19-267(L)

19-275(CON)

In the United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, STATE OF WASHINGTON, COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF VIRGINIA, STATE OF RHODE ISLAND, CITY OF NEW YORK,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

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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.

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with 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. The grant conditions at issue here undermine Congress's plan in establishing this program, as well as fundamental constitutional principles that give Congress, not the executive branch, the power to impose conditions on the receipt of federal funding. *Amici* have a strong interest in ensuring that the executive branch respects Congress's role in our 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 them enhance public safety as they see fit. Using a formula keyed to the jurisdiction's population and violent crime rate, Byrne JAG awards provide states and cities with financial assistance to "provide additional personnel, equipment,

[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.

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 Byrne JAG Act places minimal limits on the public safety and criminal justice uses to which funds may be allocated.

Despite that, the Attorney General sought to mandate new funding conditions for every Byrne JAG award in order to coerce localities into adopting immigration policies preferred by President Trump. Significantly, as the First, Third, Seventh, and Ninth Circuits have all held, Congress neither imposed these conditions, nor authorized the Attorney General to impose them. *City of Chicago v. Barr*, Nos. 18-2885, 19-3290, 2020 WL 2078395 (7th Cir. Apr. 30, 2020) (*Chicago II*); *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City of Philadelphia v. Attorney Gen.*, 916 F.3d 276 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018). A panel of this Court, however, disagreed. The panel's decision makes two fundamental errors, and this case should be reheard en banc to correct them.

First, the panel's decision cannot be squared with the Act's text and structure, or with Congress's plan in passing it. The panel's ruling effectively converts a

formula grant program designed to give states and local governments maximum flexibility into a discretionary grant program in which the executive branch may freely add conditions that comport with its own view of wise policy.

As *amici* know, Congress designed the Byrne JAG program as a formula grant to ensure that states and localities would have maximum flexibility in determining how best to improve public safety in their jurisdictions. To that end, 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 remotely authorizes the Attorney General to add new substantive conditions on the award of grants.

Second, the panel's ruling contravenes fundamental constitutional principles of separation of powers and federalism. In the Spending Clause, our Constitution confers the exclusive power of the purse on Congress, not the executive branch. 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) (quoting U.S. Const. art. I, § 8, cl. 1). The Supreme Court has held that if Congress wishes to impose conditions on the receipt of federal financial assistance, it must do so in the text of the statute to give state and local governments fair notice. *See Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S.

291, 304 (2006). By permitting the Attorney General to add new conditions to coerce state assistance in the enforcement of federal immigration laws, the panel's ruling arrogates to the executive Congress's exclusive power of the purse and denies states and localities the fair notice of grant conditions the law demands.

The petition for rehearing en banc should be granted to correct these errors.

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 chose to create a formula grant program that gave states and local jurisdictions considerable discretion in determining how best to spend the funds that they were awarded. 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)) (withholding up to five percent of Byrne JAG funds to 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, it did just the opposite, carefully limiting the Attorney General's role in administering the program.

Congress 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 cannot be squared with the text of the Byrne JAG Act, would "transform the highly-structured formula grant into one that vested total [discretion] in the Attorney General to impose barriers to the grant," *Chicago II*, 2020 WL 2078395 at *17, and "would render superfluous Congress's carefully prescribed conditions under which the Attorney General can normally withhold Byrne JAG funding." *Los Angeles*, 941 F.3d at 942. 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." *Providence*, 954 F.3d at 35.

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 relating to "data, records, and information (programmatic and financial)," *id.* § 10153(A)(4); and to set "guidelines" to conduct "program assessment[s]," *id.* § 10152(c)(1). Congress also gave the Attorney General the authority to permit jurisdictions to spend their Byrne JAG funds on certain "vehicles," "vessels," "aircraft," "luxury items," "real estate," "construction projects," or "similar matters" in "extraordinary and exigent circumstances." *Id.* § 10152(d)(2). Nothing in the Byrne JAG statute authorizes the Attorney General to impose additional conditions on grantees. *See Philadelphia*, 916 F.3d at 284; *Chicago*, 888 F.3d at 284; *Providence*, 954 F.3d at 32, 34-35.

Ignoring the Act's text and structure, the panel held that the Attorney General could force state and local governments to adopt immigration policies preferred by the executive branch—such as requiring states to provide federal agents access to state correctional facilities and to notify the federal government when certain immigrants are released from state custody—as a funding condition pursuant to the Act's grant of authority to impose reasonable reporting requirements relating to "data, records, and information (programmatic and financial)," 34 U.S.C. § 10153(A)(4), and to require that "there has been appropriate coordination with affected agencies," *id.* § 10153(A)(5)(C). These holdings "stretch the statutory

language beyond hope of recognition" and "destabilize the statutory formula." *Providence*, 954 F.3d at 32, 34. "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).

In designing the Byrne JAG Act as a formula grant program, Congress left states and localities free to decide how best to enhance public safety. Nowhere in the Act did Congress empower the Attorney General to override state policy choices regarding how to best ensure public safety. By misconstruing the Act's language and ignoring its design, the panel's decision transforms a formula grant program designed to permit states to function as laboratories of experimentation, *see New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), into one that forces states to adopt federal policies to obtain funding. This undercuts the congressional plan to establish a formula grant program. If the Attorney General has the authority to foist the President's preferred federal immigration policy on states as a condition of funding, "Byrne JAG would no longer function as a formula grant program." *Providence*, 954 F.3d at 42.[2]

[2] The panel decision also upheld the Attorney General's requirement that localities comply with 8 U.S.C. § 1373. But notably, § 1373 does not explicitly apply to grantmaking, and applying it to Byrne JAG funds contravenes Congress's considered choice to establish a formula grant program and give localities broad discretion to use federal funds in the manner that best supports local needs.

Further, because the panel's decision relied on statutory language that is common to federal statutes governing grant programs, the ruling threatens to confer on executive branch administrators new sweeping powers to coerce states in other contexts as well. *See, e.g.*, 34 U.S.C. § 10702(2) (requiring grantees under the Comprehensive Opioid Abuse program to provide an "assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require"); *id.* § 10552(a)(3) (requiring grantees seeking funding for school security to provide an "assurance that the applicant shall maintain and report such data, records, and information (programmatic and financial) as the COPS Director or the BJA Director may reasonably require"); *id.* § 10614(d)(5) (requiring grantees seeking funding for drug courts to "certify that there has been appropriate consultation with all affected agencies and that there will be appropriate coordination with all affected agencies in the implementation of the program"); 42 U.S.C. § 1396a(a)(6) (state plan for Medicaid block grant must provide that State "will make such reports, in such form and containing such information, as the Secretary [of Health and Human Services] may from time to time require").

In sum, the panel's ruling is incompatible with the Act's text, structure, and design. It allows the Attorney General to set conditions on federal funding to make all Byrne JAG recipients follow the President's preferred immigration policies. This

not only undermines the statute's carefully-crafted design and frustrates its goal of enhancing public safety, it does violence to fundamental constitutional principles, as the next Section discusses.

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 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). Parliament eventually ended these prerogatives. The Bill of Rights of 1689 prohibited "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." 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 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). In the Spending Clause, the Framers denied the President the power of the purse. Instead, the Constitution gives Congress exclusive power over "all those matters which will call for disbursements out of the national treasury." *The Federalist No. 30*, at 156 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1961).

Because the Framers gave the Spending Clause power to Congress, it is Congress—and Congress alone—that has 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). "The 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), or "to revise . . . clear statutory terms to suit [his] own sense of how [a] statute should operate," *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327-28 (2014). Yet that is exactly what the executive branch has attempted to do here.

The Attorney General's action also does violence to constitutional principles

of federalism. Spending Clause legislation must give state and local governments fair notice of conditions on the receipt of federal financial assistance in the text of the congressional enactment. "[W]hen Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Arlington*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17). That was clearly not the case here, and thus state and local governments were denied the fair notice of grant conditions that only Congress can provide.

The panel erred in failing to recognize that the Attorney General's actions are at odds with these fundamental constitutional principles.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: May 7, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 2,547 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 7th day of May, 2020.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: May 7, 2020

/s/ Brianne J. Gorod
Brianne J. Gorod

APPENDIX:
LIST OF *AMICI*

U.S. Senate

Blumenthal, Richard
Senator of Connecticut

Booker, Cory
Senator of New Jersey

Durbin, Richard J.
Senator of Illinois

Hirono, Mazie K.
Senator of Hawaii

Harris, Kamala D.
Senator of California

Klobuchar, Amy
Senator of Minnesota

Markey, Edward J.
Senator of Massachusetts

Menendez, Robert
Senator of New Jersey

Merkley, Jeffrey A.
Senator of Oregon

Udall, Tom
Senator of New Mexico

Warren, Elizabeth
Senator of Massachusetts

Whitehouse, Sheldon
Senator of Rhode Island

U.S. House of Representatives

Nadler, Jerrold
Representative of New York

Lofgren, Zoe
Representative of California

Barragán, Nanette Diaz
Representative of California

Bass, Karen
Representative of California

Brownley, Julia
Representative of California

Cárdenas, Tony
Representative of California

Clarke, Yvette D.
Representative of New York

Davis, Susan A.
Representative of California

Deutch, Theodore E.
Representative of Florida

Engel, Eliot L.
Representative of New York

Escobar, Veronica
Representative of Texas

Eshoo, Anna G.
Representative of California

Espaillat, Adriano
Representative of New York

García, Jesús G. "Chuy"
Representative of Illinois

Garcia, Sylvia R.
Representative of Texas

Gomez, Jimmy
Representative of California

Haaland, Deb
Representative of New Mexico

Johnson, Henry C. "Hank" Jr.
Representative of Georgia

Lee, Barbara
Representative of California

Lowenthal, Alan
Representative of California

Maloney, Carloyn B.
Representative of New York

Meng, Grace
Representative of New York

Holmes Norton, Eleanor
Delegate of District of Columbia

Ocasio-Cortez, Alexandria
Representative of New York

Pallone, Frank Jr.
Representative of New Jersey

Raskin, Jamie
Representative of Maryland

Schakowsky, Jan
Representative of Illinois

Schiff, Adam
Representative of California

Serrano, José E.
Representative of New York

Smith, Adam
Representative of Washington

Soto, Darren
Representative of Florida

Thompson, Mike
Representative of California

Vargas, Juan
Representative of California

Velázquez, Nydia M.
Representative of New York