No. 19-3358

IN THE

United States Court of Appeals for the Seventh Circuit

CITY OF EVANSTON, and
THE UNITED STATES CONFERENCE OF MAYORS,
Plaintiffs-Appellees,

v.

WILLIAM P. BARR,
Attorney General of the United States,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, No. 18-cv-4853 (Leinenweber, J.)

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Pursuant to Seventh Circuit Rule 26.1, *amici* state that the Constitutional Accountability Center is the only law firm that has appeared for *amici* in this Court.

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with the laws governing the Edward Byrne Memorial Justice Assistance Grant program, a grant program that provides federal financial assistance to states and localities to help them enhance public safety. As *amici* know, Congress established this program to provide states and localities with funding to determine what approaches to law enforcement and public safety will work best in their communities. The grant conditions at issue here undermine Congress's carefully considered plan in establishing this program, as well as fundamental constitutional principles that give Congress, not the executive branch, the power to make laws establishing conditions on the receipt of federal financial assistance. *Amici* have a strong interest in ensuring that the executive branch respects both the role of Congress in our Constitution's system of separation of powers and the laws that Congress has enacted.

A full listing of *amici* appears in the Appendix.

INTRODUCTION

The Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") program provides federal financial assistance to localities across the country to help

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

them enhance public safety as they see fit. Using a formula keyed to the jurisdiction's population and violent crime rate, Byrne JAG funds provide states and cities with financial assistance that they can use to "provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." 34 U.S.C. § 10152(a)(1); *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) ("'formula' grants," unlike discretionary grants, "are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula"). Reflecting the primary role of states and cities in fighting crime, the statute establishing the Byrne JAG program places minimal limits on the public safety and criminal justice uses to which funds may be allocated.

Despite that, the Attorney General sought to administratively mandate new funding conditions for all Byrne JAG awards in an effort to coerce local jurisdictions into adopting immigration policies preferred by President Trump. Significantly, Congress neither imposed these conditions, nor authorized the Attorney General to impose them.

As *amici* know from their experience in Congress, Congress designed the Byrne JAG program as a formula grant program to ensure that states and localities would have maximum flexibility in determining how best to improve public safety in their jurisdictions. The one-size-fits-all conditions that the Attorney General now

seeks to impose not only are at odds with the flexibility that was central to Congress's plan in establishing the grant program, but also would undermine public safety in jurisdictions like Evanston, Illinois by decreasing trust and cooperation between the police force and crime victims and witnesses in many neighborhoods.

To ensure that states and localities would have maximum discretion in determining how to use Byrne JAG funds, Congress limited the executive branch's authority over the program, giving the Attorney General only extremely narrow powers over its administration. None of these powers authorizes the Attorney General to add new substantive conditions on the award of grants, which is why the Attorney General here relies, in part, on a statute that does not concern either the Byrne JAG program or the Attorney General. And that statute, which imposes duties on the Assistant Attorney General of Justice Programs that are primarily related to information sharing, does not help the Attorney General either. Congress did not hide an elephant in that mousehole.

The Attorney General's attempt to administratively write into law new substantive Byrne JAG funding conditions not authorized by Congress—and, indeed, at odds with the laws Congress did pass—also runs afoul of fundamental constitutional principles. The Framers of our Constitution took pains to deny the executive branch the power to both make the law and then execute it, recognizing that such concentrated power "in the hands of a single branch is a threat to liberty." *Clinton v. City*

of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) ("The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government."). They also conferred on Congress the power of the purse, providing in the Constitution's Spending Clause that Congress has the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Under this Clause, Congress may "grant federal funds to the States" and impose conditions to "ensure that the funds are used by the States to 'provide for the . . . general Welfare' in the manner Congress intended." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) ("*NFIB*") (quoting U.S. Const. art. I, § 8, cl. 1); *see Chicago*, 888 F.3d at 277 ("the power of the purse rests with Congress"). The Framers thus gave the legislative power, including the authority to impose conditions on the receipt of federal financial assistance, to Congress, recognizing that "[m]oney is . . . considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions." *The Federalist No. 30*, at 188 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1961). In short, "[t]he United States Constitution exclusively grants the power of the purse to Congress, not the President." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225,

1231 (9th Cir. 2018) (citing U.S. Const. art. I § 9, cl. 7; *id.* art. I, § 8, cl. 1).

Here, the executive branch has turned a blind eye to these vital structural constitutional principles, hard-wired into our Constitution by the Framers in order to preserve liberty. Once again, it "falls to . . . the judiciary . . . to act as a check on . . . [the] usurpation of power." *Chicago*, 888 F.3d at 277. The Attorney General's actions cannot be squared with the Framers' design, which gave Congress the exclusive power of the purse. Nor can they be squared with the laws passed by Congress, which deny the Attorney General a freewheeling power to impose policy conditions on grant programs such as the Byrne JAG program. In sum, "[n]ot only has the Administration claimed for itself Congress's exclusive spending power, it has also attempted to coopt Congress's power to legislate." *San Francisco*, 897 F.3d at 1234. The judgment of the district court should be affirmed.

ARGUMENT

I. CONGRESS DID NOT GRANT THE ATTORNEY GENERAL THE POWER TO IMPOSE NEW GRANT CONDITIONS ON BYRNE JAG PROGRAM RECIPIENTS.

In enacting the Byrne JAG program, Congress sought to give state and local law enforcement "flexibility to spend [federal] money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005). To achieve that end, Congress gave states and local jurisdictions considerable discretion in determining how best to spend the funds that they were awarded

under the grant program. Congress of course retained the power to impose conditions on the receipt of grant funds when it concluded that some policy was sufficiently important to warrant conditioning the award of funds on compliance with that policy. *See, e.g.*, NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 104, 121 Stat. 2559, 2568-69 (codified at 34 U.S.C. § 40914(b)(2)) (providing for the withholding of up to 5 percent of Byrne JAG funds from states that fail to provide adequate records to the National Instant Criminal Background Check System); *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 125, 120 Stat. 587, 598-99 (codified at 34 U.S.C. § 20927); Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, § 2, 128 Stat. 2860, 2861 (codified at 34 U.S.C. § 60105(c)(2)). But Congress did not give the power to make that determination to the executive branch.

In fact, Congress did just the opposite, carefully limiting the Attorney General's role in administering the program. It granted the Attorney General a handful of specifically defined and exceedingly narrow powers, thereby ensuring that the executive branch would not impose constraints on award recipients that were at odds with Congress's carefully considered choice about how best to structure the program. Giving the Attorney General carte blanche to add new conditions on the receipt of Byrne JAG funding has no basis in the text of the Byrne JAG statute and "would render superfluous Congress's carefully prescribed conditions under which

the Attorney General can normally withhold Byrne JAG funding." *City of Los Angeles v. Barr*, 941 F.3d 931, 942 (9th Cir. 2019). Indeed, Congress's "express authorization for specific deviations from the formula" reflects that "Congress did not intend to give the DOJ the power to advance its own priorities by means of grant conditions." *City of Providence v. Barr*, No. 19-1802, 2020 WL 1429579, at *8 (1st Cir. Mar. 24, 2020).

In designing the Byrne JAG program, Congress conferred on the Attorney General the authority to choose the "form" of the application for funds, 34 U.S.C. § 10153(A), and the "certification" that grantees must sign, *id.* § 10153(A)(5); to impose reasonable reporting requirements, *id.* § 10153(A)(4); and to set "guidelines" to be used to conduct "program assessment[s]," *id.* § 10152(c)(1). Congress also gave the Attorney General the authority to permit, based on a finding of "extraordinary and exigent circumstances," jurisdictions to spend their Byrne JAG funds on certain "vehicles," "vessels," "aircraft," "luxury items," "real estate," "construction projects," or "similar matters." *Id.* § 10152(d)(2). Nothing in the Byrne JAG statute authorizes the Attorney General to impose additional conditions on grantees, as he has attempted to do here. *See City of Philadelphia v. Attorney Gen.*, 916 F.3d 276, 284 (3d Cir. 2019) ("Such authorization is nowhere to be found in the text of the statute."); *Chicago*, 888 F.3d at 284 ("None of those provisions grant the Attorney General the authority to impose conditions that require states or local governments

to assist in immigration enforcement, nor to deny funds to states or local governments for the failure to comply with those conditions."); *Providence*, 2020 WL 1429579, at *8 ("[T]he statutory formula . . . does not allow the DOJ to impose by brute force conditions on Byrne JAG grants to further its own unrelated law enforcement priorities.").[2]

The Attorney General effectively concedes as much. Instead of relying on the provision governing the Byrne JAG program, the Attorney General relies in large part on a separate provision—Section 10102—that does not even address the powers of the Attorney General, but instead sets forth the powers of the Assistant Attorney General for the Office of Justice Programs. Appellant's Br. 20-27 (discussing 34 U.S.C. § 10102(a)(6)). According to the Attorney General, even though Congress

[2] In a recent ruling, the Second Circuit explicitly disagreed with this Court's decision in *Chicago* and held that the Attorney General may require Byrne JAG recipients to assist in the enforcement of immigration laws pursuant to the Attorney General's authority to prescribe the form of a Byrne JAG application and to require certifications and reporting from grantees. *See New York v. U.S. Dep't of Justice*, Nos. 19-267, 19-275, 2020 WL 911417, at *23-27 (2d Cir. Feb. 26, 2020). The Second Circuit read the statute's grant of authority to choose the form of the application to confer on the Attorney General a sweeping power to write into law new conditions on grantees, ignoring both settled principles of statutory interpretation, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (finding it unlikely that Congress would have delegated sweeping authority "in so cryptic a fashion"), and federalism, *see Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 304 (2006) ("In a Spending Clause case, the key is . . . what the States are clearly told regarding the conditions that go along with the acceptance of those funds."). Tellingly, the Attorney General does not even press a similar argument in this case.

chose to sharply circumscribe the Attorney General's authority under the Byrne JAG program, it implicitly gave this Assistant Attorney General—a subordinate of the Attorney General—the sweeping power to add new substantive conditions to grants in a different subchapter of the Code. That is wrong. That statute, which gives the Assistant Attorney General the authority to "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," does not supersede Congress's decision to deny the Attorney General the authority to impose substantive constraints on Byrne JAG recipients. 34 U.S.C. § 10102(a)(6).

First, Section 10102 is located in an entirely different subchapter of the U.S. Code than the Byrne JAG program, and nothing in the text suggests that it governs the Byrne JAG program. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Second, the text of Section 10102 makes clear that it does not vest in the Assistant Attorney General lawmaking powers to impose new substantive conditions on grants. *See Chicago*, 888 F.3d at 284 ("The Attorney General's interpretation is contrary to the plain meaning of the statutory language."). Section 10102 merely

requires the Assistant Attorney General to deliver information about the state of the criminal justice system, *see* 34 U.S.C. § 10102(a)(1) (duty to "publish and disseminate information on . . . criminal justice systems"); *id.* § 10102(a)(3) (duty to "provide information . . . relating to criminal justice"), and to maintain relationships with stakeholders, government bodies, and experts in the field, *see id.* § 10102(a)(2) (duty to "maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice"); *id.* § 10102(a)(4) (duty to "maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice"); *id.* § 10102(a)(5) (duty to "coordinate and provide staff support to coordinate the activities of" various government offices). None of these obligations, which focus primarily on delivering information and maintaining contacts, authorizes the Assistant Attorney General to add new substantive grant conditions.

After imposing that list of specific obligations on the Assistant Attorney General, Section 10102 contains a catch-all provision stating that the Assistant Attorney General may "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." *Id.* § 10102(a)(6). The Attorney General's reliance on this provision is misplaced. To start, Section 10102(a)(6) does not specifically

confer any new authority on the Assistant Attorney General: it simply makes clear that the Assistant Attorney General may exercise such power "as may be vested . . . pursuant to this chapter or by delegation of the Attorney General," including "placing special conditions on all grants." *Id.* Nowhere in the U.S. Code has the Assistant Attorney General been vested with the power to make new law and add substantive grant conditions.

On top of that, the Attorney General's argument depends on reading the "special conditions" language in this subprovision in isolation from the rest of Section 10102. But "statutes 'should not be read as a series of unrelated and isolated provisions.'" *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)). Rather, courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015) (internal quotation marks and citations omitted); *United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). The sweeping lawmaking power the Attorney General claims differs in kind from the narrow information-sharing obligations imposed by Section 10102. *See Philadelphia*, 916 F.3d at 288 ("Given the ministerial nature of the powers in the preceding five subsections, we would be hesitant to find such a sweeping grant of authority in the sixth subsection absent clear language

to support that interpretation."); *Providence*, 2020 WL 1429579, at *13 (refusing to "interpret the sixth and final subsection to grant wide-ranging substantive authority to the Assistant AG to impose special conditions on Byrne JAG grants at his discretion when the neighboring provisions confer only ministerial responsibilities upon him"). Indeed, the Assistant Attorney General "is an unlikely recipient of such broad authority, given . . . the statute's otherwise careful allocation of decisionmaking powers." *Gonzales*, 546 U.S. at 274; *Chicago*, 888 F.3d at 287 (observing that the claim that "such sweeping authority" was "provided to the Assistant Attorney General by merely adding a clause to a sentence in a list of otherwise-ministerial powers defies reason"); *Los Angeles*, 941 F.3d at 943 n.14 (refusing to read § 10102(a)(6) to confer "broad power" in light of "the ministerial duties described in the rest of the section"); *New York,* 2020 WL 911417, at *11 (agreeing that "§ 10102(a)(6) does not itself confer authority on the Attorney General (or AAG) to impose the conditions here at issue").

Finally, the authority to place "special conditions," 34 U.S.C. § 10102(a)(6), on grants is not a lawmaking power to add new conditions; rather, it is a term of art that "refers to the power to impose tailored requirements when necessary, such as when a grantee is 'high risk.'" *Los Angeles*, 941 F.3d at 941; *Providence*, 2020 WL 1429579, at *15-16; *see* 28 C.F.R. § 66.12(a)(5) (DOJ regulations noting that, for high risk grantees, "special conditions and/or restrictions shall correspond to the high

risk condition and shall be included in the award"); OMB Circular No. A-102 (Revised), Grants and Cooperative Agreements with State and Local Governments, § 1(g) (Aug. 29, 1997) ("Agencies may impose special conditions or restrictions on awards to 'high risk' applicants/grantees . . . ."). The regulations applicable to other federal agencies are similar. *See* 7 C.F.R. § 550.10 (Department of Agriculture); 34 C.F.R. § 80.12 (Department of Education); 45 C.F.R. § 74.14 (Department of Health and Human Services). The Attorney General's argument cannot be squared with this settled, circumscribed meaning.

In sum, the Attorney General has sought to arrogate to himself the power to set conditions on federal funding in order to make all Byrne JAG recipients follow President Trump's preferred immigration policies. In doing so, he threatens not only to undermine the statute's carefully crafted flexibility and frustrate its goal of enhancing public safety, but also to impose new costs on Byrne JAG recipients, as the Department of Justice acknowledged in its solicitation form. *See* U.S. Dep't of Justice, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program Fiscal Year 2019 Local Solicitation* 24 (2019), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jaglocal19.pdf (advising that "[t]he reasonable costs . . . of complying with these conditions, including honoring any duly authorized requests from DHS that [are] encompassed by these conditions, will be allowable costs under the award"). The imposition of these new costs only

underscores how fundamentally the Attorney General's actions are at odds with Congress's plan in establishing the program. As noted earlier, Congress wanted to give states and localities financial support and maximum flexibility in determining how best to enhance public safety in their jurisdictions. But these new costs would require states and localities to prioritize the executive branch's policy preferences over their own and to redirect resources to support the executive branch's agenda. Congress carefully limited the Attorney General's powers over the grant program to prevent exactly that.[3]

Because Congress has not given the Attorney General the power to impose additional conditions on Byrne JAG recipients, the Attorney General's decision to do so does violence to Congress's deliberate and considered choices about how to structure this public safety grant program. It also does violence to fundamental constitutional principles, which give Congress—and not the executive branch—the power to make the very sorts of spending choices at issue here, as the next Section discusses.

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[3] The government also seeks to rely on 8 U.S.C. § 1373 and 8 U.S.C. § 1464, Appellant's Br. 31-33, but the district court recognized that superimposing § 1373 and § 1464 on the Byrne JAG process would impermissibly commandeer local authorities in contravention of binding Supreme Court precedent. *See* Appellant's Br. Short App. 14. Notably, neither § 1373 nor § 1464 explicitly applies to grantmaking, and applying these provisions to Byrne JAG funds contravenes Congress's choice to give localities broad discretion to use those federal funds in the manner that best supports local needs.

II. SEPARATION-OF-POWERS PRINCIPLES DO NOT PERMIT THE EXECUTIVE BRANCH TO IMPOSE NEW CONDITIONS ON RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE.

When the Framers wrote the Constitution more than two centuries ago, they took pains to deny the President the kind of sweeping powers the King of England had enjoyed. In the seventeenth and eighteenth centuries, British Kings had used their royal prerogatives both to legislate, and to tax and spend, without the approval of Parliament. *See, e.g.*, Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 272-77 (2009); Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1217-29 (2009). After centuries of struggle, Parliament succeeded in ending these prerogatives. The Bill of Rights of 1689 prohibited the various devices the King had used to raise money on his own, providing that "levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2, § 4 (Eng.). In 1782, Parliament eliminated the King's prerogative to determine how the "civil list"—the domestic budget—would be spent. Figley & Tidmarsh, *supra*, at 1229.

In the U.S. Constitution, "the prerogatives that had been discredited in England were naturally rejected by the Framers." Reinstein, *supra*, at 307. The Framers

gave the lawmaking power, including the power of the purse, to Congress, recognizing that "the Prerogatives of the British Monarch" were not "a proper guide in defining the Executive powers." 1 *The Records of the Federal Convention of 1787*, at 65 (Max Farrand ed., 1911). The U.S. Constitution "exclusively grants the power of the purse to Congress, not the President," *San Francisco*, 897 F.3d at 1231, and strictly limits the President's lawmaking powers, appreciating that "'[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty.'" *The Federalist No. 47*, *supra*, at 271 (James Madison) (quoting Montesquieu).

As the Supreme Court has explained, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *id.* at 655 (Jackson, J., concurring in the judgment and opinion of the Court) ("The Executive, except for recommendation and veto, has no legislative power."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."). Thus, "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585). These separation-of-powers principles "w[ere] designed to implement a fundamental

insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); *San Francisco*, 897 F.3d at 1232 ("[I]f 'the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.'" (quoting *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring))); *The Federalist No. 47*, *supra*, at 269 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

In the Spending Clause, the Framers denied the President the power of the purse, instead explicitly giving the power to tax and spend—which British Kings had claimed as a royal prerogative—to Congress. The Spending Clause is the first and one of the most sweeping powers the Constitution confers upon Congress, providing the power "[t]o 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. The Framers, who had witnessed the disastrous consequences of the failure of the Articles of Confederation to give such a power to Congress, called the power of the purse "an indispensable ingredient in every constitution," *The Federalist No. 30*, *supra*, at 156 (Alexander Hamilton); *see The Federalist No. 31*, *supra*, at 163 (Alexander Hamilton) ("[R]evenue is the essential engine by which the means of answering the national exigencies must be

procured . . . ."); Akhil Reed Amar, *America's Constitution: A Biography* 106 (2005) (explaining that under the Articles, Congress could raise money only by making requests to the States, but "State governments had often failed to provide the funds that the Confederation demanded of them," and that "[w]ithout a strong revenue stream, vital federal functions were withering"). The Framers thus gave Congress power over "all those matters which will call for disbursements out of the national treasury." *The Federalist No. 30*, *supra*, at 156 (Alexander Hamilton); *The Federalist No. 78*, *supra*, at 433 (Alexander Hamilton) ("The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.").

Because the Framers gave the Spending Clause power to Congress alone, and because they strictly limited the President's lawmaking powers, the executive branch has no power to dictate what the federal government spends money on, or the conditions it attaches to those expenditures. "Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals." *San Francisco*, 897 F.3d at 1235. Rather, it is Congress—and Congress alone—that has broad power to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see NFIB*, 567 U.S. at 576 ("Congress may use this power to grant federal funds to the States, and may condition such a grant upon the

States' 'taking certain actions that Congress could not require them to take.'" (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999))); *Chicago*, 888 F.3d at 283 ("the Executive Branch does not otherwise have the inherent authority . . . to condition the payment of such federal [grant] funds on adherence to its political priorities"); *San Francisco*, 897 F.3d at 1234 (the executive branch may not "claim[] for itself Congress's exclusive spending power").

Because the power to "fix the terms on which [Congress] shall disburse federal money to the States," *Pennhurst*, 451 U.S. at 17, belongs to Congress alone, the executive cannot change Congress's decision, except by persuading Congress to amend the laws that it has enacted. It is well settled that "[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (refusing to "cloth[e] the President with a power entirely to control the legislation of congress"); *see Clinton*, 524 U.S. at 447 (the President lacks "unilateral power to change the text of duly enacted statutes"). In other words, the executive branch cannot make an end-run around the "single, finely wrought," "step-by-step, deliberate and deliberative process," *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983), the Framers prescribed for lawmaking. To license such executive lawmaking "would deal a severe blow to the Constitution's separation of powers." *Util. Air Regulatory Grp. v. EPA*,

573 U.S. 302, 327 (2014).

In sum, while the President's duty to "execut[e] the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress . . . it does not include a power to revise . . . clear statutory terms to suit [his] own sense of how [a] statute should operate." *Id.* Yet that is exactly what the Attorney General has attempted to do here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: April 27, 2020

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Warren, Elizabeth
Senator of Massachusetts

Van Hollen, Chris
Senator of Maryland

Merkley, Jeff
Senator of Oregon

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I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Elizabeth B. Wydra
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on April 27, 2020.

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/s/ Elizabeth B. Wydra
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