IS THE PRICE RIGHT FOR SANCTUARY CITIES?

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I. INTRODUCTION

Eleven states and a growing list of localities self-identify as sanctuary jurisdictions after implementing immigration policies that affect how state and local officials interact with federal immigration officers.[1] States and localities enact sanctuary policies to encourage more trusting and cooperative relationships between law enforcement and undocumented members of the community.[2] Through these governments supporting these relationships, undocumented immigrants may feel more comfortable cooperating with police and reporting crimes.[3] United States Immigration and Customs Enforcement ("ICE") oppose these policies because the agency believes that they interfere with the cooperation between federal immigration officers and state officials.[4] ICE asserts that releasing undocumented immigrants threatens communities and cooperation between federal and state officers is necessary for

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[1] Jessica M. Vaughan & Bryan Griffith, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD. (Mar. 22, 2021), https://cis.org/Map-Sanctuary-Cities-Counties-and-States.

[2] *See* City of Chicago v. Barr, 961 F.3d 882, 918 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 30 (1st Cir. 2020); City of Phila. v. Att'y Gen. of the U.S., 916 F.3d 276, 282 (3d Cir. 2019).

[3] *City of Providence*, 954 F.3d at 30.

[4] *DHS, ICE Announce Arrests of More Than 170 At-large Aliens in Sanctuary Jurisdictions*, U.S. IMMIGR. AND CUSTOMS ENF'T (Oct. 16, 2020), https://www.ice.gov/news/releases/dhs-ice-announce-arrests-more-170-large-aliens-sanctuary-jurisdictions [hereinafter DHS].

ensuring public safety.[5]

Both sides of this contested debate raise valid points in defense of their respective positions. Several studies show that sanctuary jurisdictions are safer and have more positive economic indicators than non-sanctuary jurisdictions.[6] A 2017 report by the Center for American Progress found that, on average, thirty-five-and-one-half fewer crimes were committed for every 10,000 people in jurisdictions that disregard ICE detainers compared to jurisdictions that honor them.[7] Additionally, the study found that these jurisdictions have lower poverty rates, higher employment rates, and lower reliance on public assistance programs than non-sanctuary jurisdictions.[8] A study in 2020 by Proceedings of the National Academy of Sciences concluded that "sanctuary policies, although effective at reducing deportations, do not threaten public safety."[9] While these studies do not provide definitive proof that sanctuary policies should be standard practice, they do support the proposition that communities are not negatively impacted by these immigration policies.

By contrast, there are instances of criminal convictions and pending criminal charges against undocumented immigrants who were released after state or local officials failed to honor ICE detainers due to sanctuary policies in place.[10] In November 2020, Fernando De Jesus Lopez-Garcia, an undocumented immigrant, stabbed five victims, injuring three and killing two, at a homeless shelter where he was staying in San Jose, California.[11] Lopez-

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[5] *Id.*

[6] *Sanctuary Policies: An Overview*, AM. IMMIGR. COUNCIL, 4 (last accessed Oct. 2, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/sanctuary_policies_an_overview.pdf [hereinafter *Sanctuary Policies: An Overview*].

[7] *Sanctuary Policies: An Overview*, *supra* note 6, at 4. A detainer is a written request for state or local law enforcement to hold a detained individual for an extra forty-eight hours after their release date so that federal immigration officials have "time to decide whether to take the individual into federal custody." *Immigration Detainers*, ACLU (last visited Oct. 2, 2021), https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers#:~:text=An%20ICE%20detainer%E2%80%94or%20%E2%80%9Cimmigration,into%20the%20federal%20deportation%20system.

[8] *Sanctuary Policies: An Overview*, *supra* note 6, at 4.

[9] *Sanctuary Policies: An Overview*, *supra* note 6, at 4.

[10] *See* DHS, *supra* note 4.

[11] *UPDATE: Police Detail San Jose Church Stabbing Suspect's Violent Criminal*

Garcia had prior convictions of assault with a deadly weapon and felony domestic violence.[12] The police had previously arrested Lopez-Garcia for misdemeanor domestic violence, resulting in the issuance of an immigration detainer.[13] Due to California's sanctuary policies, the detainer was not honored and Lopez-Garcia was released from state custody without alerting ICE.[14] Instances like these attract media attention on account of the divisive nature of sanctuary policies. Stories such as Lopez-Garcia's trigger doubt and skepticism about the value and benefit of sanctuary policies—even though these instances of criminal behavior do not represent the vast majority of undocumented immigrants living in the country.

In response to the lack of cooperation between state and local jurisdictions and federal immigration officers, the Attorney General put conditions on police funding grants for the 2017 fiscal year in an attempt to discourage jurisdictions from establishing sanctuary policies.[15] There is currently a circuit split that exists over whether the Attorney General is statutorily authorized to implement three immigration-related conditions on Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG") funding.[16] These three conditions are referred to as the Notice, Access, and Certification (or "Compliance") Conditions.[17] Jurisdictions that have implemented "sanctuary policies" are especially at risk of losing the Byrne JAG grant funding because their policies are not typically in compliance

History, Repeat Deportations, S.F. BAY AREA NEWS (Nov. 25, 2020), https://sanfrancisco.cbslocal.com/2020/11/25/update-police-identify-san-jose-church-stabbing-suspect-detail-lengthy-criminal-history/.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, U.S. DEP'T OF JUST. (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[16] *See* City & Cnty. of S.F. v. Barr, 965 F.3d 753 (9th Cir. 2020); City of Chicago v. Barr, 961 F.3d 882 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23 (1st Cir. 2020); New York v. U.S. Dep't of Just., 951 F.3d 84 (2d Cir. 2020); City of Phila. v. Att'y Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019).

[17] SARAH HERMAN PECK, CONG. RSCH. SERV., LSB10126, DOJ GRANT CONDITIONS TARGETING SANCTUARY JURISDICTIONS: LITIGATION UPDATE 1 (2018).

with these newly implemented conditions. Through analyzing existing circuit precedent, this Comment explores whether the Attorney General has the statutory authority to implement the immigration conditions.

Part II of this Comment provides background information on the history and current state of sanctuary jurisdictions in the country, the Byrne JAG grant program itself, and the challenged conditions imposed on Byrne JAG grant applications for fiscal year 2017. Part III summarizes each circuit's current position, examines the reasoning behind the Third, First, Seventh, and Ninth Circuits' decisions to strike down the conditions, and the Second Circuit's contrary decision to uphold the challenged conditions. Part IV analyzes the circuits' reasonings and concludes that the Access and Notice Conditions are not statutorily authorized through either the Byrne JAG statute itself or through the assigned Assistant Attorney General duties statute. Part IV also concludes that a provision of the Byrne JAG statute authorizes the Certification Condition and permits the Attorney General to require grant recipients to comply with 8 U.S.C. § 1373 because this provision qualifies as an "applicable Federal law." It will also look into the greater federalism concerns that could become implicated by allowing this kind of statutory interpretation.

II. BACKGROUND

A. *Sanctuary Jurisdictions*

The term "sanctuary jurisdiction" refers to states and cities that have enacted a range of measures limiting their participation in the federal government's enforcement of immigration law.[18] The utilization of sanctuary policies originated from the response of a network of religious organizations that offered assistance to a wave of nearly one million Salvadoran and Guatemalan immigrants in the 1980s.[19]

[18] SARAH HELMAN PECK, CONG. RSCH SERV., R44795, "SANCTUARY" JURISDICTION: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION 3 (2019).

[19] *Sanctuary Policy FAQ*, NAT'L CONF. OF STATE LEGISLATURES (June 20, 2019), https://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx.

These religious groups offered jobs, legal aid, food, and medical care to the asylum seekers.[20] In 1989, shortly following this wave of immigrants, San Francisco became the first city to formally enact what was later labeled a sanctuary policy.[21] The ordinance prohibited city funds and resources from being used "to assist in the enforcement of federal immigration law or to gather information regarding the immigration status of individuals" within the city unless required by federal or state law.[22]

The immigration-related policies that lead to a jurisdiction being categorized as a sanctuary jurisdiction tend to vary since there is no explicit definition of the term.[23] Despite the lack of explicit and standardized sanctuary jurisdiction practices, these policies fit into some overarching categories that: (1) restrict police from arresting people based on federal immigration violations or using civil immigration warrants to detain people; (2) prohibit 287(g) agreements (agreements between local or state police and the Department of Homeland Security ["DHS"] that deputize certain police officers to carry out functions normally performed by federal immigration agents);[24] (3) prevent contracts allowing undocumented immigrants to be held in detention; (4) prevent detention facilities; (5) restrict city officials from inquiring about one's immigration status; (6) restrict sharing undocumented immigrants' information with the federal government; (7) restrict responses to detainers; and (8) policies that do not allow ICE into local jails without a warrant.[25] A common sanctuary policy is to place restrictions on holding undocumented immigrants in jails after ICE has issued a detainer for the individual.[26] A detainer refers to the written request, in which ICE asks that an arrested individual not be released from jail for up to forty-eight hours, so ICE can take custody of them.[27]

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20 *Id.*

21 *Id.*

22 *Id.*

23 *Sanctuary Policies: An Overview*, *supra* note 6, at 1.

24 *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL, 1 (July 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview.pdf.

25 *Sanctuary Policies: An Overview*, *supra* note 6, at 2–3.

26 *Sanctuary Policies: An Overview*, *supra* note 6, at 3.

27 *Sanctuary Policy FAQ*, NAT'L CONF. STATE LEGISLATURES (June 20, 2019),

The number of sanctuary jurisdictions has dramatically increased since San Francisco's first ordinance in the late 1980s. Prior to President Obama taking office in 2009, there were only forty sanctuary jurisdictions throughout the country.[28] By the 2016 election, there were 300 sanctuary jurisdictions.[29] Following President Trump winning the 2016 election, and prior to his inauguration, thirty-eight more jurisdictions announced that they would become sanctuary jurisdictions.[30] Within the first year of President Trump taking office, the number of sanctuary jurisdictions throughout the country increased to 564.[31]

B. *The Byrne JAG Program*

The Edward Byrne Memorial Justice Assistance Grant Program provides funding to states and localities to support a broad range of criminal justice projects.[32] These initiatives include funding for law enforcement, crime prevention and education, prosecution, technology improvements, drug treatment, crime victim and witness assistance, and corrections.[33] The total amount of funding is around $445 million per fiscal year.[34] The Byrne JAG program is a formula grant, and funding is determined by a state's share of the national population and the state's number of reported violent crimes.[35] Forty percent of each state's grant is then directly given to units of the state's local government based on each localities' proportion of the three-year average of violent crimes.[36] Congress combined the Edward Byrne Memorial Formula Grant Program and the Local Law

https://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx.

[28] *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, FED'N FOR AM. IMMIGR. REFORM, 1 (May 2018), https://www.fairus.org/sites/default/files/2018-05/Sanctuary-Report-FINAL-2018.pdf.

[29] *Id.*

[30] *Id.* at 2.

[31] *Id.*

[32] *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: Overview*, BUREAU JUST. ASSISTANCE, https://bja.ojp.gov/program/jag/overview (last visited Oct. 2, 2021).

[33] *Id.*

[34] NATHAN JAMES, CONG. RSCH SERV., IF10691, THE EDWARD BYRNE MEM'L JUST. ASSISTANCE GRANT (JAG) PROGRAM 2 (2020) [hereinafter NATHAN JAMES].

[35] NATHAN JAMES, *supra* note 34, at 1.

[36] NATHAN JAMES, *supra* note 34, at 1.

Enforcement Block Grant Program to form the current Byrne JAG program through the Violence Against Women and Department of Justice Reauthorization Act of 2005.[37] This consolidation was meant to simplify the application process for these funding programs.[38]

The program is codified in 34 U.S.C. §§ 10151–10158.[39] Grant recipients must certify that the grant-funded programs meet all the requirements of the statute, all the application material is correct, "there has been appropriate coordination with affected agencies" (the "coordination provision"), and "the applicant will comply with all provisions of this part and all other applicable Federal laws."[40] The statute also requires, for each covered fiscal year, that the recipient "shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require" (the "data or information reporting provision").[41] Additionally, the Attorney General has a rulemaking provision that allows him to issue rules to assist in carrying out the program.[42]

C. *The Challenged Conditions*

The phrase "challenged conditions" refers to the three immigration-related conditions that have been placed on Byrne JAG funds, which consist of the Certification or Compliance Condition, the Access Condition, and the Notification Condition.[43] In 2016, an investigation conducted by the Department of Justice's ("DOJ") Inspector General revealed that there was a significant decline in the cooperation of state and local entities with federal immigration authorities.[44] As a result of this report, in July 2016, Attorney General Lynch identified 8 U.S.C. § 1373 as "an applicable Federal law" for Byrne JAG

37 NATHAN JAMES, CONG. RSCH. SERV., RS22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 2 (2013).

38 *Id.*

39 New York v. U.S. Dep't of Just., 951 F.3d 84, 92 (2d Cir. 2020).

40 34 U.S.C. § 10153(a)(5).

41 34 U.S.C. § 10153(a)(4).

42 34 U.S.C. § 10155.

43 SARAH HERMAN PECK, CONG. RSCH. SERV., LSB10126, DOJ GRANT CONDITIONS TARGETING SANCTUARY JURISDICTIONS: LITIGATION UPDATE 1–2 (2018).

44 *New York*, 951 F.3d at 98.

grants.[45] Under Section 1373, state and local governments cannot prohibit or restrict any government entity from sending or receiving information relating to immigration status.[46] Following the transition of the Obama administration to the Trump administration, Attorney General Sessions released a notice that there would be three new conditions placed on Byrne JAG funding grants with the goal of "increas[ing] information sharing between federal, state, and local law enforcement, ensuring that federal immigration authorities have the information they need to enforce immigration laws and keep our communities safe."[47]

The Compliance Condition requires grant recipients to certify that they are compliant with 8 U.S.C. § 1373.[48] The Access Condition requires that immigration enforcement officers have access to jails and prisons where undocumented immigrants are housed so that ICE officers can meet with them and inquire if they are eligible to stay in the country.[49] The Notice Condition requires that recipients have a policy in place to ensure that DHS will be notified 48-hours prior to the release of immigrants who are in the state's or locality's custody and wanted for removal from the United States.[50]

III. CIRCUIT COURT SUMMARY

After the Attorney General announced the challenged conditions would apply to Byrne JAG applications, lawsuits sprang up all around the country, seeking to enjoin imposing these conditions on grants.[51] The key issue placed before the circuits was whether Congress had given statutory authority to

45 *Id.* at 99.

46 8 U.S.C. § 1373(a).

47 *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, U.S. DEP'T OF JUST. (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

48 SARAH HERMAN PECK, CONG. RSCH. SERV., LSB10126, DOJ GRANT CONDITIONS TARGETING SANCTUARY JURISDICTIONS: LITIGATION UPDATE 1 (2018).

49 *Id.* at 1–2.

50 *Id.*

51 *Id.* at 1.

the Attorney General to impose these conditions on Byrne JAG grants.[52] To answer this question, the circuits analyzed whether this power was granted through the Byrne JAG statute or, alternatively, by 34 U.S.C. § 10102, which outlines the duties and functions of the Assistant Attorney General.[53] In addition to determining if the challenged conditions are statutorily authorized, the Certification Condition required the courts to determine whether the Attorney General could mandate compliance with 8 U.S.C. § 1373 by labeling it as an applicable federal law.[54]

A. *Circuits That Have Struck Down the Challenged Conditions*

Four of the five circuits that have decided this issue have struck down the challenged conditions on the grounds that the Attorney General did not have statutory authority to implement them.[55] The Third Circuit was the first to hear this issue about the challenged conditions' legality, through a case arising out of Philadelphia.[56] Philadelphia implemented policies that limited sharing immigration-related information with federal officials, limited federal officials' access to city prisons, and limited the coordination between federal and city officials with regards to releasing undocumented immigrants from city custody.[57] The city defended these policies as necessary to "help foster trust between the immigrant community and law enforcement."[58] In response, DOJ made a preliminary determination of

[52] City & Cnty. of S.F. v. Barr, 965 F.3d 753, 759–60 (9th Cir. 2020); City of Chicago v. Barr, 961 F.3d 882, 891–92 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 31 (1st Cir. 2020); New York v. U.S. Dep't of Just., 951 F.3d 84, 90 (2d Cir. 2020); City of Phila. v. Att'y Gen. of the U.S., 916 F.3d 276, 279 (3d Cir. 2019).

[53] *City & Cnty. of S.F.*, 965 F.3d at 760–61; *City of Chicago*, 961 F.3d at 892–93; *City of Providence*, 954 F.3d at 32, 39; *New York*, 952 F.3d at 101, 104, 116, 121; *City of Phila.*, 916 F.3d at 284–88.

[54] *City & Cnty. of S.F.*, 965 F.3d at 761–64; *City of Chicago*, 961 F.3d at 898; *City of Providence*, 954 F.3d at 36–39; *New York*, 952 F.3d at 105–11; *City of Phila.*, 916 F.3d at 288–91.

[55] *City & Cnty. of S.F.*, 965 F.3d at 757; *City of Chicago*, 961 F.3d at 887; *City of Providence*, 954 F.3d at 27; *City of Phila.*, 916 F.3d at 279.

[56] *City of Phila.*, 916 F.3d at 279.

[57] *Id.* at 282.

[58] *Id.*

Philadelphia's fiscal year 2017 Byrne JAG application, notifying the city that several laws, practices, or policies violated 8 U.S.C. § 1373.[59] Accordingly, Philadelphia filed a complaint seeking to enjoin the DOJ from implementing the challenged conditions, as well as a writ of mandamus compelling the release of the city's 2017 Byrne JAG funds.[60]

Philadelphia asserted five arguments in its complaint as to why it was entitled to relief.[61] First, DOJ violated the Administrative Procedure Act ("APA") and the separation of powers doctrine because it did not have the authority to implement these conditions.[62] Second, the conditions violated the APA because the conditions were enacted arbitrarily and capriciously.[63] Third, DOJ violated the Spending Clause.[64] Fourth, the Certification Condition, as well as Section 1373, violated the Tenth Amendment.[65] Fifth, Philadelphia was in compliance with the conditions.[66]

The district court first granted a preliminary injunction and then, at a later time, granted summary judgment for the city on all claims, as well as a permanent injunction ordering DOJ to distribute Philadelphia's grant funding.[67]

On appeal, the Third Circuit only addressed whether the Attorney General had statutory authority to implement the challenged conditions and did not analyze the city's other arguments.[68] The Attorney General asserted three possible sources of authority to implement the challenged conditions: the Byrne JAG statute, 34 U.S.C. § 10102(a), which outlined the duties of the Assistant Attorney General, and 34 U.S.C. § 10153(a)(5)(D), which required compliance with "all other

59 *Id.*

60 *Id.*

61 *Id.* at 282–83.

62 *City of Phila.*, 916 F.3d at 283.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *City of Phila.*, 916 F.3d at 284. Because the court found that the challenged conditions exceeded the Attorney General's statutory authority, it did not have to make determinations as to Philadelphia's other arguments. *Id.* at 291.

applicable Federal laws," as authorization for the Certification Condition.[69]

First, the Third Circuit looked at whether the Byrne JAG statute provided authority to implement the Notice and Access Conditions and ultimately held that it did not.[70] The court reasoned that, while the statute required data reporting and coordination between affected agencies, interpreting this to grant authority for the challenged conditions would stretch the language "too far."[71] As for the data reporting provision, the court explained that it was explicitly limited to only "programmatic and financial" information, which these conditions did not involve.[72] The court further reasoned that because the coordination provision was phrased in the past tense, stating that there "has been" appropriate coordination, there were no grounds for imposing ongoing coordination and only required coordination in connection with the grant application.[73] Additionally, the court explained that the statute and other parts of the U.S. Code explicitly laid out circumstances when the Attorney General could withhold or reallocate grant funds, but these never authorized that the Attorney General could withhold all grant funds for any reason.[74]

Next, the Third Circuit concluded that the Attorney General did not have authority to implement the challenged conditions through 34 U.S.C. § 10102(a)(6), which states that the Assistant Attorney General can "exercise such other powers and functions as may be vested in the Assistant Attorney General . . . including placing special conditions on all grants."[75] The court reasoned that the plain text of this statute only allowed the Assistant Attorney General to place special conditions to the extent that the Attorney General or a statute vested power to him.[76] The Third Circuit also noted that the five subsections preceding

69 *Id.* at 284.

70 *Id.* at 284–87.

71 *Id.* at 285.

72 *Id.* Programmatic meaning information related to the grant-funded programs.

73 *Id.*

74 *City of Phila.*, 916 F.3d at 286.

75 *Id.* at 287.

76 *Id.* at 287–88.

subsection six in 34 U.S.C. § 10102(a)[77] were of a ministerial nature, and it was hesitant to find that the sixth subsection granted such sweeping power when the statute lacked language to support such a proposition.[78]

The Third Circuit further held that 8 U.S.C. § 1373 was not an applicable law for the purposes of the Certification Condition.[79] According to the court, the term "applicable" was meant to be narrowly interpreted and not to include all possible laws that could independently apply to grant applicants.[80] Because the other requirements in 34 U.S.C. § 10153(a)(5) all relate to grant-funded programs, the court found it reasonable and correct to interpret that "all other applicable Federal laws" referred only to laws that apply to grant operations.[81] The court also looked at DOJ's historical practices, which were not in line with such a broad interpretation of "all other applicable Federal laws."[82] The Third Circuit additionally noted that allowing the Attorney General to implement these challenged conditions would transform the Byrne JAG grant from a formula grant to a

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77 34 U.S.C. § 10102(a)

> The Assistant Attorney General shall–(1) publish and disseminate information on the conditions and progress of the criminal justice systems; (2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice; (3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice; (4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice; (5) coordinate and provide staff support to coordinate the activities of the Office and the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention; and (6) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants.

78 *City of Phila.*, 916 F.3d at 288.

79 *Id.* at 291.

80 *Id.* at 289.

81 *Id.* at 289–90 (quoting 34 U.S.C. § 10153(a)(5)(D)).

82 *Id.* at 290.

discretionary one.[83] Allowing the conditions to be upheld would distort the original purpose and planned distribution of grant funds that Congress put in place when the grant program was codified. Utilizing spending conditions in such a way allows the executive branch to put pressure on states and localities to carry out the administration's policies instead of being able to make policy decisions in the best interest of its jurisdiction.

Following the Third Circuit's decision, the First Circuit was next to strike down the challenged conditions.[84] This suit arose from Providence and Central Falls, Rhode Island ("the Cities").[85] In June 2018, DOJ notified the Cities that it approved their Byrne JAG applications, and it granted each city $212,112 and $28,677, respectively.[86] Included in the grant approval letters, DOJ alerted them that they must comply with the three challenged conditions to receive their funding.[87] The Cities had sanctuary policies in place that conflicted with these conditions.[88] Both cities enacted policies prohibiting police officers from retaining custody based only on an immigration detainer or any other request by federal immigration authorities, absent a warrant.[89] In Providence, police officers could not inquire about someone's immigration status, and Central Falls had a similar policy in place that prevented officers from stopping or asking questions based on someone's immigration status.[90] In response to DOJ's notification of the imposed conditions, the Cities sued DOJ, seeking to enjoin the agency from implementing the challenged conditions on Byrne JAG grants for 2017.[91]

The Cities asserted three arguments that overlapped with several of Philadelphia's arguments in *City of Philadelphia v. Att'y Gen. of the United States*.[92] The Cities argued that DOJ

83 *Id.*

84 City of Providence v. Barr, 954 F.3d 23, 45 (1st Cir. 2020).

85 *Id.* at 26.

86 *Id.* at 29.

87 *Id.* at 29–30.

88 *Id.* at 30.

89 *Id.*

90 *City of Providence*, 954 F.3d at 30.

91 *Id.*

92 *Compare City of Providence*, 954 F.3d at 30 ("In relevant part, the Cities alleged that the DOJ did not possess statutory authority to impose the challenged

lacked statutory authority to implement the challenged conditions, that the implementation of the conditions was arbitrary and capricious, and that the conditions were unconstitutional.[93] The district court found that DOJ did not have statutory authority and granted summary judgment for the Cities, as well as a permanent injunction.[94] On appeal, DOJ argued that statutory authorization came from either the Byrne JAG statute or the duties and functions provision for the Assistant Attorney General.[95]

The First Circuit held that the Byrne JAG statute itself did not allow DOJ to impose the challenged conditions on grant recipients.[96] First, the court reasoned that the information reporting provision contained within 34 U.S.C. § 10153(a)(4) did not give the Attorney General authority.[97] While grant recipients are required to report both programmatic and fiscal information to the federal government, the court noted that the actions required by the challenged conditions did not fall into the category of programmatic information.[98] Unlike the Third Circuit, the court outlined the more convincing interpretation of programmatic information, defining it as information and data relating to the Byrne JAG grant itself or the programs funded by the grant.[99] Then, the court addressed whether the coordination provision contained in 34 U.S.C. § 10153(a)(5)(C) authorized the challenged conditions.[100] Based on the statutory construction, specifically Congress's usage of the past tense, the court

conditions, that the imposition of the challenged conditions was arbitrary and capricious, and that the challenged conditions were unconstitutional."), *with* City of Phila. v. Att'y Gen. of the U.S., 916 F.3d 276, 282–83 (3d Cir. 2019) ("The City argued that . . . the Department acted ultra vires in enacting the Challenged Conditions in violation of the [APA]" and the Constitution's separation of powers; the Conditions were enacted arbitrarily and capriciously in violation of the APA; they violated the Spending Clause of the Constitution; the Certification Condition and Section 1373 violated the Tenth Amendment of the Constitution; and the City was, in fact, in substantial compliance with the Challenged Conditions.").

93 *City of Providence*, 954 F.3d at 30.

94 *Id.*

95 *Id.* at 31.

96 *See id.* at 35.

97 *City of Providence*, 954 F.3d at 32.

98 *Id.*

99 *Id.* at 33; *City of Phila.,* 916 F.3d at 285.

100 *City of Providence*, 954 F.3d at 33.

interpreted the statutory language as requiring proper coordination with affected agencies prior to the grant application being submitted, akin to the Third Circuit's interpretation.[101] Additionally, the court reasoned that coordination need only occur with agencies that will be receiving grant funding.[102] The court further noted that interpreting the information and coordination provisions as broadly as DOJ argued would destabilize the statutory formula of the grant since the statutory formula did not allow the imposition of "brute force conditions" unrelated to the grant's purpose.[103]

The First Circuit also held that 8 U.S.C. § 1373 did not qualify as an "applicable Federal law."[104] The court noted that the Second Circuit's holding that the statute qualified as applicable was too broad of an interpretation and would effectively eliminate the term "applicable" from the statute.[105] Instead, the court determined that "applicable Federal laws" was meant to include only laws that "apply to states and localities in their capacities as Byrne JAG grant recipients."[106] Additionally, the court warned that DOJ's interpretation would grant the agency significant discretion to deviate from the formula established in the statute in order to carry out its own agenda, going against Congress's intent.[107]

Finally, the First Circuit debunked what it believed was DOJ's strongest argument, concluding that 34 U.S.C. § 10102(a)(2) did not authorize the challenged conditions.[108] The court reasoned that the provision's mention of the Assistant Attorney General having the ability to "plac[e] special conditions on all grants" was meant as an example of a function he could exercise only when the power has been vested in him through the statute.[109] Granting the Assistant Attorney General the power to place these conditions based upon his own priorities would

101 *Id.*
102 *Id.* at 34.
103 *Id.*
104 *Id.* at 37.
105 *Id.* at 37, 39.
106 *City of Providence*, 954 F.3d at 39.
107 *Id.*
108 *Id.* at 32, 39.
109 *Id.* at 41.

contradict the formulaic nature of the Byrne JAG program, and if Congress had intended this kind of discretion, it would have provided for it explicitly.[110]

A month after the First Circuit's decision, the Seventh Circuit issued its ruling on the challenged conditions.[111] This case resulted from two consolidated cases that arose in Chicago, Illinois.[112] Chicago had in place a sanctuary policy called the "Welcoming City Ordinance," which conflicted with the challenged conditions and, therefore, interfered with the city's ability to obtain Byrne JAG funding for the 2017 fiscal year.[113] The Ordinance prohibited disclosing or requesting information related to immigration status and detaining someone based on a belief about their immigration status alone or detainers for "violations of civil immigration laws."[114] Additionally, the Ordinance prohibited ICE agents from accessing detainees, conducting investigative interviews, or allowing police officers to respond to ICE requests or share information about custody status or release dates.[115]

The City of Chicago sued the Attorney General, arguing, as the prior cities had, that there was no statutory authority for the conditions, the conditions violated the Spending Clause, and 8 U.S.C. § 1373 was unconstitutional under anticommandeering.[116] The district court granted summary judgment for Chicago, finding that 8 U.S.C. § 1373 was unconstitutional under anticommandeering, the conditions exceeded the Attorney General's statutory authority, and the statute violated the separation of powers.[117]

In line with the Third and First Circuits, the Seventh Circuit found that the Attorney General did not have statutory authority to impose the Notice and Access Conditions through 34 U.S.C. § 10102(a)(6).[118] The court was in consensus with its previously

110 *Id.* at 41–42.
111 City of Chicago v. Barr, 961 F.3d 882, 882, 931 (7th Cir. 2020).
112 *Id.* at 886.
113 *Id.* at 889.
114 *Id.*
115 *Id.*
116 *Id.* at 889–90.
117 *City of Chicago*, 961 F.3d at 890.
118 *Id.* at 894.

mentioned sister circuits that, when looking at the plain language of this subsection, it was clear that the Assistant Attorney General could exercise certain powers, such as placing special conditions on grants, but only when the statute had vested it or through a delegation of power.[119] Furthermore, because the Byrne JAG grant program was a formula grant, allowing this type of power to fully deny grants would depart from the intended function of the program.[120]

Next, the Seventh Circuit held that "all other applicable Federal law" should not be broadly interpreted to include Section 1373, but it did not rule on the statute's constitutionality.[121] The court rejected the Attorney General's interpretation that this provision included all federal statutes that apply to states because it would make the words "other applicable" in statutes superfluous.[122] When looking at the five other subsections, the court noted it was clear that they relate to the grant's application and requirements.[123] Taking the preceding subsections into consideration, the most logical reading of the sixth subsection was that "all other applicable Federal law" meant federal laws that relate to grants and grantees.[124] Similar to the Third Circuit, the Seventh Circuit looked at the subsequent subchapters of the Byrne JAG statute and reasoned that they used similar language in reference to grant recipients, but not laws that generally apply to states.[125]

Unlike previous decisions striking down the challenged conditions, the Seventh Circuit identified four specific issues with the Attorney General's broad interpretation and clarified how it would conflict with the principle of separation of powers.[126] First, allowing the Attorney General to impose conditions, like the challenged conditions, would give him the power to implement conditions that Congress has declined to implement.[127] Second,

119 *Id.* at 893.
120 *Id.*
121 *Id.* at 898.
122 *Id.*
123 *City of Chicago*, 961 F.3d at 899.
124 *Id.*
125 *See id.* at 899–901.
126 *Id.* at 902.
127 *Id.*

allowing the Attorney General to impose qualifying conditions at his own discretion would change the formula grant into a discretionary grant.[128] Third, this interpretation contradicts other portions of the Byrne JAG statute and raises constitutionality concerns.[129] Fourth, this interpretation conflicts with another provision of the Byrne JAG statute that prohibits any federal agency or department from exercising control over any state police force or criminal justice agency.[130] The court's concern shows that this issue goes further than statutory interpretation, and requires consideration of the ramifications of upholding the challenged conditions.

The most recent circuit decision regarding the challenged conditions comes from the Ninth Circuit.[131] San Francisco expected to receive $923,401 as a sub-grant from California's Byrne JAG application and $524,845 as a direct grant from San Francisco's application.[132] The City and County of San Francisco self-identify as sanctuary jurisdictions, enacting policies that limit city employees from assisting federal immigration law enforcement.[133] San Francisco sued DOJ in August 2017, seeking to enjoin implementation of the challenged conditions and declaratory relief—asking the court to narrowly interpret 8 U.S.C. § 1373 under which their jurisdictions' sanctuary laws would comply with the statute.[134]

San Francisco argued that the challenged conditions lacked statutory authorization, violated the Spending Clause, and violated the APA.[135] Additionally, the City argued the constitutionality of 8 U.S.C. § 1373, claiming that it violated the Tenth Amendment, and, in the alternative, its policies complied with the statute when appropriately construed.[136] The district court granted summary judgment for San Francisco, holding that the challenged conditions and 8 U.S.C. § 1373 were

128 *Id.*
129 *City of Chicago*, 961 F.3d at 902.
130 *Id.* at 902, 908.
131 City and Cnty. of S.F. v. Barr, 965 F.3d 753, 753 (9th Cir. 2020).
132 *Id.* at 758.
133 *Id.* at 757.
134 *Id.* at 759.
135 *Id.*
136 *Id.*

unconstitutional.[137]

On appeal, the Ninth Circuit agreed with the sister circuits, finding that the Attorney General was not statutorily authorized to implement the Access and Notice Conditions under 34 U.S.C. § 10102(a)(6).[138] The court relied on precedent to hold that, while the Attorney General is allowed to place special conditions on grants and determine priority purposes pertaining to formula grants, the Access and Notice Conditions did not qualify as "special conditions" or "priority purposes."[139]

The Ninth Circuit's decision went one step further than prior circuit decisions by providing a working definition for "special conditions" and "priority purposes."[140] In *City of Los Angeles v. Barr*, the court interpreted "special conditions" to mean individualized requirements, such as conditions for high-risk grantees.[141] The court noted that to qualify as a "priority purpose," the purpose must be one of the Byrne JAG program's proposed purposes.[142] The court explained that the conditions were not individually tailored in the way that fell under the definition of special conditions because all grant recipients were required to comply with the Access and Notice Conditions.[143] Additionally, the court noted that the conditions did not qualify under priority purposes because the Notice and Access Conditions were not one of the articulated purposes of the Byrne JAG grant program.[144]

Additionally, the court found that the Access and Notice Conditions were not authorized through the information reporting and coordination provisions within the Byrne JAG statute.[145] Relying again on *City of Los Angeles*, the circuit court reasoned that interpreting these provisions to authorize the

137 *City & Cnty. of S.F.*, 965 F.3d at 760.

138 *Id.* at 761.

139 *Id.* at 760–61 (citing City of L.A. v. Barr, 941 F.3d 931, 939–44 (9th Cir. 2019)).

140 *City of L.A.*, 941 F.3d at 941, 942.

141 *Id.* at 941.

142 *Id.* at 942.

143 *Id.*

144 *Id.*

145 *City & Cnty. of S.F.*, 965 F.3d at 761.

challenged conditions would exceed the statutory language.[146] In *City of Los Angeles*, the Ninth Circuit did not consider it "'programmatic' information" because information about the release of detained immigrants did not relate to programs funded by Byrne JAG.[147] The circuit court further held that the coordination provision did not authorize the challenged conditions because the statute did not require "an ongoing obligation" to coordinate with affected agencies "throughout the life" of the grant's duration.[148]

Unlike other circuit courts, the Ninth Circuit did not determine whether the Certification Condition was statutorily authorized; instead, it found that San Francisco's sanctuary laws complied with 8 U.S.C. § 1373 and, therefore, satisfied the Certification Condition.[149] The Ninth Circuit also departed from its sister circuits in interpreting Section 1373. It interpreted the Section narrowly, determining that it applied only to "'immigration status'" or "'a person's legal classification under federal law.'"[150] San Francisco's sanctuary policies prohibited the sharing of release-related information, such as release dates, release status, and contact information, as well as local police responding to ICE requests about the release of detainees.[151] The court found that while these policies restricted the release of certain information to federal immigration authorities, the information being restricted did not relate to immigration status or immigration classification and, therefore, did not conflict with the Ninth Circuit's narrow interpretation of Section 1373.[152]

B. *Circuit That Has Upheld the Challenged Conditions*

The Second Circuit is the only circuit to uphold the challenged conditions, creating the circuit split.[153] The court addressed the issue in a case where the State of New York was set

146 *Id.*
147 *City of L.A.*, 941 F.3d at 945.
148 *Id.*
149 *City & Cnty. of S.F.*, 965 F.3d at 764.
150 *Id.* at 763 (quoting U.S. v. Cal., 921 F.3d 865, 891 (9th Cir. 2019)).
151 *Id.* at 763–64.
152 *Id.* at 764.
153 New York v. U.S. Dep't of Just., 951 F.3d 84, 123 (2d Cir. 2020).

to receive $25 million in Byrne JAG grants, contingent on their compliance with the challenged conditions.[154] On two separate occasions, DOJ also informed New York City that they had policies in place that violated Section 1373, which rendered them ineligible to receive Byrne JAG funding.[155] In response, the State and City of New York sued DOJ, challenging the conditions as unconstitutional and violative of the APA.[156] The district court granted New York's summary judgment motion and found that the conditions violated the APA, lacked statutory authority, and that 8 U.S.C. § 1373 violated the Tenth Amendment's anticommandeering principle.[157]

The Second Circuit began its analysis by agreeing with the previous circuits on the point that 34 U.S.C. § 10102(a)(6) did not, by itself, grant the authority to impose the challenged conditions.[158] The court reasoned that the use of the word "'including,'" prior to the phrase "placing special conditions on all grants, and determining priority purposes for formula grants[,]" signaled that the latter consisted of illustrative examples rather than expansions of the Attorney General's power.[159] As other circuits explained, while it was a power that could be exercised by the Assistant Attorney General, it was one that must be vested or delegated to him.[160]

The Second Circuit found that the Certification Condition was statutorily authorized through 34 U.S.C. § 10153(a)(5)(D), which is the provision that states that grant applicants must comply with "'*all other applicable Federal laws*.'"[161] The court interpreted the statute as allowing the Attorney General to determine not only the form or "style" of a grant applicant's certification but also "the specificity of its content[.]"[162] The Second Circuit relied on two dictionary definitions of "applicable" to inform its statutory interpretation and concluded

154 *Id.* at 100.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.* at 101–02.
159 *New York*, 951 F.3d at 101–02 (quoting 34 U.S.C. § 10102(a)(6)).
160 *Id.* at 102.
161 *Id.* at 104 (quoting 34 U.S.C § 10153(a)(5)(D)).
162 *Id.* at 105.

that an "applicable Federal law" was one that related to the grant recipient or the grant itself.[163] Additionally, the usage of "all" did not show an intent that the phrase should be narrowly construed.[164] Next, the court rejected the Third Circuit's concerns that this interpretation created a surplusage or redundancy problem because it reasoned that the use of the modifier "'applicable'" served a limiting function.[165] The fact that Byrne JAG was a formula grant did not mean that this phrase needed to be narrowly construed because formula grant recipients have to satisfy certain requirements prior to receiving funding.[166] This differs from how the other circuits interpreted this statute because it allows for the Attorney General to require compliance with a broader range of statutes than other circuits would have allowed.

The court further explained that Section 1373 did not conflict with 34 U.S.C. § 10228, which prohibits federal agencies or officers from exercising control or direction over any state police.[167] While Section 1373 prevented state authorities from prohibiting the sharing of information relating to citizenship and immigration status with federal immigration officials, it did not require federal supervision or control over the "day-to-day operations" of state police or even mandate state police compliance with federal immigration officials.[168] The court found that DOJ's history of focusing on laws that pertain to grants themselves and not grant recipients when determining what laws are applicable did not mean that the subsection needed to be limited to those laws only.[169] Finally, the Second Circuit explained that this condition was not ambiguous, and applicants had clear notice that they must include a certification to comply with "all other applicable Federal laws," and, here, the plaintiffs were given explicit notice that they must comply with Section 1373.[170]

163 *Id.* at 106.
164 *Id.*
165 *New York*, 951 F.3d at 106–07.
166 *Id.* at 107.
167 *Id.* at 108.
168 *Id.* at 108–09.
169 *Id.* at 109.
170 *Id.* at 110.

The Second Circuit further held that Section 1373 was not a commandeering violation under the Tenth Amendment, as it applied to federal spending.[171] Congress is allowed to place conditions on federal funding, and it does not create a commandeering problem if the state has "a legitimate choice whether to accept the federal conditions in exchange for federal funds."[172] Byrne JAG funding constituted less than 0.1% of New York's annual budget.[173] Coercion did not occur in this situation because the loss of Byrne JAG funding did not represent a significant percentage of annual budgets.[174]

The Second Circuit next held that the Notice Condition was statutorily authorized by the reporting requirement under 34 U.S.C. § 10153(a)(4).[175] The court concluded that the sharing of release information, as required by the Notice Condition, qualified as "programmatic" information.[176] The court determined that programmatic information related to programs funded by Byrne JAG grants that have to do with prosecution, incarceration, or release of individuals—since some will inevitably be people who are removable from the United States.[177] This interpretation of "programmatic" information is the broadest interpretation by any circuit and has the potential to include a wide range of state or local law enforcement information.

The Second Circuit found additional statutory authorization for the Notice Condition through the coordination provision under 34 U.S.C. § 10153(a)(5)(C).[178] The court disagreed with the Third Circuit's interpretation that coordination did not need to continue into the future.[179] Like it did for "applicable," the court relied on the dictionary definition of "coordination" to inform its interpretation, determining that coordination referred to establishing how a relationship will function, going forward, to

171 *New York*, 951 F.3d at 111.
172 *Id.* at 115 (quoting NFIB v. Sibelius, 567 U.S. 519, 578 (2012)).
173 *New York*, 951 F.3d at 116.
174 *Id.*
175 *Id.*
176 *Id.* at 117.
177 *Id.* at 117–18.
178 *Id.* at 116–18.
179 *New York*, 951 F.3d at 118.

accomplish effective results.[180] Coordination must occur prior to the grant application being filed, but it is deemed "appropriate" when the state establishes a relationship with the federal government and "the sequence of their conduct throughout the grant period."[181] The court further explained that DHS qualified as an affected agency requiring coordination because the usage of grant funds for programs related to prosecuting, incarcerating, or releasing undocumented immigrants affected how DHS has to perform its statutory duties.[182]

The Second Circuit further found that the Access Condition was also statutorily authorized under the coordination provision in 34 U.S.C. § 10153(a)(5)(C).[183] Relying on its earlier reasoning for how the Notice Condition was authorized through the coordination provision, the court explained that, in order for DHS to carry out its statutory duty, it needed to know which individuals were removable from the United States, making it an affected agency.[184] Access to facilities was "appropriate coordination" because it allowed the grant recipient and the affected agency—DHS—to conduct their duties "in an orderly sequence."[185]

Additionally, the Notice and Access Conditions were both statutorily authorized by 34 U.S.C. § 10155.[186] This section of the Byrne JAG statute allowed the Attorney General to issue rules on how the Byrne Program requirements will be carried out.[187]

The Second Circuit took its analysis further than the other circuits in being the only one to determine whether the conditions violated the APA.[188] The court concluded that the challenged conditions were not arbitrary and capricious and, therefore, did not violate the APA.[189] The standard for when an agency acts in an arbitrary and capricious manner is when it

180 *Id.*
181 *Id.* at 119.
182 *Id.*
183 *Id.* at 121.
184 *Id.*
185 *New York*, 951 F.3d at 121.
186 *Id.* at 120–22.
187 *Id.* at 121.
188 *Id.* at 122–24.
189 *Id.*

"entirely failed to consider an important aspect of the problem" at hand.[190] The court reasoned that the fact that DOJ did not discuss the detrimental effects of the Certification Condition did not meet this standard.[191] Additionally, the Notice and Access Conditions did not reach this standard because they were applied against people in the state's custody, so they were unlikely to cause detriments and, therefore, did not require discussion.[192]

IV. ANALYSIS

A. *The Access and Notice Conditions Are Not Statutorily Authorized*

All circuits that have ruled on the challenged conditions agree that 34 U.S.C. § 10102(a)(6) does not provide statutory authority for the Attorney General to impose Access and Notice Conditions on Byrne JAG grants.[193] This lack of authority is evident by a reading of the statute's plain language. Specifically, Congress placed the word "including" preceding "placing special conditions on all grants."[194] This phrasing indicates that, while this subsection intends to illustrate the kinds of power the Attorney General can exercise under this statute, it does not bestow upon the Attorney General the power to place any special conditions on any grants.[195] Additionally, as most circuits have articulated, the authority in this subsection limits the Assistant Attorney General to powers already vested in the Attorney General through a delegation of power or through the statute itself.[196]

It logically follows that none of the circuits found statutory

190 *New York*, 951 F.3d at 122 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

191 *New York*, 951 F.3d at 122.

192 *Id.* at 123.

193 City & Cnty. of S.F. v. Barr, 965 F.3d 753, 761 (9th Cir. 2020); City of Chicago v. Barr, 961 F.3d 882, 894 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 45 (1st Cir. 2020); *New York*, 951 F.3d at 101; City of Phila. v. Att'y Gen. of the U.S., 916 F.3d 276, 287–88 (3d Cir. 2019).

194 34 U.S.C. § 10102(a)(6) (2017).

195 *New York*, 951 F.3d at 102.

196 *City of Chicago*, 961 F.3d at 894; *City of Providence*, 954 F.3d at 45; *New York*, 951 F.3d at 101–02; *City of Phila.*, 916 F.3d at 287–88.

authorization through this particular statute. Allowing 34 U.S.C. § 10102(a)(6) to function as statutory authorization may have been the most dangerous precedent the circuits could have set. Interpreting this illustrative phrase in this manner would allow the Attorney General unfettered discretion to place any condition on federal grants. While other constitutional and statutory safeguards exist that could limit this power, the Attorney General could still use this authority to carry out the administration's regulatory agenda by leveraging funding upon which states and localities rely. States could not rely on commandeering to protect their funds from being held hostage in most situations because of the high standard required to show coercion.[197] If it were to be contingent upon these conditions, only states and localities supportive of the administration's policies would be eligible for federal funding.

There is no statutory authorization for the Notice and Access Conditions through the information reporting provision under 34 U.S.C. § 10153(a)(4). To justify the Notice Condition under this provision, the Second Circuit explained that sharing release information qualifies as "programmatic" information because the grant-funded programs will involve individuals who are removable from the United States.[198] This interpretation, however, conflicts with the usage of the word "program" throughout the Byrne JAG statute. As the First Circuit states, throughout the statute, "program" refers to the Byrne JAG grant program itself, along with the specific activities and programs the grant funds.[199] The Third Circuit's view further supports this proposition, holding that the information reporting provision only includes "information regarding the handling of federal funds and the programs to which those funds are directed."[200] The Ninth Circuit's precedent echoes a similar interpretation.[201]

The Second Circuit's interpretation, that release information qualifies as "programmatic information," stretches the phrase beyond what Congress intended, and deviates from the previous

197 *See* NFIB v. Sibelius, 567 U.S. 519, 578–80 (2012).

198 *New York*, 951 F.3d at 117.

199 *City of Providence*, 954 F.3d at 32.

200 *City of Phila.*, 916 F.3d at 285.

201 *See* City of L.A. v. Barr, 941 F.3d 931, 945 (9th Cir. 2019).

understanding of the term. To permit such a broad interpretation of this term would open the door to allowing the executive branch to effectively put in place policies that Congress has declined. This raises serious federalism concerns because the federal government could now have a troubling level of involvement in, and oversight of, state and local police. By allowing the executive branch to make these decisions, there would be a lack of democratic accountability, since Congress is elected to make these kinds of policy decisions.

There is no statutory authorization for the Notice and Access Conditions through the coordination provision under 34 U.S.C. § 10153(a)(5)(C). One contributing factor to this determination is that Congress chose to use past tense verbiage when stating that there "has been appropriate coordination with affected agencies."[202] This tense choice, as the First Circuit pointed out, supports the view that Congress intended for grant applicants to show that coordination with affected agencies had taken place prior to submission of the Byrne JAG grant application.[203] The Third Circuit articulates a similar, and logical, interpretation that applicants must certify "that there *was* appropriate coordination in connection with the grantee's application," and the subsection does not impose the requirement of ongoing coordination in matters unrelated to grant funding.[204]

The coordination provision does not act as statutory authorization, contrary to the Second Circuit's opinion.[205] There, the court interpreted that "appropriate coordination" did not only include conduct prior to grant submission, but also dictated future conduct.[206] The Second Circuit interpreted the subsection language to mean establishing a relationship that determines future conduct throughout the grant period by relying on the dictionary definition of "coordination."[207] The Second Circuit is

202 34 U.S.C. § 10153(a)(5)(C).

203 *City of Providence*, 954 F.3d at 33.

204 *City of Phila.*, 916 F.3d at 285.

205 *But see* New York v. U.S. Dep't of Just., 951 F.3d 84, 116, 121 (2d Cir. 2020).

206 *Id.* at 118.

207 *Id.* at 118–19.

correct in its determination that DHS would qualify as an "affected agency" for purposes of the subsection because programs funded by these grants do affect how DHS carries out its statutory duties.[208] However, while DHS may be an "affected agency," interpreting this provision for the future—beyond prior grant submissions—directly contradicts the past tense language Congress chose to utilize when drafting this statute.

Specifically, the usage of the Notice and Access Conditions to influence state and local immigration policy decisions adds complexity to an already complicated balance of power between the states and federal government when it comes to the area of immigration. The precedent of *NFIB v. Sibelius* and commandeering cannot be used to protect states because the amount of funding does not reach the point where a choice has been taken away from the states when deciding between the grant and its immigration policy.[209] Although the funding conditions cannot be seen as coercion by the courts, they are effectively having this result on jurisdictions depriving states and localities of making policy decisions for how they would like to handle non-citizens within its jurisdiction.[210]

While only one circuit court has upheld the usage of these conditions, there is reason to be concerned about the kind of precedent being set. Allowing the sharing of release information opens the door to requiring states to report to the federal government a broad array of information that pertains to day-to-day police operations. This raises serious federalism concerns because the federal government could now have a troubling level of involvement and oversight of state and local police relying on this precedent. While oversight and information sharing are necessary in some specific instances, too much oversight will remove state and localities' autonomy and freedom in determining how to best police its jurisdiction.[211]

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208 *Id.* at 119.

209 *See supra* notes 174, 199 and accompanying text.

210 *See* Daisy Contreras, Comment, *The End of "Sanctuary Cities" or the End of the Separation of Powers?: An Analysis of the Executive Branch's Misuse of the Spending Power to Crack Down on Sanctuary Cities*, 52 TEX. TECH. L. REV. 847, 871-72 (2020) (discussing how grant preferences effectively denied funding from sanctuary cities).

211 *See generally* Peter J. Boettke, Liya Palagashvili, & Ennio E. Piano,

B. *The Certification Condition is Statutorily Authorized*

While the Notice and Access Conditions are not statutorily authorized, the Certification Condition *does* have statutory authorization for the Attorney General to apply it to Byrne JAG grant funding. The provision under 34 U.S.C. § 10153(a)(5)(D) requires grant applicants to certify that they will comply with the Byrne JAG requirements and "all other applicable Federal laws."[212] As the Second Circuit explained, the statute allows the Attorney General to determine the form and specificity of grant applicants' certification.[213] This favors the interpretation that the Attorney General would have the power to specify which laws would qualify as "other applicable Federal laws." Other circuits opt for a narrow interpretation that would exclude Section 1373 because they believe this subsection refers to laws applying to states and cities in their capacities as grant recipients and not as independent entities.[214] As the Second Circuit points out, a plain reading of the statute's language better supports that an "applicable Federal law" can pertain to either the grant applicant or the grant being sought.[215]

Circuits have adopted a narrower interpretation due to other concerns. The Third Circuit asserts that a narrow construction is necessary to avoid implicating the canon against surplusage, which would allow all possible laws that could independently

Federalism and the Police: An Applied Theory of "Fiscal Attention", 49 ARIZ. ST. L. J. 907 (2017) (discussing the effect that federal oversight has on local police); Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Enforcement*, 19 ASIAN AM. L. J. 35 (2012) (discussing how post-9/11 federal policing initiatives affect local law enforcement).

212 34 U.S.C. § 10153(a)(5)(D).

213 *New York*, 951 F.3d at 105.

214 City of Chicago v. Barr, 961 F.3d 882, 899 (7th Cir. 2020); City of Phila. v. Att'y Gen. of the U.S., 916 F.3d 276, 289 (3d Cir. 2019); City of Providence v. Barr, 954 F.3d 23, 39 (1st Cir. 2020).

215 *New York*, 951 F.3d at 106.

apply to the grant applicant to qualify.[216] This concern, however, is not relevant because the usage of "applicable" limits the laws that could possibly apply to these grant applications and applicants.[217] Additionally, several circuits raise concerns that allowing this condition contravenes the formalistic nature of the Byrne JAG Program and have it, instead, function on a conditional basis.[218] While this is a valid concern, a grant that requires meeting certain conditions does not necessarily mean that the grant is no longer a formulaic grant. This argument is adequately addressed by the fact that formulaic grant applicants still have to satisfy requirements specific to the grant prior to receiving funding.[219]

Additionally, requiring grant recipients to certify compliance with Section 1373 would not prevent states and localities from implementing some sanctuary policies in their respective jurisdictions. Section 1373 only prohibits state and local governments from enacting policies that restrict information sharing "regarding the citizenship or immigration status" of undocumented immigrants.[220] This, however, does not require government officials to collect information about citizenship or immigration status, prohibit policies that restrict compliance with detainers, or prohibit policies that will limit information sharing related to criminal case information, release dates, or custody status.[221] Additionally, as seen in *City and County of San Francisco*, courts would be able to adopt either a broad or narrow interpretation of Section 1373 when determining whether a specific jurisdiction's policies conflict with the statute.[222]

C. *Greater Federalism Implications*

The precedent of upholding these challenged conditions could stretch much further than immigration policies. Allowing these conditions means that the federal government can put

216 *City of Phila.*, 916 F.3d at 289.
217 *New York*, 951 F.3d at 106.
218 *City of Phila.*, 916 F.3d at 290; *City of Providence*, 954 F.3d at 42.
219 *New York*, 951 F.3d at 107.
220 8 U.S.C. § 1373.
221 *See Sanctuary Policies: An Overview*, *supra* note 6, at 3.
222 *See* City & Cnty. of S.F. v. Barr, 965 F.3d 753, 761 (9th Cir. 2020).

pressure on states and localities to follow its agenda across a broad array of policy issues.

A possible parallel can be seen between the usage of funding conditions to influence immigration policy and states that have legalized marijuana.[223] The legalization of marijuana is an area of the law, similar to immigration, where tension exists between some states' policies and the federal government. During the Trump administration, there were concerns that Attorney General Sessions would withhold funding to states that had legalized marijuana, having a similar effect that the challenged conditions had on sanctuary jurisdictions, although there was ultimately no such action taken.[224] While the current tension between federal and state approaches to marijuana may be resolved during the Biden administration, if it is not, future administrations can possibly utilize funding conditions similar to the challenged conditions to influence changes in states' marijuana policies. The legalization of marijuana is just one example of the numerous possibilities in which grant funding conditions could be used to influence state and local policy decisions. Any area of the law where there is a conflict between states' policies and the executive branch could become vulnerable to this kind of manipulation. Issues such as abortion, energy policies, criminal justice reform, and, even more recently, vaccine-related regulations just scratch the surface of areas where the executive branch could decide to implement conditions that would put state funding in jeopardy if it does not follow the executive branch's approach.

The issue is not the usage of conditions on spending to influence state and local policy decisions but, rather, the fact that these are conditions put in place by the executive branch without having gone through Congress. Interpretations like the Second Circuit's in determining that the Notice and Access Conditions are statutorily authorized stretches the statute beyond what Congress originally intended. Allowing this kind of precedent places a power with the executive branch that could be easily

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[223] Arlen Gharibian, *Weed Whacking Through the Tenth Amendment: Navigating a Trump Administration Threat to Withhold Funding From Marijuana-Friendly States*, 52 LOY. L.A. L. REV. 275, 284 (2019).

[224] *Id.*

abused to push administration policies where Congress has chosen not to enact legislation.

While the usage of spending conditions to put pressure on sanctuary jurisdictions to make changes, on its face, would probably not be met with backlash from conservatives, the precedent this practice sets is one that should concern both sides of the aisle. As this section discusses, precedent to allow conditions like the challenged conditions has the potential to take away state autonomy in making policy decisions for its jurisdiction. Additionally, while these cases involved a Republican executive branch implementing conditions against jurisdictions with what are seen as liberal policies, the situation can be easily reversed when a Democrat is in control of the executive branch. In conclusion, while this line of cases may not concern conservatives, the greater federalism issues and possible expansions this kind of precedent would provide should cause them just as much concern as their Democratic colleagues.

V. CONCLUSION

The circuit split that has developed over the challenged conditions' legality focuses on whether the Attorney General has statutory authorization to implement these conditions. The First, Third, Seventh, and Ninth Circuits have all struck down the challenged conditions on the grounds that the Attorney General lacks the necessary authorization. The Second Circuit takes the alternative position and upholds all three conditions, finding authorization from the statute that outlines the duties and functions of the Assistant Attorney General. This Comment concludes that the Access and Notice Conditions are not statutorily authorized through either the "Duties and Functions of Assistant Attorney General" provision in 34 U.S.C. § 10102(a)(6), or the information reporting or coordination provisions of the Byrne JAG statute codified at 34 U.S.C. § 10153(a)(4) and (a)(5)(C), respectfully. These conditions overstep the federal government's role, as well as the Attorney General's power, raising serious federalism concerns. By contrast, the Certification Condition is statutorily authorized through 34 U.S.C. § 10153(a)(5)(D) and 8 U.S.C. § 1373 and qualifies as an "applicable Federal law." Upholding the Certification Condition

does not mean that sanctuary jurisdictions cannot continue to implement their policies, but rather requires courts to interpret exactly what kinds of immigration policies can exist in harmony with the condition.