 01-06 provide that their general directives to avoid the disclosure of such information lapse when it comes to persons suspected of crimes. *See* Confidentiality Order § 3B(3) (permitting disclosure when "the individual to whom such information pertains is suspected by such officer or employee or such officer's or employee's agency of engaging in criminal activity"); Memorandum 01-06, ¶ 3A(3) (permitting disclosure when "[t]he immigrant is suspected of engaging in criminal activity"). Each policy further instructs Philadelphia officers to cooperate with federal authorities in law enforcement efforts and to follow ordinary law enforcement protocols, irrespective of a criminal

suspect's immigration status. *See* Confidentiality Order § 2C ("Law enforcement officers shall continue to cooperate with state and federal authorities in investigating and apprehending individuals who are suspected of criminal activity."); Memorandum 01-06, ¶ 3B ("Sworn members of the Police Department who obtain information on immigrants suspected of criminal activity will comply with normal crime reporting and investigating procedures"); *id.* ¶ 3C ("The Philadelphia Police Department will continue to cooperate with federal authorities in investigating and apprehending immigrants suspected of criminal activities.").

There can be no debate that, by their clear letter, the City's policies do not "prohibit" or "restrict" information exchange about criminal suspects. 8 U.S.C. § 1373(a)-(b).[23]

b. As to witnesses to crimes, victims of crimes, and other law-abiding persons seeking City services, Philadelphia's non-disclosure policies provide special protection. *See* Confidentiality Order §3B ("No City officer or employee shall disclose confidential information" about such individuals, except if they consent or the disclosure is required by law); Memorandum 01-06, ¶ 3C ("[I]mmigrants who are victims of crimes will not have their status as an immigrant transmitted [to federal authorities] in any manner."). But reading Section 1373 to demand otherwise—*i.e.*, to require the City to disclose confidential information about these

[23] As a matter of practice and consistent with these exceptions, the City regularly shares whatever identifying information it has about criminal suspects and detainees with federal authorities. Philadelphia's Police Department, District Attorney's Office, prison officials, and municipal court staff use three law enforcement databases as part of their routine activities, each of which the federal government, including ICE, can regularly access. Two are run by the FBI; the other is maintained by the First Judicial District of Pennsylvania and the Philadelphia District Attorney's Office but is available to ICE pursuant to an end-user license agreement. *See* Compl. ¶¶ 53-54 (describing Philadelphia's use of the FBI's National Crime Information Center (NCIC) database, Integrated Automated Fingerprint Identification System, and Preliminary Arraignment System). By voluntarily using these systems, the City makes available to federal authorities—indeed, on a daily basis—the names and fingerprint data of virtually any criminal suspect, arrestee, or detainee within the City, irrespective of their backgrounds. *Id.*; *accord* Compl. Ex. 14, pp. 7-9.

individuals, despite the City's conclusion that doing so would harm public safety and well-being—would raise numerous constitutional problems.

First and foremost, construing Section 1373 to impose such an obligation on Philadelphia would interfere with the City's ability to administer its police powers. The Constitution unquestionably preserves those powers for States and municipalities, not for the Federal Government. *See Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) ("[t]he States have broad authority to enact legislation for the public good" through the "police power," while "[t]he Federal Government, by contrast, has no such authority"); *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (similar); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (similar). Cities like Philadelphia have substantial autonomy and discretion to use their police powers to safeguard the safety, health, and general welfare of their residents. *See, e.g., Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 593 (1906) (the police power "has always been exercised by municipal corporations"); *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1248 (Pa. 2004) (recognizing Philadelphia's police powers); 6A *McQuillin Municipal Corporations* § 24:34 (3d ed. rev. 2017) ("[M]unicipal corporations have police power to safeguard the health, comfort and general welfare of their inhabitants[.]").

Congress may not disturb these exercises of autonomy lightly. To displace a State's or municipality's police powers, Congress must provide a "clear statement" of its intent to subvert the federal-state balance. *Bond*, 134 S. Ct. at 2093; *see also United States v. Bass*, 404 U.S. 336, 349 & n.16 (1971) (collecting cases). Thus, in addition to the general constitutional-avoidance canon, *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (courts should approach statutes with "the reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubts"), this Court's analysis should be guided by the "background principle"

that "it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089 (emphasis added, internal quotation marks omitted).

Section 1373 offers no such certainty. It contains no clear statement that Congress sought to overhaul the traditional federalism balance that has existed for centuries, or that it intended to compel States and localities to forsake the sound execution of their police powers. But that is precisely what would happen were Philadelphia made to abandon its confidentiality policies for witnesses, victims, and law-abiding persons because of Section 1373. Trust with the immigrant community would be broken, crime reporting and witness participation would drop, safety would be compromised, and access to healthcare, education, and basic necessities among segments of the immigration population would be threatened. *See* Compl. ¶¶ 27-32, 37, 83, 100; Abernathy Decl. ¶ 9. Section 1373 speaks to voluntary information exchange; it contains no "certain" signal that Congress wished to dislodge cities' longstanding authority to determine how best to protect the health and safety of their residents. *Bond*, 134 S. Ct. at 2090; *see* 6A *McQuillin*, *supra*, § 24:34 ("[E]ach municipality . . . should make its own police regulations for the preservation of the health, safety, and welfare of its own citizens.").

Construing Section 1373 to compel Philadelphia to disclose information about the above classes of individuals also would grate against the anti-commandeering principles embedded in the Tenth Amendment. The Tenth Amendment provides that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. Nor may the federal government "circumvent that prohibition by . . . command[ing] the States' *officers*, or those of their political subdivisions, to administer or enforce" a federal program. *Printz v. United States*, 521 U.S. 898, 935 (1997) (emphasis added). While insisting

that States and localities keep open *some* channels of communication with federal authorities may be permissible under the Tenth Amendment, mandating that localities adopt a particular disclosure policy would raise concerns. State and local governments need to maintain control over their own "officers," and that includes determining how and when local officials share information with federal authorities. *See Printz*, 521 U.S. at 935. Were it otherwise, local officials could be summoned by ICE at any moment to drop what they are doing, look up a person's immigration-status information, and help "administer" a federal program. That would produce the very commandeering that the Tenth Amendment forbids. *See* Gabriel J. Chin, *Controlling the Criminal Justice System: Colorado as a Case Study*, 94 Denv. L. Rev. 497, 500 (2017) ("Federal displacement of state authority over its employees in a regime when the federal government cannot direct and control state employees directly creates employees who, on this issue, can act unilaterally and be answerable to no one."); Bernard W. Bell, *De-Funding Sanctuary Cities*, Yale J. on Reg.: Notice & Comment (Mar. 28, 2017) ("[D]epriving a sovereign of the right to control its own employees has significant implications—it severs the hierarchical relationship between senior officials and their subordinates").

Finally, construing Section 1373 to compel Philadelphia to disclose information about witnesses and victims as a condition of receiving Byrne JAG funds would violate the Spending Clause. As previously discussed, "Congress may attach conditions on the receipt of federal funds" to induce States and localities to act in certain ways that Congress could not require outright. *Dole*, 483 U.S. at 206. But those "conditions must . . . bear some relationship to the purpose of the federal spending." *New York*, 505 U.S. at 167. Indeed, they should be "reasonably calculated to address" that purpose. *Dole*, 483 U.S. at 209. The stated "purpose of" the Byrne JAG program is "to improve the administration of the criminal justice system." 34

U.S.C. §10153(a)(6). Compelled disclosure of information about law-abiding individuals would not be "reasonably calculated to address" that goal—especially where Philadelphia has concluded that requiring this information be shared with the federal government *jeopardizes* public safety. *See* Compl. ¶¶ 36-37, 83; Abernathy Decl. ¶ 9. Indeed, just two short years ago, a task force convened by the White House on 21st century policing agreed with this concept.[24] Under the Spending Clause, the Byrne JAG statute cannot impose a condition so at odds with the statute's purpose.

c. Philadelphia's disclosure policies were also drafted to contain savings clauses that authorize City employees and officials to provide access to immigration-status information when "required by law." The Confidentiality Order provides: "No City officer or employee shall disclose confidential information unless . . . such disclosure *is required by law*." Confidentiality Order § 3B(2) (emphasis added)). Police Department Memorandum 01-06 likewise states: "[P]olice personnel will transmit [confidential immigration-status] information to federal immigration authorities . . . when *[r]equired by law*." Memorandum 01-06, ¶ 3A(1) (emphasis added). When the "plain text" of a law contains a savings clause, that text is the "authoritative statement." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011); *accord Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed . . . ." (internal quotation marks omitted). Courts regularly construe savings clauses to negate other parts of a statute or to carry controlling weight. *See Cameron v. United States*, 252 U.S. 450, 455 (1920); *N.J. Transit*

[24] *See Final Report of the President's Task Force on 21st-Century Policing* 18 (2015), https://goo.gl/hJvNJT ("Immigrants often fear approaching police officers when they are victims of and witnesses to crimes and when local police are entangled with federal immigration enforcement.").

Policemen's Benevolent Ass'n Local 304 v. N.J. Transit Corp., 806 F.2d 451, 456 (3d Cir. 1986); *Henry v. Schlesinger*, 407 F. Supp. 1179, 1190 n.30 (E.D. Pa. 1976).

Accordingly, if this Court deems Section 1373 to be an applicable and enforceable provision that Philadelphia must follow in order to receive its Byrne JAG award, the savings clauses in the City's policies ensure that Section 1373 will be followed. Indeed, the Department of Justice's Office of the Inspector General previously approved of another locality's policies as consistent with Section 1373 years ago, largely on the basis of that jurisdiction's savings clauses. *See* U.S. Dep't of Justice, Office of the Inspector Gen., *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States* 26 (2007), https://goo.gl/qKBXjA ("[I]n light of the specific provisions requiring compliance with federal law, we cannot conclude that San Francisco's policies are contrary to 8 U.S.C. § 1373.").

II. PHILADELPHIA WILL SUFFER IRREPARABLE HARM ABSENT THE REQUESTED RELIEF.

Philadelphia will suffer irreparable harm if the DOJ is permitted to impose its three new grant conditions on applicants for the FY2017 JAG grant. Irreparable harm in the Third Circuit means that which cannot be undone after-the-fact through monetary compensation. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-485 (3d Cir. 2000); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir.1989). Philadelphia will suffer such harm absent this Court's intervention.

The Department aims to make Philadelphia do one of three things: (1) change its policies to comply with the new Byrne JAG conditions, interpreted to their most extreme extent; (2) forfeit the City's entitlement to $1.6 million in funding; or (3) accept its grant award with the expectation that the City *may* be deemed in compliance with the new grant conditions, but then subject itself to potential consequences ranging from funding denials, to debarment, to

administrative sanctions, if the Department takes an unreasonable interpretation of the conditions and deems Philadelphia in violation of its contractual award. Thrusting Philadelphia into this "stark choice" itself inflicts irreparable harm on the City. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-1059 (9th Cir. 2009); *Cty. of Santa Clara v. Trump*, Nos. 17-cv-00574-WHO & 17-cv-00485-WHO, 2017 WL 1459081, at *27-*28 (N.D. Cal. Apr. 25, 2017) ("By forcing the Counties to make this unreasonable choice, the Order results in . . . irreparable harm."). And each choice, whatever option Philadelphia chooses, will cause it to suffer an injury that "money cannot atone for." *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 225 (3d Cir. 1987).

As to the *first* option, forcing Philadelphia to change its policies would inflict two distinct harms. One is the interference with Philadelphia's autonomy and exercise of its police powers, which courts have widely recognized as an irreparable injury. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *Texas v. United States*, 201 F. Supp. 3d 810, 834-835 (N.D. Tex. 2016). The other is the impact on Philadelphia's public safety and well-being. Philadelphia officials have engaged in a concerted effort to build trust with the City's immigrant community and ensure that its residents feel safe to engage fully in public life. Forcing Philadelphia to abandon its policies would destroy that trust. *See* Compl. ¶¶ 100-102; Abernathy Decl. ¶ ¶, 7, 9. Residents could be discouraged from accessing City services or speaking to the police, and the crime rates that Philadelphia has seen fall could tick back up. Compl. ¶ 37.

These are not empty fears: The Administration's rhetoric against so-called sanctuary cities has already led to a decline in overall crime reporting by Latinos in Philadelphia and two

other major cities.[25] If Philadelphia were to adopt the Department's preferred policies, there is every reason to believe that this troubling trend would worsen.

The *second* option before Philadelphia is no better: Under this course, Philadelphia could decline to accept the three new conditions and forfeit its entitlement to $1.6 million in FY 2017 Byrne JAG funding. Losing out on this money will hamper Philadelphia's ability to provide the varied and essential services its JAG appropriation has funded over the years. Compl. ¶ 62. In the upcoming year, the City intends to use its award for important initiatives such as giving its police and emergency personnel naloxone to reverse deadly opioid overdoses. *See* Wertheimer Decl. ¶ 11; *supra* p. 5. The President's own Commission on Combating Drug Addiction and the Opioid Crisis has recommended actions like this to save lives.[26] Depriving Philadelphia of JAG funding would "have an immediate impact on [the City's] ability to provide critical resources to the public, causing damage that would persist regardless of whether funding [was] subsequently reinstated." *United States v. North Carolina*, 192 F. Supp. 3d 620, 629 (M.D.N.C. 2016); *see also Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 739 (S.D. In. 2016) (finding irreparable harm where an organization would be "[unable] to provide adequate social services to its clients"); *Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 738 (M.D. Tenn. 2012) (finding irreparable harm where the plaintiff faced "the prospect of cuts in programming, community contacts and employees"). Indeed, district courts have found that a locality's inability to apply for formula grant funding—due to the Department of Justice's alleged improper administration of the grant—constituted irreparable harm and warranted preliminary relief. *See Harris Cty.*, 976 F. Supp. at 608-609 (involving Byrne JAG's

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[25] Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight (May 18, 2017), https://goo.gl/ft1fwW.

[26] President's Commission on Combating Drug Addiction and the Opioid Crisis, *Interim Draft Report*, pp. 5-6 (July 31, 2017), https://goo.gl/W9iH5g.

predecessor LLBEG program); *Dallas Cty. v. Bureau of Justice Assistance*, 988 F. Supp. 1030, 1031 (N.D. Tex. 1996) (same).

The *third* option also subjects Philadelphia to irreparable injury: Should it accept its FY 2017 award on the assumption that it does comply with the conditions as interpreted reasonably and modestly, Philadelphia could be subjecting itself to claw-backs and even sanctions if the Department disagrees. As stated in the City's Complaint, Philadelphia believes that it may already comply with the jail access condition, given that it permits ICE agents to access its facilities if the inmate consents. Compl. ¶ 101. Philadelphia further believes that its notification policies do not meaningfully conflict with the Department's objectives, because Philadelphia provides advance notification when ICE presents a judicial warrant, and ICE has rarely sent the City advance notification requests for inmates with schedule release dates *without* also providing a warrant. Compl. ¶ 102. Additionally, as provided in Philadelphia's certification letter and its FY 2017 grant application, the City believes its policies comply with Section 1373.

However, given the ambiguity in the conditions as written, the lack of explanation by the Department, and the absence of any response to Philadelphia's Section 1373 certification submissions, the City is left only to wonder whether the Department will accept its position. That means that Philadelphia would have to agree—within 45 days of its award—whether to accept its FY 2017 grant, not knowing whether the Department would find Philadelphia to be non-compliant with one or more of the stated conditions. If the Department does come to such a conclusion, Philadelphia could face a claw-back of funds appropriated and spent, as well as sanctions or debarment. Requiring the City to submit a grant application under this cloud of uncertainty is itself an irreparable harm. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992).

In short, whether or not the City bends to the Department's will, Philadelphia and its residents stand to suffer irreparable harm absent this Court's intervention.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR GRANTING THE REQUESTED RELIEF.

The balance of hardships and public interest favor preliminarily enjoining the Attorney General from imposing the challenged conditions on Philadelphia, and preserving the City's ability to receive its local Byrne JAG allocation, until this Court resolves whether those conditions are lawful. As to the respective hardships born by the parties or the balance of equities, the Department of Justice has identified no harm whatsoever—and there is none—that it would suffer from the imposition of a preliminary injunction. Granting the requested relief would mean simply that the Department has to wait before imposing the three new conditions on Philadelphia in conjunction with its FY 2017 Byrne JAG award—*i.e.*, that the Department cannot deny Philadelphia an award based on one or more of the conditions, or grant Philadelphia an award but subsequently impose sanctions if it determines that Philadelphia is in breach, until this Court determines whether the new conditions withstand scrutiny. There is no conceivable reason why the Department would be irreparably damaged or burdened at all by having to wait to disburse Philadelphia's award. At the very least, the "issuance of an injunction would not harm" the Department of Justice "more than a denial would harm" the City. *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990).

The public interest also plainly favors granting the requested relief. The public interest is always served by the prevention of constitutional violations. *Swartwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002). Allowing the City to continue observing policies that are designed to forge trust with the immigrant community—and that have helped keep the City healthy, safe, and integrated—would benefit all Philadelphia residents.

CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin the Department of Justice from enforcing the advance notification, jail access, and Section 1373 conditions for the FY 2017 Byrne JAG award as to Philadelphia, and enjoin the Department from withholding any JAG funding from Philadelphia on account of non-compliance with 8 U.S.C. § 1373 because Philadelphia does comply with that condition as properly construed.

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Respectfully submitted,

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