UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

THE CITY OF CHICAGO

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States, in his official capacity,

Defendant.

Civ. Action No. 1:17-cv-5720
Hon. Harry D. Leinenweber

BRIEF *AMICI CURIAE* OF ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND IMMIGRATION LAW SCHOLARS IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

HARRY SANDICK
JAMISON DAVIES (*pro hac vice* pending)
MICHAEL D. SCHWARTZ (*pro hac vice* pending)
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036

EDWARD F. MALONE
Barack Ferrazzano Kirschbaum & Nagelberg LLP
200 West Madison Street, Suite 3900
Chicago, IL 60606

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes & Executive Orders

Legislative History

Other Authorities

PRELIMINARY STATEMENT

This case concerns the limits on the federal executive branch's authority to co-opt states and localities into administering the executive's regulatory agenda rather than addressing their own public safety priorities. Since the Founding, "[t]he promotion of safety of persons and property [has been] unquestionably at the core of [the states'] police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). The Constitution reserves this police power to the states as well as localities. *See id.* (treating state and local governments equivalently). But in today's era of expansive federal spending, the federal government has vast power to influence state and local policy by attaching conditions to federal grants. The Constitution protects federalism by limiting the types of conditions Congress may impose on federal grants and the manner in which they may be imposed, and by denying the Executive Branch unilateral authority to impose new conditions. Defendant's vision of federal executive authority, if accepted, would permit federal agencies to ignore these basic constitutional principles and impose spending conditions of their own confection.

Amici, who are listed in Appendix A, are scholars of administrative, constitutional, and immigration law. They have a professional interest in the proper construction and enforcement of constitutional and statutory limits on federal executive power. The parties focus on defendant's threat to deny the City of Chicago law enforcement funding under the Edward Byrne Justice Assistance Grant ("Byrne JAG") program. By contrast, *amici* provide a unique perspective on the larger ramifications of the Court's decision for federal executive authority.

SUMMARY OF ARGUMENT

The well-settled constitutional rules that deny federal agencies unilateral authority to impose conditions on federal spending are of considerable importance. Congress offers federal

funding to states and localities in areas ranging from policing to healthcare, and states and localities increasingly depend upon federal funding to provide government services. The ubiquity of federal funding makes judicial enforcement of constitutional and statutory limits on federal spending conditions crucial to protecting state and local sovereignty.

Article I of the Constitution grants the power of the purse to Congress, not to the President or to the Attorney General. U.S. Const. art. I, § 8, cl. 1. The Department of Justice does not have freewheeling authority independent from Congress to impose spending conditions under the Constitution. And for good reason. Over the course of the last eight months, the Administration—in an effort to fulfill the President's campaign promise to "end" sanctuary cities[1]—has already tried to bypass the limits on the federal spending power multiple times. The Attorney General's announcement—via a press release—of sweeping and intrusive demands on states and localities that receive Byrne JAG grants is only the latest example.

No provision of the Byrne JAG statute gives the Attorney General sweeping discretion to condition funding on acquiescence to the president's immigration plans. Congress did not authorize the Department to impose the new conditions on Byrne JAG grants. Further, the Constitution limits even Congress's authority to leverage federal funding to require states and local governments to implement federal policies. *See NFIB v. Sebelius*, 567 U.S. 519, 576 (2012) (explaining that the Court has "recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives"). The Attorney General can no more circumvent those constitutional limits than Congress can.

[1] Full Text: Donald Trump Immigration Speech in Arizona (Aug. 22, 2016) (hereinafter "August Speech"), *available at* http://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614.

Defendant invites this Court to hold that a federal agency may impose its own conditions on a funding program without clear and specific congressional authorization, even when those conditions are inconsistent with Congress's purposes. Should the Court accept this invitation, it would set a dangerous precedent that goes far beyond the current bid to force Byrne JAG recipients to implement the President and Attorney General's immigration policies. Administration officials will feel free to disregard the balance between state and federal authority and require states and localities to administer whatever unrelated priorities the executive wants to pursue in any particular fiscal year. This case confirms the need for federal courts to protect federalism by enforcing the constitutional limits on federal executive power.

ARGUMENT

I. The Attorney General Has Disregarded Constitutional Limits on the Exercise of Federal Spending Power That Protect States and Localities

Article I of the Constitution grants Congress the power to tax and to spend: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1. Congress "alone has access to the pockets of the people"—the executive branch has no authority to spend under Article I, for "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." The Federalist, No. 48, at 148 (James Madison); U.S. Const., art. I, § 9, cl. 7. And when Congress intends to authorize a condition on federal grants to states and localities, it must do so clearly and consistent with the constitutional limits on its spending power. It is for Congress to enact spending measures and authorize conditions on federal grants, leaving to the federal executive the task of implementing those programs. Since the executive has no independent spending power, it thus also has no authority to create new conditions on federal funds once appropriated by Congress.

The Framers adopted a carefully calibrated separation of powers that protects both individual liberty and federalism by limiting the authority of each branch of the federal government. These constitutional limits protect states and localities against the very sort of executive branch dysfunction that has been on display in this case, culminating in the Attorney General announcing, unilaterally and without authority, new conditions on Byrne JAG grants.

A. The Spending Clause and the Separation of Powers Limit Congress's Authority to Impose Conditions on Federal Grants and Deny Federal Agencies the Ability to Independently Force States and Localities to Accept Conditions

Congress may not wield its spending power in a way that leaves states and localities guessing every fiscal year at what conditions will be placed on federal funding. Instead, spending conditions must be set forth clearly: "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). A reviewing court "must carefully inquire" into the legislative scheme before concluding that the executive branch can order states and localities to comply with particular conditions to receive federal grants. *Id.* at 18. This clear-statement rule ensures that a state has "voluntarily and knowingly" agreed to the spending condition. *Id.* at 17. In short, an agency may impose a condition on federal funding to a state or locality only if there is specific statutory language authorizing it.

When authorizing spending conditions, Congress must also comply with other constitutional limits on its spending power. Spending conditions must: (1) be designed to promote the general welfare, (2) be related to Congress's public purpose in spending the funds, (3) not be subject to an independent constitutional bar, and (4) not be unduly coercive. *See South Dakota v. Dole*, 483 U.S. 203, 207-08, 211 (1987). Like the other limits on Congress's spending

power, these constitutional constraints help ensure "the political accountability key to our federal system." *NFIB*, 567 U.S. at 578.

To ensure political accountability and protect federalism, the Framers not only limited Congress's Article I authority over spending. They also denied to the executive branch independent Article II authority to impose conditions on federal spending. The executive's duty is to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. In carrying out that duty, the executive departments, like administrative agencies, are creatures of statute whose "power to act . . . [is] authoritatively prescribed by Congress." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013). Neither the President nor an executive agency has the "constitutional authority to withhold" funds that Congress has appropriated, and withholding such funds "violates [the] obligation to faithfully execute the laws duly enacted by Congress." *County of Santa Clara v. Trump*, 2017 U.S. Dist. LEXIS 62871, at *74 (N.D. Cal. Apr. 25, 2017) (citing *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (striking down Line Item Veto Act, which purported to give President authority to cancel specific types of spending provisions)); *see also In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (holding that President "does not have unilateral authority to refuse to spend the funds" that Congress has appropriated). As with legislation, so too with the federal purse; the executive departments cannot make policy by withholding spending without statutory authority.

By limiting congressional and executive authority over spending, the Constitution protects states and localities. The finely wrought procedures of federal lawmaking preclude a single person—whether the President or a Department head—from arrogating to himself power over "the pockets of the people." The Federalist, No. 48, at 148 (James Madison). With the power to spend comes the power to make policy by imposing conditions on the acceptance of

federal funds. Together, the Spending Clause and separation-of-powers rules ensure that the concurrence of Congress is necessary before the federal government can leverage federal funding to encourage states and localities to implement federal policies. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1391 (2001) (explaining that "federal lawmaking procedures," including those limiting federal spending, "safeguard federalism"). States and localities may take their concerns about a spending proposal to Congress and to the White House. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (1985) (explaining that "the shape of the constitutional scheme" of federal lawmaking protects states' "'residuary sovereignty'" (quoting The Federalist No. 62, at 408 (B. Wright ed. 1961))). Political safeguards are thus built into the constitutional scheme, and judicial enforcement of the constitutional limits on spending conditions is essential to the federal system.

B. The Dysfunctional Administrative Process in this Case Underscores the Need for Judicial Enforcement of Constitutional Limits on Federal Spending Power

When an agency official announces new conditions on federal grants unilaterally and without any formal process, it leaves states and localities without any recourse but to the federal courts. The executive branch dysfunction that has been on display in this case underscores the need for judicial enforcement of the constitutional limits on federal spending.

"End[ing]" so-called "sanctuary cities" has been a preoccupation of the President since before he took office. *See* August Speech, *supra* n.1. To that end, the Administration has twice tried to bypass limits on the federal spending power to threaten such jurisdictions with funding cut-offs. Within a week of taking office, the President issued Executive Order 13,768, directing Administration officials to "ensure that jurisdictions that . . . refuse to comply with 8 U.S.C.

§ 1373 . . . are not eligible to receive Federal grants."[2] Local governments promptly challenged the move in federal court. Though the Executive Order contained no language limiting the grants that would be affected, in an effort to save the Order the Department of Justice advanced a strained, *post hoc* narrowing interpretation that the district court rejected. *See Santa Clara*, 2017 U.S. Dist. LEXIS 62871, at *14. The court found that plaintiffs were likely to succeed on the merits of their constitutional challenge and entered a nationwide preliminary injunction. *Id.* at *97. The court made clear that Congress had not "broadly condition[ed] federal funds or grants on compliance with [8 U.S.C.] § 1373 or other federal immigration laws"—in fact, it had "repeatedly, and frequently, declined" to do so. *Id*. at *75-76.

Undeterred, the Administration then switched course. The Attorney General issued a press release announcing the challenged conditions on Byrne JAG funding.[3] The Attorney General did not engage in procedures often used when the federal government endeavors to control the actions of state and local governments to allow for transparency and consultation. For example, when agencies conduct notice-and-comment rulemaking, states and localities may raise federalism concerns directly with the agency. Many agencies have voluntarily conducted notice-and-comment rulemaking when making substantive changes to grant conditions.[4] In the Byrne JAG statute, Congress also instructed that "[t]he Attorney General shall issue rules to

[2] Exec. Order 13,768, *Enhancing Public Safety in the Interior of the United States* § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (hereinafter "Interior Enforcement Executive Order"), *available at* https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

[3] U.S. Dept. of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[4] *See* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 Yale L.J. 248, 325 n.394 (2014) (noting agency practice of waiving Administrative Procedure Act exemption from rulemaking for grants).

carry out" the Byrne JAG program. 42 U.S.C. § 3754. Yet when it adopted the new and intrusive conditions on the Byrne JAG program here, the Attorney General declined to conduct notice-and-comment rulemaking and did not solicit the views of states and localities through any other process.[5] The Attorney General certainly did not appear to consider the federalism impacts of forcing states to open their jails to federal immigration officials and to redirect policing resources to meet the Administration's immigration enforcement goals.

The *Santa Clara* preliminary injunction was not the first time a court rejected executive branch efforts to conscript state and local law enforcement officials into carrying out the work of federal immigration officers. For example, the federal government's Secure Communities program, which began in 2008, precipitated a federalism crisis when officials were forced to admit they had left no way for states and localities to "opt out" of immigration checks for every arrestee, dramatically raising the stakes of police contact for noncitizen community members.[6] States and localities, unable to stop their routine booking process from being co-opted for immigration checks, instead sought to limit the circumstances under which local officials would comply with the "detainers" issued by federal immigration authorities under Secure Communities. But federal courts had to clarify that the executive lacked statutory authority to require local officials to hold individuals on detainers beyond the time they would otherwise be entitled to release. *See Galarza v. Szalczyk*, 745 F.3d 634, 641-45 (3d Cir. 2014) (finding that mandatory detainer compliance was not authorized by 8 U.S.C. § 1357(d) and would violate the

[5] In the past, the executive branch has directed federal agencies to have an "open exchange of information and perspectives" with state and local officials when creating new policies. Exec. Order 13,563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821, 3821-22 (Jan. 18, 2011).

[6] *See* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 Am. U.L. Rev. 1259, 1272-73, 1279-81 (2015); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. Rev. 1819 (2011).

Tenth Amendment's anti-commandeering doctrine). In *Moreno v. Napolitano*, this Court further ruled that the executive's practice of regularly issuing immigration detainers to local officials without first trying to obtain warrants violated limits on the federal government's statutory civil arrest authority under 8 U.S.C. § 1357(a)(2). 213 F. Supp. 3d 999, 1003-04 (N.D. Ill. 2016).

Unwilling to heed the lessons of prior administrations, the current Administration has reinstituted the Secure Communities program, *see* Interior Executive Order at § 10, and doubled down on pressing state and local criminal justice actors into the service of the federal immigration enforcement machinery, ignoring "the removal system Congress created." *Arizona v. United States*, 567 U.S. 387, 407 (2012). In its quest to maximize immigration enforcement, the Administration has gone to extraordinary lengths to punish and discourage sanctuary cities, first by threatening to take away *all* federal funding, and now by unilaterally announcing unprecedented conditions on Byrne JAG funding. No prior administration demonstrated such willingness to bypass the constitutional system despite well-established limits on its authority.

II. Congress Did Not and Could Not Authorize the Conditions that the Attorney General Seeks to Unilaterally Impose on Byrne JAG Funding

Defendant's newly minted conditions on Byrne JAG funding violate statutory limits on the Department's authority and constitutional constraints on the federal government's spending power. No act of Congress contains the type of clear statement required to permit the Attorney General to condition Byrne JAG funds on compliance with the agency's notice, access, or information-sharing requirements. Further, interpreting the Byrne JAG statute to authorize the Attorney General's new conditions would violate the constitutional limits on the federal spending power. Accepting the Department's interpretation of its authority would therefore set a dangerous precedent not only for the Byrne JAG program, but also for the myriad other federal grant programs on which states and localities have come to rely.

A. The Byrne JAG Statutory Scheme Does Not Authorize the Attorney General's Conditions

Even assuming that Congress may delegate to an agency the authority to create new spending conditions—a question that this Court need not answer—there is no indication in the Byrne JAG statute that Congress intended for the Attorney General to have any authority to impose immigration-related requirements on grantees of the type contemplated here. Indeed, the statutory text does not even authorize the Department to impose *criminal justice* mandates on local law enforcement actors, much less authorize the executive branch to leverage Byrne JAG funding to require participation in the enforcement of *civil* immigration laws. Rather, the statutory structure, purpose, and history all confirm that Congress intended the Department to defer to state and local policy choices.

The Byrne JAG program is largely a formula grant created for criminal law enforcement, and the statutory structure reflects that purpose. *See* 42 U.S.C. § 3751(a)(1) (authorizing Attorney General to "make grants to States and units of local government" to support "criminal justice," but "in accordance with the formula established under section 3755 of this title") (transferred to 34 U.S.C. § 10152(a)(1)). By statute, the Attorney General may design a "form" for Byrne JAG applications, "reasonably require" applicants to "maintain and report such data, records, and information (programmatic and financial)," and develop a "program assessment component." *See id.*; 42 U.S.C. § 3752(a) (transferred to 34 U.S.C. §§ 10152-53). Congress specified a few prohibited uses of Byrne JAG funding, but generally allows states and localities to adapt the program's funding to their specific needs. *See* 42 U.S.C. § 3751(d) (listing prohibited uses); H.R. Rep. No. 109-233, at 89 (explaining that Congress's purpose was to "give State and local governments more flexibility"). Options, not mandates, are the bedrock of the Byrne JAG program.

The Byrne JAG program's purpose and history also confirm that Congress did not authorize the Attorney General to impose civil immigration enforcement mandates on grantees. Since 2005, when Congress created the program, its focus has been on improving the criminal justice system, including policing, adjudication, and incarceration, not on immigration policy. *See* 42 U.S.C. § 3751. It would run counter to the program's purpose to permit the Attorney General to use it as a tool to carry out the Administration's immigration agenda. In fact, Congress has declined to adopt any conditions on Byrne JAG funding related to immigration enforcement, despite numerous attempts to do so by individual legislators. *See, e.g.*, Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3(b) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2(b)(2) (2015).

In light of the Byrne JAG statute's text, structure, purpose, and legislative history, something more than stray, generic statutory phrases is required to authorize the Department's new conditions. *See Pennhurst*, 451 U.S. at 17. The Department cites 42 U.S.C. § 3712(a)(6)—which provides the power to "plac[e] special conditions on . . . grants" and "determin[e] priority purposes for formula grants"—but this provision does nothing more than assign to the Assistant Attorney General for the Office of Justice Programs whatever "powers and functions [are] vested in [the AAG] pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants." This provision would only be relevant if Congress had vested statutory authority in either the Attorney General or the Assistant Attorney General to implement any of the Department's immigration-related Byrne JAG requirements. But Congress did not do so.[7]

[7] In the same Act that added the cited Section 3712 language, Congress set forth a number of new conditions on grant funds, none of which are related to immigration enforcement. *See generally* Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, Pub. L. No. 109-162,

Next, the Department contends that it may require Byrne JAG grantees to certify their compliance with 8 U.S.C. § 1373 pursuant to 42 U.S.C. § 3752(a)(5)(D), which requires grantees to certify compliance with the Byrne JAG statute and "all other applicable Federal laws." The Department apparently reads this provision to confer on it unlimited discretion to convert into grant conditions any of the thousands of laws that apply to states and localities. But there is nothing in the statute that suggests Congress intended to confer such broad powers on the Department. More likely, "all other applicable Federal laws" refers only to laws that apply to federal grantees *as* grantees, such as the "provisions of" the Byrne JAG program, 42 U.S.C. § 3752(a)(5)(d). Congress has elsewhere used the same statutory text—"all other applicable Federal laws"—to the same effect.[8]

If Congress intended to authorize new, substantive policy conditions on Byrne JAG grants, then it would have had to speak far more clearly than it did in the statutory provisions on which the Department relies. *Pennhurst*, 451 U.S. at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.). The Department offers

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119 Stat. 2960 (2006). Congress also identified *other* factors—unrelated to immigration enforcement—that are given priority in the allocation of formula grants. *See, e.g.*, *id.* § 505(f). Some cross-cutting spending conditions that Congress *has* approved include those related to compliance with various civil rights and nondiscrimination laws. *See, e.g.*, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in "any program or activity receiving Federal financial assistance"); 42 U.S.C. § 2000cc-1 (protecting free exercise rights of institutionalized persons in any "program or activity that receives Federal financial assistance").

[8] The Comprehensive Opioid Abuse Grant Program, for example, requires a certification that the applicant "will comply with all provisions of this part and all other applicable Federal laws." 42 U.S.C. § 3797ff-1(3)(D). In implementing this statutory requirement, the Department certainly has not required an applicant to certify compliance with any and all federal laws that might apply to them. *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, Comprehensive Opioid Abuse Site-based Program FY 2017 Competitive Grant Announcement, OMB No. 1121-0329, at 43 (Jan. 24, 2017), *available at* https://www.bja.gov/funding/CARA17.pdf. Congress has also required federal compliance certifications with substantially identical language in a variety of other arenas. *See, e.g.*, 23 U.S.C. § 108 (grants for real estate acquisitions to facilitate transportation projects); 25 U.S.C. § 4112 (grants for Indian tribal housing); Pub. L. No. 113-121, 128 Stat. 1193, 1244-45 (2014) (grants for feasibility studies for various water-related projects).

no limiting principle to its proffered interpretations of § 3712(a)(6) and § 3752(a)(5)(d). In defendant's view, the executive could withhold funds on almost *any* basis, criminal justice related or not, that he sees fit. That is counter to from Congress's explicit intent to give Byrne JAG grantees maximum flexibility and is not the scheme that Congress created.

B. Congress Did Not Authorize the Attorney General to Violate Constitutional Limits on the Federal Government's Spending Power

There is a second, independent reason why the Court should reject the Attorney General's unilateral imposition of immigration-related conditions on Byrne JAG funding. Even if Congress *had* authorized the conditions at issue here, such conditions would raise at least two serious constitutional problems. This Court should avoid an interpretation of the Byrne JAG statute that would violate the constitutional limits on Congress's spending power. *See DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

First, when Congress authorizes a spending condition, it must be "germane[]" to the grant's public purposes. *Dole*, 483 U.S. at 207-08 & n.3. If the condition is not related to the program's purpose, then it is an unconstitutional regulation of states and localities. *See N. Ill. Chapter of Assoc. Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1006 (7th Cir. 2005) ("Conditions on spending may become regulation if they affect conduct other than the financed project."). Defendant's immigration-related conditions on Byrne JAG grants are not germane for the same reasons that they are not statutorily authorized. The Byrne JAG grant is a criminal justice program intended to provide states and localities with flexibility in criminal justice policy. Immigration enforcement is not co-extensive with crime control, and should not be treated as such. *See* Rubén Rumbaut & Walter Ewing, The Myth of Immigrant Criminality and the Paradox of Assimilation, Immigration Policy Center (2007) (warning that the trope of immigrant criminality "undermin[es] the development of reasoned public responses to both immigration

and crime"). Indeed, as the International Association of Police Chiefs recently explained, entangling local police with immigration enforcement may *impede* efforts to combat violent crime. "Police Chiefs to Trump: Don't Punish Sanctuary Cities," NBC News (Mar. 29, 2017), *available at* https://perma.cc/L4BD-7G9H.[9]

Defendant contends that the challenged conditions are germane because they are designed to promote the "enforcement of *criminal* immigration statutes." Def. Opp. Br. at 18-19 (emphasis added). But that claim is disingenuous. The notice, access, and information-sharing requirements are largely aimed at furthering the issuance of and compliance with immigration detainers, which have traditionally been used to enable the enforcement of *civil* immigration laws. *See, e.g.*, *Arizona*, 567 U.S. at 410 (discussing forms of voluntary state and local cooperation to facilitate civil removability). The Department offers no evidence that it intends to use the conditions only for criminal investigations, or that the conditions were tailored to reduce violent crime as opposed to routine immigration enforcement.

Second, the Attorney General's information-sharing requirement raises constitutional concerns under the Tenth Amendment because 8 U.S.C. § 1373 infringes on states' and localities' supervisory authority over their employees' official communications. The statute precludes states and local officials from declining "to provide information that belongs to the State and is available to them only in their official capacity." *Printz v. United States*, 521 U.S. 898, 932 n.17 (1997) (striking down statute with information-sharing provision).[10] Denying

[9] *See also* Tom Wong, *The Effects of Sanctuary Policies on Crime and the Economy, National Immigration Law Center* (Jan. 26, 2017) (finding that "[c]rime is . . . significantly lower in sanctuary counties compared to nonsanctuary counties"), *available at* https://perma.cc/B57Q-XGTE.

[10] *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. Pa. L. Rev. 103, 159-64 (2012) (arguing that information-sharing statutes such as Section 1373 violate anti-commandeering principle of *Printz*); *cf. City of New York v. United States*, 179 F.3d 29, 36-37 (2d Cir. 1999) (declining to strike down 8 U.S.C. § 1373 but explaining how a challenge under the Tenth

supervisory authority over these officials would thus deny state and local governments the ability to "regulate in accordance with the views of the local electorate." *New York v. United States*, 505 U.S. 144, 169 (1992).

CONCLUSION

Federal agencies play an important role in implementing spending programs, but not by creating new spending conditions whenever it suits the President's policy preferences. Permitting an agency such unbridled authority "would threaten the political accountability key to our federal system." *NFIB*, 567 U.S. at 578. *Amici* urge the Court to reject the Administration's latest bid for unilateral executive power and grant Plaintiff's motion for a preliminary injunction.

Date: August 31, 2017

Respectfully submitted,

/s/ Harry Sandick

HARRY SANDICK
JAMISON DAVIES (*pro hac vice* pending)
MICHAEL D. SCHWARTZ (*pro hac vice* pending)
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
hsandick@pbwt.com
jmdavies@pbwt.com
mschwartz@pbwt.com

EDWARD F. MALONE
Barack Ferrazzano Kirschbaum & Nagelberg LLP
200 West Madison Street, Suite 3900
Chicago, IL 60606
ed.malone@bfkn.com

Amendment might succeed if it could be shown that the disclosure of information would unduly interfere with municipalities' ability to carry out local government functions).

APPENDIX A*

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

Seth Davis
Assistant Professor of Law
University of California, Irvine School of Law

Ingrid V. Eagly
Professor of Law
UCLA School of Law

César Cuauhtémoc García Hernández
Associate Professor of Law
University of Denver Sturm College of Law

Bill O. Hing
Professor of Law
University of San Francisco School of Law

Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
University of Chicago Law School

Annie Lai
Assistant Clinical Professor of Law
University of California, Irvine School of Law

Christopher N. Lasch
Associate Professor of Law
University of Denver Sturm College of Law

Ilya Somin
Professor of Law
George Mason University, Antonin Scalia Law School

Juliet P. Stumpf
Robert E. Jones Professor of Advocacy and Ethics
Lewis & Clark Law School

* *Amici curiae* appear in their individual capacities; institutional affiliations are provided here for identification purposes only.

Philip L. Torrey
Managing Attorney
Harvard Immigration and Refugee Clinical Program
Harvard Law School

Laurence H. Tribe
Carl M. Loeb University Professor and Professor of Constitutional Law
Harvard Law School

Michael J. Wishnie
William O. Douglas Clinical Professor of Law
Yale Law School

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I electronically filed the foregoing Brief *Amici Curiae* of Administrative Law, Constitutional Law, and Immigration Law Scholars in Support of Plaintiff's Motion for a Preliminary Injunction using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Harry Sandick
Attorney for *Amici Curiae*