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Comment

CATCH ME IF YOU CAN: THE FEDERAL GOVERNMENT'S LONG-WINDED CHASE TO ROUND UP IMMIGRANTS AND DEFUND SANCTUARY CITIES

MONIKA CHAWLA*

“We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.”¹

I. LACING UP ITS SHOES: THE GOVERNMENT BEGINS ITS HOT PURSUIT OF UNDOCUMENTED IMMIGRANTS

Imagine a group of Spanish-speaking immigrants congregated at their local church in Manhattan.² As they commence their usual prayers, enjoying the respite from their daily hurdles, two federal immigration agents appear at the door.³ Suddenly, their daily prayer has turned into an experience saddled with fear and uncertainty.⁴ For the undocumented immigrants, participating in communal daily prayers raises the possibility of being detained—a drastically different reality than that of an average churchgoer.⁵ Today, millions of other undocumented immigrants are at

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1. *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018).

2. See Liz Robbins, *In a “Sanctuary City,” Immigrants Are Still at Risk*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/nyregion/sanctuary-cities-immigrants-ice.html> [<https://perma.cc/Z8FY-MJV3>] (describing a congregation at Saint Peter’s Church located in Midtown Manhattan providing shelter for Spanish-speaking immigrants).

3. See *id.* (recounting story of Reverend Amandus J. Derr, a pastor at Saint Peter’s Church, who claimed he escorted two agents from United States Immigration and Customs Enforcement (ICE) out of his church during a congregation).

4. See *id.* (noting visit by ICE agents left members of congregation, particularly undocumented immigrants, worried about their safety and future). As an effort to track down undocumented immigrants in recent years, ICE agents have appeared in New York’s courthouses, individuals’ homes, and in this instance, a church. See *id.*

5. See *id.* (noting starkly different life paths faced by U.S. citizens and undocumented immigrants in event of run-in with law enforcement). Undocumented immigrants are not guaranteed safety merely by living in sanctuary cities, because ICE agents do not require permission from state police to exercise full discretion in arresting immigrants. See *id.* See generally *City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 281 (3d Cir. 2019) (noting how ICE uses tools

risk of detainment and deportation under the Trump Administration's strict enforcement of federal immigration policies.⁶

Over the last few years, the Administration has taken a hardline position on immigration enforcement, threatening mass deportation, enacting travel bans, and directing the Department of Justice (DOJ) to aggressively enforce federal immigration laws.⁷ As a result, immigrant communities across the nation live in constant apprehension.⁸ Undocumented immigrants are often victims of and important witnesses to crimes, but fear that approaching local authorities will result in deportation.⁹ To reassure immigrant residents of their safety, jurisdictions across the United States have declared or reaffirmed themselves "sanctuary cities" and announced their refusal to cooperate with the government's strict immigration enforcement procedures.¹⁰

such as immigration detainers to facilitate cooperation between the state and national governments). The court outlined the procedure for arresting undocumented immigrants as such:

Once ICE identifies a removable alien who is in state or local custody, it cannot simply wrest that individual from custody. Instead, it may issue a detainer, which serves to "advise another law enforcement agency that [it] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien."

Id. (quoting 8 C.F.R. § 287 (2019)).

6. *See generally* Susana A. Sandoval Vargas, *Sanctuary Jurisdictions: In a System of Checks and Balances, Who Has the Authority to Defeat Them?*, 14 SEVENTH CIR. REV. 186, 186–87 (2018) (noting that while President Trump only vowed to deport all "bad hombres," or Mexican immigrants with serious criminal records including criminals, drug dealers, and rapists, ultimately entire immigrant communities, including non-criminals, are affected by "[d]eportation, prolonged detentions, denaturalization, and family separation").

7. *See City of Philadelphia*, 916 F.3d at 281 n.2 (explaining how immigration enforcement falls primarily under the responsibility of the Department of Homeland Security (DHS), which utilizes a variety of methods to enforce federal immigration policy). Working under the DHS, ICE is the law enforcement agency that identifies, apprehends, and removes illegal immigrants from the United States. *See id.* *See generally* Ilya Somin, *Reclaiming and Restoring Constitutional Norms: Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1247–48 (2019) (stating Trump Administration's efforts to engage local governments in enforcement of federal immigration policy has ultimately resulted in several legal challenges).

8. *See City of Chicago v. Sessions*, 888 F.3d 272, 280 (7th Cir. 2018) (finding that undocumented immigrants who are witnesses to or victims of crimes may avoid contacting local police because "they fear that reporting will bring the scrutiny of the federal immigration authorities to their home," putting themselves or their undocumented family members at risk).

9. *See id.* (expanding on how fear of immigration authorities is a source of frustration for many sanctuary jurisdictions, as lack of cooperation and assistance with local authorities hinders local law enforcement efforts and perpetuates repeat offenses by criminals with knowledge that their crimes will rarely be reported in immigrant communities).

10. *See* H. Robert Baker, *A Brief History of Sanctuary Cities*, TROPICS META (Feb. 2, 2017), <https://tropicsofmeta.com/2017/02/02/a-brief-history-of-sanctuary-cities/> [https://perma.cc/E8CR-DR8C] (noting "sanctuary city" became a relevant

Sanctuary city is a broad term used to describe jurisdictions with “immigrant-friendly” policies in place to effectively limit cooperation with federal authorities on immigration-related matters.¹¹ Though this term has entered common usage in the current political climate, sanctuary jurisdictions are far from a new phenomenon.¹² They emerged in the early 1980s to protect refugees fleeing civil wars in El Salvador and Guatemala.¹³ Since then, many cities continue to support and protect immigrant communities within their borders, particularly immigrants with strong ties to the community and no criminal records.¹⁴ As sanctuary jurisdictions limit the enforcement of federal immigration laws, they have become a prime

term when a Los Angeles pastor deemed his church a “sanctuary” for destitute and undocumented immigrants). The term evolved to include cities that openly pushed back against federal immigration policies under the Bush and Obama Administrations. *See id.* More than 300 jurisdictions across the country, including cities and counties, currently have sanctuary policies in place. *See id.*; *see also* Judith McDaniel, *The Sanctuary Movement, Then and Now*, RELIGION & POL. (Feb. 21, 2017), <https://religionandpolitics.org/2017/02/21/the-sanctuary-movement-then-and-now/> [<https://perma.cc/79PL-SUR2>] (discussing how Los Angeles informally became a sanctuary city in 1979 when it filed a police order preventing police from inquiring about the immigration status of residents). San Francisco is another city that openly declared itself a sanctuary city and even filed a lawsuit against the Trump Administration upon issuance of an executive order that threatened to withdraw federal funds from sanctuary jurisdictions. *See id.*

11. *See* McDaniel, *supra* note 10 (defining sanctuary cities). *See generally* Somin, *supra* note 7, at 1247 (providing further background information about sanctuary cities).

12. *See generally* McDaniel, *supra* note 10 (describing history of the “Sanctuary Movement”).

13. *See id.* (recounting advent of Sanctuary Movement, which formed to offer protection to undocumented refugees fleeing Central American wars). During the 1980s, churches in California and Arizona assisted and housed survivors of mass killings in El Salvador and Guatemala, who crossed the border from Mexico into the United States. *See id.* After the U.S. government announced it would not allow refugees fleeing these killings to file for asylum and instead would return them to their respective countries, religious groups in California and Arizona declared themselves “sanctuaries” and began building communities to house the refugees. *See id.* Over time, churches, synagogues, mosques, and Quaker meeting houses began to function as sanctuaries and refused to let immigration authorities enter their “sacred spaces” to make arrests. *See id.*

14. *See* Tal Kopan, *What Are Sanctuary Cities, and Can They Be Defunded?*, CNN POL. (Mar. 26, 2018, 3:40 PM), <https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> [<https://perma.cc/S863-TESA>] (observing different ways cities have stood up for immigrant communities). Los Angeles does not allow its police to stop people solely to determine their immigration status. *See id.* Chicago and San Francisco have developed city funds to provide legal services to both documented and undocumented immigrants. *See id.* Chicago has also created a “welcoming city ordinance,” which provides that it will not cooperate with immigration detentions or investigate the citizenship status of residents unless it is mandated by a law or court. *See id.*; *see also* CHI., ILL., MUN. CODE § 2-173-005(c) (2016). Additionally, a dozen other states and the District of Columbia allow undocumented immigrants to obtain driver’s licenses. *See id.* (detailing certain jurisdictions’ specific protection policies).

target of the Trump Administration.¹⁵ On January 25, 2017, shortly after his inauguration, President Trump issued Executive Order 13,768, titled “Enhancing Public Safety in the Interior of the United States” (the Executive Order), which declared jurisdictions that willfully refuse to share the immigration and citizenship status of residents were ineligible “to receive [f]ederal grants, except as deemed necessary for law enforcement purposes.”¹⁶ The order authorized the Secretary of the Department of Homeland Security (DHS) to designate certain jurisdictions as sanctuary cities.¹⁷ It also directed the Attorney General to withhold DOJ-sponsored funds to sanctuary cities, including any cities that hindered the enforcement of any federal laws.¹⁸ The County of Santa Clara, however, challenged the Executive Order three months after its release, and the Ninth Circuit permanently enjoined the order on the grounds that tying federal aid to immigration policy violated the constitutional separation of powers.¹⁹

15. See Vargas, *supra* note 6, at 186 (noting that immigration enforcement and deportation of immigrants with criminal records were prioritized by Trump Administration); see also Somin, *supra* note 7, at 1247 (noting one of the policies of President Trump’s agenda was to challenge cities failing to enforce federal immigration laws).

16. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (declaring sanctuary jurisdictions ineligible to receive federal grants, except as Attorney General deems necessary). Executive Order 13,768 provides the Attorney General can take appropriate enforcement actions against any jurisdiction that willfully refuses to comply with 8 U.S.C. § 1373. See *id.* (detailing government’s attempt to prevent information-sharing regarding immigration and citizenship status among government officials); see also Caitlin Yilek, *Trump “Sanctuary Cities” Executive Order Is Unconstitutional, U.S. Appeals Court Rules*, WASH. EXAMINER (Aug. 1, 2018), <https://www.washingtonexaminer.com/news/us-appeals-court-trump-sanctuary-cities-executive-order-unconstitutional> [<https://perma.cc/3FPL-78B7>] (discussing how Executive Order was part of Trump Administration’s efforts to crack down on sanctuary cities and jurisdictions that offer protections to illegal immigrants). See generally Somin, *supra* note 7, at 1250–51 (discussing contents of Executive Order No. 13,768).

17. See Somin, *supra* note 7, at 1251 (enumerating the powers of the Secretary of the DHS).

18. See *id.* (enumerating Attorney General’s power to enforce Executive Order).

19. *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017), *aff’d sub nom, City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (holding that conditioning receipt of federal funds on active participation in federal immigration enforcement violates constitutional prohibition of federal commandeering”); *City & County of San Francisco*, 897 F.3d at 1225 (affirming district court’s injunction). The Ninth Circuit explained that “[a]bsent [any] congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to [further] its own policy goals.” See *id.* at 1235. See generally P.J. D’Annunzio, *Federal Appeals Court Ruling a Win for Philadelphia’s Sanctuary City Policy*, LEGAL INTELLIGENCER (Feb. 15, 2019, 11:08 AM), <https://www.law.com/thelegalintelligencer/2019/02/15/federal-appeals-court-affirms-philadelphias-sanctuary-city-policy/?slreturn=20190814205247> [<https://perma.cc/M2P3-FKXG>] (discussing how Northern District of California judge blocked enforcement of President Trump’s Executive Order, which barred federal funds from sanctuary cities).

Despite this holding, the Attorney General continued furthering the policy goals of the Trump Administration by adding new conditions to applications for law enforcement grants, notably the Edward Byrne Memorial Justice Assistance Grant (the Byrne Grant).²⁰ Sanctuary cities recently challenged both President Trump's Executive Order and the DOJ's conditions on Byrne Grant funds, successfully arguing both actions were unconstitutional uses of power.²¹ Courts addressed the issue, by and large holding that the Executive Order violates the Tenth Amendment and the Spending Clause.²² They held that the power to condition federal grants is strictly under the purview of Congress, and that former Attorney General Jeff Sessions exceeded his statutory authority by imposing the conditions in his capacity as Attorney General.²³

In July 2019, the Ninth Circuit deviated from what was slowly becoming a trend of federal courts protecting sanctuary cities and their access to federal funds.²⁴ In evaluating applicants for the Community Oriented Po-

20. See *City of Chicago v. Sessions*, 888 F.3d 272, 276–80 (7th Cir. 2018) (holding Attorney General lacked authority to impose “notice” and “access” conditions on City of Chicago’s application for Byrne Grant). The Byrne Grant provides state and local law enforcement agencies with a generous amount of funds for personnel, equipment, training, and other expenses. See *id.* at 278 (noting that Byrne Grant is “the primary provider of federal criminal justice funding to state and local governments,” and has been used to acquire body cameras and police vehicles, and fund community programs aiming to reduce violence); see also Somin, *supra* note 7, at 1253 (noting that Byrne Grant provides large amounts of assistance to state and local law enforcement agencies, granting approximately \$275 million in 2016).

21. See Vargas, *supra* note 6, at 188–92 (arguing that sanctuary justifications have continued to prevail despite the Attorney General’s enactment of new conditions to federal funds).

22. See *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *1, *3 (W.D. Wash. Oct. 19, 2017) (holding unconstitutional President Trump’s order conditioning federal funds to sanctuary cities under Spending Clause). The United States District Court for the Western District of Washington noted in its opinion that, “[t]he Spending Clause authorizes Congress to ‘lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.’” See *id.* at *8 (quoting U.S. CONST. art. I, § 8, cl. 1). The court further explained that, “[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *Id.* at *8 (internal quotation marks omitted) (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). For a further discussion of the facts of *City of Seattle*, see *infra* notes 58–60 and accompanying text.

23. See, e.g., *City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 279 (3d Cir. 2019) (enjoining enforcement of new conditions imposed by Attorney General because Congress never granted Attorney General this power).

24. See *City of Los Angeles v. Barr*, 929 F.3d 1163, 1169 (9th Cir. 2019) (holding that DOJ had authority to withhold grants from sanctuary cities over their refusal to work with federal immigration enforcement authorities, and that factors used in evaluating grant applicants did not violate Spending Clause or Tenth Amendment).

licing Services Grant (COPS Grant), the DOJ used a points system that prioritized cities expressing an interest in working with federal immigration enforcement authorities.²⁵ Specifically, the Ninth Circuit found constitutional the DOJ's use of the points system and preferential treatment in the competitive application process.²⁶ As such, the question remains as how the conditions placed on the COPS Grant were different, if at all, from those imposed on the Byrne Grant.²⁷

This Comment argues that the Ninth Circuit's decision to uphold the COPS Grant conditions should not be persuasive in future litigation involving similar DOJ grants because it allows the DOJ to effectively coerce applicants into complying with federal immigration policies—a practice that other circuits have found violates the separation of powers.²⁸ The policy of conditioning funds on compliance with federal immigration law through a points system violates the Spending Clause and it is contrary to recent holdings of many federal courts.²⁹ Part II of this Comment discusses the background of sanctuary city litigation and describes the types of conditions placed on federal funding, noting the similarities between the Byrne and COPS grants. Part III compares the analysis of federal cases that have considered the DOJ's conditions placed on the Byrne and COPS grants. Part IV critically assesses the points system employed in the COPS Grant application, and advocates for courts to abandon the Ninth Circuit's reasoning in assessing grant conditions for sanctuary cities. Finally, Part V discusses the impact of these rulings, particularly the Ninth Circuit's decision, on undocumented immigrants and the future of sanctuary cities.

25. *See id.* at 1183 (Wardlaw, J., dissenting) (discussing history and purpose of Community Oriented Policing Services (COPS) grant program, delegated through the DOJ). Congress's purpose in enacting the COPS Grant program was to "improve communication and cooperation . . . between police officers and the communities they serve," and to ultimately increase the number of police officers on the streets. *See id.* Specifically, COPS Grant funds are used by police departments to rehire officers who were laid off due to budgetary concerns and to hire and train replacement officers. *See id.*

26. *See id.* at 1182 (upholding DOJ's preferential treatment in granting community policing funds to cities that cooperate with immigration authorities and agree to Certification of Illegal Immigration Cooperation). The Certification of Illegal Immigration Cooperation required the city to ensure that the DHS personnel had access to its jail records and detention facilities, the ability to meet with anyone classified as an alien, and advance notice regarding the release of an alien in custody. *See id.* at 1171–72.

27. *See id.* at 1194 (Wardlaw, J., dissenting) (recognizing Seventh Circuit's explanation of how federal immigration enforcement, such as raids, negatively affect "local trust-building" that COPS grant seeks to promote because immigrants may attribute these activities to local police and ultimately start to fear them).

28. *See* Toni M. Massaro & Shafali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 15–16 (2018) (discussing how local governments should use fundamental constitutional principles as deterrents against abusive federal and state power, which in turn promotes checks and balances and fair, democratic systems).

29. For a further discussion of constitutional issues arising from conditions on federal grants, see *infra* notes 141–77 and accompanying text.

II. HIT THE GROUND RUNNING: THE BEGINNINGS OF SANCTUARY CITY LITIGATION

Congress sought to indirectly regulate sanctuary cities and immigration policy far before President Trump issued Executive Order 13,768.³⁰ In 1996, Congress enacted 8 U.S.C. § 1373, a statute encouraging communication between state and local governments and the federal government regarding an individual's immigration status.³¹ While the statute was intended to facilitate information sharing, it did not explicitly require collaboration between different levels of government.³² At bottom, the statute prohibits local officials from withholding information relating to a resident's immigration status when officials specifically request that information.³³ However, the statute does not explicitly *mandate* constant interaction and information-sharing with federal immigration officials.³⁴ It makes no mention of federal funds being conditioned on compliance; nor does it warn against any potential consequences of violation.³⁵

30. See 8 U.S.C. § 1373 (2018) (providing communication guidelines between government agencies and Immigration and Naturalization Service); see also Exec. Order No. 13,768, *supra* note 16, at 8799 (relying on 8 U.S.C. § 1373). See generally Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today's Immigration Problem*, Vox (Mar. 17, 2020), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> [https://perma.cc/L8TZ-RX6S] (noting President Clinton signed a bill in 1996 known as the "Illegal Immigration Reform and Immigration Responsibility Act," which restricted the rights of people who stayed in the United States unlawfully for a period of time). Among its other provisions, the bill made immigrants easily eligible for deportation based on minor criminal offenses, including nonviolent crimes. See *id.*

31. See Vargas, *supra* note 6, at 193 (discussing how Congress enacted statutes such as 8 U.S.C. § 1373, a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, in response to sanctuary jurisdictions' unwillingness to enforce existing federal immigration laws).

32. See *id.* at 194 (arguing that 8 U.S.C. § 1373 was intended to merely encourage federal and state governments to work together in combatting immigration issues, but collaboration was not a mandate).

33. See 8 U.S.C. § 1373(a) (2018) (detailing government entities' duty in sharing information with Immigration and Naturalization Service). The statute reads: Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Id.

34. See Vargas, *supra* note 6, at 193–95 (noting that the federal government has unsuccessfully tried to use the provisions of section 1373 as "tools" to try to overcome sanctuary jurisdiction policies in court). While courts found that state and local laws requiring cooperation with federal authorities regarding the sharing of immigration information were not preempted by federal law, most federal attempts to punish sanctuary cities through violations of this statutory provision have failed. See *id.*

35. See *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018) (noting DOJ has not proven that federal police grants, such as Byrne

In recent litigation involving the DOJ's ability to place conditions on federal funds, courts have relied on an abundance of Supreme Court precedent in determining the limited instances when the DOJ can exercise this power.³⁶ Federal appellate and district court cases striking down President Trump's Executive Order provide further guidance.³⁷ Considered throughout these cases is the overarching question of whether the federal government is justified in coercing cities to comply with federal immigration policies.³⁸ Importantly, the Byrne and COPS Grant applications are strikingly similar, and both appear to be ways for the DOJ to promote its own policies.³⁹

A. *A Race Against Time: The History and Evolution of Sanctuary City Jurisprudence*

The extent of Congress's power to attach conditions to federal grants was clarified in various Supreme Court decisions, beginning in 1981 with *Pennhurst State School and Hospital v. Halderman*.⁴⁰ In *Pennhurst*, the Supreme Court mandated that Congress state any conditions to federal

and COPS Grants, are historically conditioned on compliance with 8 U.S.C. § 1373).

36. See Vargas, *supra* note 6, at 195 (noting that despite government's argument that access to federal funds requires compliance with section 1373, sanctuary cities have continued to prevail). See generally *City of Los Angeles v. Barr*, 929 F.3d 1163, 1174 (9th Cir. 2019) (discussing various Supreme Court cases establishing limits to conditions on federal funding).

37. See *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *1, *3 (W.D. Wash. Oct. 19, 2017) (holding President Trump's Executive Order is unconstitutionally coercive); see also *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1196 (N.D. Cal. 2017) (holding that requiring cities to actively participate in federal immigration enforcement as a condition of receiving federal grants violates constitutional prohibition against federal commandeering).

38. See, e.g., *City of Seattle*, 2017 WL 4700144, at *22 (considering whether Executive Branch can require compliance if Congress did not mandate sanctuary jurisdictions to cooperate with enforcement of federal immigration laws such as section 1373). The court warned that if executive orders are misused, they can greatly affect the system of "checks and balances," which is one of the nation's most important constitutional principles. See *id.* at *25–26; see also Elizabeth McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 181–82 (2016) (noting how anti-sanctuary city laws could lead to dire consequences for public safety and health in sanctuary cities, affecting virtually all residents). See generally Masaro, *supra* note 28, at 4–6 (discussing sanctuary jurisdiction controversy and how local and federal authorities are fighting over control of immigration enforcement).

39. See *City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 280 (3d Cir. 2019) (discussing details of the Byrne Grant program); see also *City of Los Angeles v. Barr*, 929 F.3d 1163, 1186 (9th Cir. 2019) (Wardlaw, J., dissenting) (detailing history and purpose of COPS Grant, and its enactment as part of Violent Crime Control and Law Enforcement Act).

40. 451 U.S. 1 (1981).

funds in unambiguous language.⁴¹ The Supreme Court reasoned that when Congress explicitly spelled out its conditions, states could “knowingly” make a decision with a full understanding of the consequences if they were to accept the money.⁴² Furthermore, if states voluntarily chose to accept the conditions, they would be entering into a contract with Congress; as such, they could not later argue the conditions had been retroactively imposed.⁴³

Indeed, while Congress retains broad power to attach conditions on the receipt of federal funds, the Supreme Court has placed limits on that power.⁴⁴ In particular, the federal government can only induce states into federal programs that “promote the general welfare,” and financial inducement cannot turn into extreme compulsion.⁴⁵ In *South Dakota v. Dole*,⁴⁶ Congress required states to adopt a minimum drinking age of twenty-one years and threatened to cut 5% of federal highway funding to states that did not comply.⁴⁷ The Court held this was a valid use of Congress’s spending power because of two main reasons: it addressed the national concern of safe interstate travel, and was “relatively mild encouragement” to the states, as a 5% potential loss of highway funds was not significant enough to cross the line into compulsion.⁴⁸ By contrast,

41. *See id.* at 17 (“There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”). In *Pennhurst*, the plaintiffs argued that a federal-state grant program should be reinterpreted as “retroactively” imposing significant costs on states that received those funds. *See id.* at 20–26. The court rejected such an interpretation, holding that conditions of the grant were clearly stated. *See id.* at 20.

42. *See id.* (providing further reasoning for its holding). The court mentioned that states could only exercise their choice “knowingly” if they were “cognizant of the consequences of their participation.” *See id.* This need to make an informed choice, the court noted, would be compromised if a state’s potential obligations were “largely indeterminate.” *See id.* at 24. This rule was meant to cover situations in which a state would be unlikely to accept federal funds if it knew the full extent of its obligations. *See id.* at 24–25.

43. *See id.* at 17 (analyzing how legislation allocating funds to states in exchange for compliance with certain conditions is similar to a contract between Congress and states).

44. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (noting holding and relative importance of case).

45. *See id.* at 211 (discussing limits of Congress’s spending power, and finding statute was “reasonably calculated” to advance the general welfare and address the national concern of safe interstate travel).

46. 483 U.S. 203 (1987).

47. *See id.* at 211 (describing facts of case, in which South Dakota permitted its residents over the age of nineteen to purchase beer, directly conflicting with 23 U.S.C. § 158, which permitted reduction of highway funds to a state if it had a minimum drinking age below twenty-one). South Dakota sought a declaratory judgment that section 158 violated Congress’s spending power. *See id.* at 205.

48. *See id.* at 211–12 (finding that withholding a mere 5% of funds constituted a “small financial inducement,” especially when states had other meaningful alternatives to obtain highway funding). The Court also looked to several other cases and noted it previously upheld a condition on federal grants that required 10% of funds to be allocated for contracts involving minority businesses. *See id.* at 217.

the Court held in *National Federation of Independent Businesses v. Sebelius*⁴⁹ that Congress misused its spending power when it threatened to eliminate all of a state's existing Medicaid funding if the state refused the Affordable Care Act's expansion in health care coverage.⁵⁰ The Court held that such a drastic reduction in federal funding amounted to "economic dragooning" and did not offer states a legitimate choice in accepting the conditions in exchange for federal funds.⁵¹

Although the Supreme Court never considered whether federal police grants can be conditioned on compliance with federal immigration policies, many district and appellate courts have reviewed this issue by virtue of reviewing challenges to President Trump's Executive Order.⁵² If the Supreme Court took on this issue, it could look to a series of cases that have ruled in favor of sanctuary cities.⁵³ The first challenge to Trump's Executive Order came in *County of Santa Clara v. Trump*,⁵⁴ where a California federal district court concluded that requiring cities to actively participate in federal immigration enforcement as a condition of receiving federal grants violated the Constitution's prohibition against federal commandeering.⁵⁵ The court permanently enjoined the President's order.⁵⁶

49. 567 U.S. 519 (2012).

50. *See id.* at 581 (describing what constitutes impermissible use of Congress's spending power). *But see* *Arizona v. United States*, 567 U.S. 387, 398 (2012) (noting limits of state power). In *Arizona*, the Supreme Court struck down provisions of a state law allowing local police to cooperate with ICE officials. *See id.* The Court announced that under the country's political system, "both the National and State Governments have elements of sovereignty the other is bound to respect." *See id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). The Court ruled that Arizona was involving itself in a matter of federal jurisdiction when it was assisting ICE, and in doing so, it was actually overstepping its state authority. *See id.* at 403–11. The Court reasoned that the federal government possesses broad powers in the realm of immigration and the status of aliens, while the states have primary authority for defining and enforcing criminal law. *See id.* at 394.

51. *See Sebelius*, 567 U.S. at 523 (finding that threat to cut off state's existing Medicaid funding was essentially "a gun to the head," given that citizens substantially relied on these funds).

52. *See e.g.*, *City of Seattle v. Trump*, Civ. A. No. 17-497-RAJ, 2017 WL 4700144, at *1, *23 (W.D. Wash. Oct. 19, 2017).

53. *See e.g.*, *City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 283 (3d Cir. 2019) (observing how federal efforts to force sanctuary cities to cooperate have been under significant litigation pressure, as many cities have succeeded in thwarting Attorney General's anti-sanctuary campaign). Several other jurisdictions, aside from Philadelphia, sued to enjoin enforcement of the Byrne Grant conditions, including Chicago, San Francisco, and New York. *See id.*

54. 275 F. Supp. 3d 1196 (N.D. Cal. 2017), *aff'd in part, vacated in part sub nom.*, *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

55. *See id.* at 1215–16 (holding section 9(a) of Executive Order is unconstitutional on its face and placing nationwide injunction on its enforcement).

56. *See County of Santa Clara*, 275 F. Supp. at 1215–16 (discussing how courts have applied Tenth Amendment's anti-commandeering principle to various state claims arguing that federal government has overstepped its bounds); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitu-

The Ninth Circuit affirmed on appeal and held that withdrawing funds in the absence of congressional authorization was unconstitutional.⁵⁷ Similarly, in *City of Seattle v. Trump*,⁵⁸ the United States District Court for the Western District of Washington ruled in favor of Seattle, holding that the Executive Order improperly tied funding to compliance with 8 U.S.C. § 1373.⁵⁹ In its analysis, the court reasoned that cities had no “meaningful alternatives” to accepting federal grants, and thus, the conditions under the Executive Order were unconstitutionally coercive under *Dole*.⁶⁰

Shortly after courts permanently enjoined the Executive Order, the Trump Administration used a different strategy to further its immigration policy: by allowing the Attorney General to condition states’ eligibility for a longstanding DOJ-administered Byrne Grant program on compliance with certain requirements.⁶¹ The legality of these conditions was challenged in *City of Philadelphia v. Attorney General of the United States*⁶² and *City of Chicago v. Sessions*,⁶³ in which the Third and Seventh Circuits, respectively, held the Executive Branch’s actions to be a “usurpation of power” from Congress.⁶⁴

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *Sebelius*, 567 U.S. at 578 (holding that commandeering principle applies when Congress directly commands states to regulate, or indirectly coerces states to adopt federal regulatory system as its own).

57. *See id.* at 1245. The Ninth Circuit affirmed the district court’s grant of an injunction as to the Executive Order’s effect in California, but vacated and remanded the question of a nationwide injunction, ruling that it went too far. *See id.*

58. No. 17-497-RAJ, 2017 WL 4700144, at *1 (W.D. Wash. Oct. 19, 2017).

59. *See id.* at *3 (“Congress did not delegate to the President—whether expressly, impliedly, or through acquiescence—any power or authority to condition funding on compliance with Section 1373.”).

60. *See id.* at *26 (citing *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)) (noting that financial inducement by Congress is allowed until it turns into compulsion).

61. *See City of Chicago v Sessions*, 888 F.3d 272, 278 (7th Cir. 2018) (“[I]n the face of failure of Congress to pass such restrictions and the issues with the legality of the Executive Order—on July 25, 2017, the Attorney General pursued yet another path to that goal and issued the conditions for recipients of the Byrne JAG funds that are challenged here.”).

62. 916 F.3d 276 (3d Cir. 2019).

63. 888 F.3d 272 (7th Cir. 2018).

64. *See City of Chicago*, 888 F.3d at 277 (discussing holding, reasoning, legislative history, and relevant statute). The court in *City of Chicago* held that Congress did not authorize the DOJ’s actions, and noted that there was evidence of Congress repeatedly refusing to pass bills that tied funding to immigration policies. *See id.* at 291; *see also City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d at 286 (finding three extra conditions imposed on Byrne Grant applications were unlawful because neither Byrne Grant statute, nor 8 U.S.C. § 1373, gave Attorney General authority to condition funds). Moreover, the duties and functions of the assistant Attorney General, as described under 34 U.S.C. § 10,102, only authorized him to impose conditions in limited instances. *See id.* at 287–89. The court reasoned that Congress “delineate[d] numerous, specific circumstances” under which the Attorney General could withhold funds from applicants for

While the forgoing cases seem to represent a pattern of judgments favorable to sanctuary cities, the Ninth Circuit took a different approach in *City of Los Angeles v. Barr*,⁶⁵ ruling in favor of Attorney General William Barr, Jeff Sessions' successor.⁶⁶ In *City of Los Angeles*, the Ninth Circuit ruled that the DOJ maintained sufficient authority to withhold federal COPS Grants from sanctuary jurisdictions that failed to select "immigration" as a focus area in their grant applications.⁶⁷ The court held that the DOJ was acting within its statutory authority when it prioritized agencies that agreed to give U.S. Immigration and Customs Enforcement (ICE) access to jail records and immigrants.⁶⁸ The court noted that because the scoring factors to determine grant eligibility merely "encourage[d]" rather than "coerce[d]" applicants to cooperate on immigration matters, the DOJ was not infringing on state autonomy.⁶⁹

B. *Neck and Neck: Overview of the Byrne Grant and COPS Grant Application Procedures*

The Seventh and the Third Circuits evaluated the constitutionality of three new conditions imposed on applications for the Byrne Grant, which

grants, but did not give him sweeping authority to withhold funds for merely *any* reason. *See id.* at 286.

65. 929 F.3d 1163 (9th Cir. 2019).

66. *See id.* at 1169 (holding DOJ grant conditions did not violate Spending Clause). For a further discussion of the details of the case and the COPS grant program, see *supra* notes 77–83 and accompanying text. *See generally* Philip Ewing, *Attorney General William Barr Swears Oath of Office After Senate Confirmation*, NPR (Feb. 14, 2019, 1:38 PM), <https://www.npr.org/2019/02/14/694751343/senate-confirms-william-barr-as-next-attorney-general> [<https://perma.cc/NG64-Z5PC>] (reporting on former Attorney General Jeff Sessions' replacement, who carried out the same policies as Sessions.).

67. *See City of Los Angeles*, 929 F.3d at 1177–82 (delineating eight focus areas that COPS grant applicants chose from). The focus areas include illegal immigration, child and youth safety, drug abuse education, prevention and intervention, homeland security, nonviolent crime and quality of life policing, building trust and respect, traffic/pedestrian safety, and violent crimes). *See id.* at 1171. In its application, Los Angeles selected "building trust and respect" as its focus area. *See id.* at 1172.

68. *See id.* at 1175–76 (finding DOJ's decision to award additional points to applicants that selected "illegal immigration" as their focus area or agreed to certification was merely subtle incentive and did not amount to coercion). By offering this incentive to applicants, the DOJ was not threatening to withdraw significant funds from a jurisdiction unless they complied with certain federal requirements. Nor was it imposing expensive responsibilities on a recipient or offering a financial inducement to a recipient to cooperate on illegal immigration issues. *See id.* at 1176 (citing *South Dakota v. Dole*, 483 U.S. 203, 208 (1987)).

69. *See id.* (elaborating on court's reasoning). For a further discussion of the court's analysis, see *infra* Section III.B; see also Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions that Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507, 1509 (2018) (arguing DOJ should be able to condition receipt of federal grants on recipients' compliance with 8 U.S.C. § 1373, highlighting importance of promoting information-sharing on immigrants status of *criminal suspects*).

is the primary provider of federal criminal justice funding to state and local governments.⁷⁰ Classified as a “formula grant,” Byrne Grant funds are distributed based on a “statutorily fixed formula” involving the jurisdiction’s total population and violent crime statistics.⁷¹ Any state or unit of local government can submit a Byrne Grant application to the Attorney General, and it must certify that it will comply with any rules or federal statutes regarding the handling of federal funds.⁷²

Although Philadelphia and Chicago were both regular recipients of the Byrne Grant, both failed to qualify for fiscal year 2017, the same year that the DOJ imposed the “certification,” “access,” and “notice,” conditions on applicants.⁷³ The “certification” condition required all grantees to certify compliance with 8 U.S.C. § 1373.⁷⁴ The “access” condition required local correctional facilities to ensure the DHS would have access to any state detention facility at any time.⁷⁵ Lastly, the “notice” condition required cities to provide advance notice to the DHS before an undocumented immigrant was released from custody.⁷⁶

City of Los Angeles, however, involved the COPS Grant program, which was created by Congress in 1994 to combat local crime and promote public safety.⁷⁷ An applicant for a COPS Grant must specify a law enforce-

70. *See City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 280 (3d Cir. 2019) (noting relevance of Byrne Grant program, which is administered by DOJ and “distributes over \$80 million in awards each year”). The Byrne Grant was formed to commemorate a New York police officer who died on duty. *See id.* at 279; *see also City of Chicago v. Sessions*, 888 F.3d 272, 276 (7th Cir. 2018).

71. *See City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d at 280 (noting calculation used to evaluate grant applicants). The court opined that the Attorney General’s preference of certain jurisdictions inevitably changes “the formula grant into a discretionary one.” *See id.* at 290.

72. *See id.* at 280 (noting that applicants are generally cities or municipalities, and discussing a component of the application).

73. *See id.* at 280–84 (noting several other jurisdictions that were negatively affected and subsequently sued to enjoin enforcement of conditions, including Chicago, San Francisco, and New York); *see also City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018) (affirming the district court’s preliminary injunction against “notice” and “access” conditions).

74. *See City of Philadelphia*, 916 F.3d at 280. Section 1373 bars states from prohibiting their officials “from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” *See id.* at 282 (quoting 8 U.S.C. § 1373(a)). For a further discussion of section 1373, *see supra* note 33 and accompanying text.

75. *See id.* (providing further details about new “access” condition imposed on grantees).

76. *See id.* (providing further details about new “notice” condition imposed on grantees). The “notice” condition stated that upon request from the DHS, applicants were required to provide “at least [forty-eight] hours advance notice of a scheduled release of an alien held in the applicant’s custody.” *See id.*

77. *See City of Los Angeles v. Barr*, 929 F.3d 1163, 1186 (9th Cir. 2019) (Wardlaw, J., dissenting) (detailing history and purpose of COPS Grant, and its enactment as part of Violent Crime Control and Law Enforcement Act).

ment and community policing strategy and select a particular crime problem or focus area they are intending to spend the requested funds on.⁷⁸ Funds are awarded through a competitive process in which the DOJ uses a points system to rank applicants.⁷⁹ In determining total scores and eligibility, the DOJ is authorized to award bonus points to applicants that choose to focus on “illegal immigration” over other areas, and *further* additional points to applicants that agree to a certification of compliance with federal immigration authorities.⁸⁰

Los Angeles did not select either choice in its application and subsequently failed to receive a grant.⁸¹ The city sued the Attorney General and argued that he exceeded his authority by giving preference to cities and police departments that promised to help federal authorities track immigrants.⁸² While the Ninth Circuit recognized that the imposed conditions put Los Angeles at a competitive disadvantage, it nonetheless found that the DOJ was not constitutionally barred from imposing them.⁸³

III. RUNNING OFF IN ALL DIRECTIONS: AN ANALYSIS OF THE VARIOUS ARGUMENTS FOR AND AGAINST CONDITIONS ON FEDERAL GRANTS

Since 2017, federal courts have unanimously deemed President Trump’s Executive Order to be unconstitutional on various grounds.⁸⁴ However, federal courts diverge from this unanimity when reviewing the constitutionality of the actual conditions placed on federal grants by the DOJ pursuant to the Executive Order.⁸⁵ While the Ninth Circuit ruled in

78. *See id.* at 1170–71 (discussing COPS Grant application guidelines). For a full list of focus areas applicants can choose from, *see supra* note 67.

79. *See id.* at 1171–72 (discussing grant selection process).

80. *See id.* (noting that applicants who sign Certification of Illegal Immigration Cooperation are ensuring that DHS personnel will have access to applicant’s detention facilities to meet with aliens, and provide the DHS with advance notice of up to forty-eight hours prior to scheduled releases of aliens in custody).

81. *See id.* at 1172 (discussing repercussions of Los Angeles’ focus area selection and choice to decline certification for the 2017 application cycle).

82. *See id.* (explaining procedural history and basis for lawsuit). The district court agreed with Los Angeles on all claims, including that the DOJ violated both the Spending Clause and separation of powers, and issued a permanent injunction. *See id.*

83. *See id.* at 1173 (affirming Attorney General’s argument that it was not necessary for Los Angeles to choose “illegal immigration” focus area; Los Angeles could have received additional points by selecting “homeland security” or “violent crime” rather than “building respect” focus area).

84. *See Somin, supra* note 7, at 1250 (observing how executive order regarding sanctuary cities has been subject of extensive litigation in multiple federal courts). Somin noted that by placing conditions on federal funds and delegating power to the Attorney General, the President is directly violating longstanding Supreme Court precedent, which mandates that any condition on federal grants must be authorized by Congress. *See id.* at 1251.

85. *See City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 279 (3d Cir. 2019) (finding conditions on funds were unlawfully imposed).

favor of the Attorney General, the Third and Seventh Circuits ruled against him and enjoined enforcement of conditions on federal police grants.⁸⁶ In doing so, they looked to the plain language and structure of 8 U.S.C. § 1373 to determine that Congress never intended to grant a broad discretionary power to the Executive Branch.⁸⁷

A. *The Third and Seventh Circuit's Arguments Against Conditions on Byrne Grant Funds*

The Third Circuit focused heavily on the Attorney General's statutory authority in its analysis. The City of Philadelphia was a regular recipient of the Byrne Grant, having received an average of \$2.5 million each fiscal year since the program's inception in 2006.⁸⁸ The city used these funds to update technology in courtrooms, fund reentry programs for newly released prisoners, and operate substance abuse programs for criminals.⁸⁹ However, in 2017, the DOJ withheld Philadelphia's award, claiming that the city failed to comply with three newly implemented conditions, which required greater coordination with federal officials on matters of immigration enforcement.⁹⁰ Litigation ensued and eventually reached the Third Circuit, where the primary issue was whether Congress had granted the Attorney General authority to enact the new conditions.⁹¹

But see City of Los Angeles v. Barr, 929 F.3d 1163, 1169 (9th Cir. 2019) (finding preferential scoring system constituted a lawful use of power).

86. *See* Somin, *supra* note 7, at 1256 (noting underlying rationale behind federal courts' decisions to enjoin enforcement of grant conditions). Somin argues that if the Executive Branch can impose such conditions on federal grants, regardless of whether or not they are "consistent with the logic and purpose of the program," this could give the Executive Branch an enormous amount of discretion to reshape federal grant programs. *See id.* Further, while conditions can *seem* consistent with the logic and purpose of a program, it does not make up for the lack of clear congressional authorization of the condition. *See id.*

87. *See id.* at 1285 (arguing how recent cases may have broader implications on federalism). If the Trump Administration prevails, it would greatly increase the federal government's power over state and local governments, potentially undermining the separation of powers. *See id.*

88. *See* City of Philadelphia v. Attorney Gen. of the United States, 916 F.3d 276, 279–80 (3d Cir. 2019) (emphasizing that Philadelphia did not stop receiving funds until new conditions were imposed in 2017).

89. *See id.* (detailing Philadelphia's prior uses of grant).

90. *See id.* (noting Attorney General's argument that conditions were enacted to ensure that potential recipients did not impair federal government's ability to ensure public safety by detaining and removing aliens upon release from local criminal custody). For a detailed list and discussion of the three conditions, see *supra* notes 74–76 and accompanying text.

91. *See* City of Philadelphia, 916 F.3d at 292 (discussing procedural history). Philadelphia filed suit to enjoin the Attorney General from withholding its award, and the district court granted summary judgment in its favor, finding the Attorney General had imposed the conditions "arbitrarily and capriciously." *See id.* at 284. For equitable relief, the district court imposed a sweeping requirement on the federal government to obtain a judicial warrant before seeking custody of any illegal immigrants in city custody. *See id.* On appeal, the Third Circuit vacated this judicial warrant injunction, finding the district court abused its discretion by im-

The Attorney General offered three separate statutory provisions to justify imposing the conditions: (1) the language of the Byrne Justice Assistance Grant Program Statute (the Byrne Statute), (2) the provision defining the duties of assistant attorneys general in administering the grant program, and (3) the “certification condition” provision, which requires compliance with applicable federal laws, including 8 U.S.C. § 1373.⁹² The Third Circuit found all three sources of authority insufficient.⁹³

The plain language of the Byrne Statute, the court found, allowed the Attorney General to “reasonably require” applicants to report data, records, or information to confirm they were using federal funds solely for policing services.⁹⁴ This involved asking applicants for “programmatically” or “financially” information proving they did not use Byrne Grant funds to “supplant state or local funds.”⁹⁵ However, the scope of this power did not extend to the furtherance of department-related priorities in immigration policy—as such, the Attorney General could not mandate access to prison facilities and proof of coordination with immigration agencies under the guise of the data-reporting requirement.⁹⁶ The court recognized the Attorney General’s second source of statutory authority, 34 U.S.C. § 10102(a)(6)—the special conditions clause—gives assistant attorneys general authority to place special conditions on grants and to determine priority purposes for formula grants.⁹⁷ However, the court found the text

posing a greater requirement than necessary. *See id.* at 293. However, it affirmed all other aspects of the prior holding. *See id.*

92. *See id.* at 284 (noting three different sources of authority Attorney General offered to justify enacting new conditions).

93. *See id.* at 279 (finding none of these sources provided DOJ *actual* congressional authority). The court applied the rules of statutory interpretation in determining the meaning of provisions offered by the Attorney General, while considering the text and structure of the statute as a whole, rather than reading the provisions in isolation. *See id.* at 284. The court also mentioned that it would also look for guidance in “any relevant, well-established canons of statutory interpretation.” *See id.*

94. *See id.* at 285 (discussing Attorney General’s interpretation of Byrne Grant statute). The Attorney General argued that asking for “notice” of an alien’s release from custody was the type of information he could reasonably require, while mandating “access” to prison facilities constituted “appropriate coordination” with a relevant agency. *See id.* Moreover, the Attorney General argued he could require applicants to certify that they appropriately coordinated with relevant local agencies in allocating grant money. *See id.*

95. *See id.* (delineating limits of Byrne Statute and finding provision involving data reporting and “coordination with affected agencies” did not authorize “notice” and “access” conditions as Attorney General implied).

96. *See id.* (clarifying actual scope of Attorney General’s discretion was confined to handling of funds). The court held the Attorney General’s limited authority did not extend to monitoring and reviewing states’ use of funds for purposes unrelated to the grant program. *See id.* Further, while there were very limited circumstances in which the Attorney General could withhold a small percentage of funds, he could not withhold the *entire* grant arbitrarily. *See id.* at 285–86.

97. *See id.* at 287 (noting duties and functions of assistant attorney general). “[T]he Assistant Attorney General shall ‘exercise such other powers and functions

and structure of the statute did not authorize assistant attorneys general, or even the Attorney General, to establish completely new conditions unrelated to the purpose of furthering criminal justice policies.⁹⁸ Finally, the court found the certification condition provision of the Byrne Statute could not be construed to require compliance with 8 U.S.C. § 1373.⁹⁹ Doing so would give the Attorney General unbounded power to impose grant conditions and ultimately “destabilize the formula nature of the grant,” giving it a discretionary nature instead.¹⁰⁰ The court further reasoned that if Congress intended the Byrne Grant to be discretionary, it would have likely placed it in the U.S. Code’s section containing discretionary DOJ grants, rather than giving the grant its own separate title, section, and description.¹⁰¹ Thus, the court found that no statutory provision the Attorney General offered could be construed as giving him authority to enact the new conditions.¹⁰²

as may be vested in the Assistant Attorney General . . . including placing special conditions on all grants, and determining priority purposes for formula grants.” *See id.* (quoting 34 U.S.C. § 10102(a)(6)).

98. *See id.* (finding relative placement of clause and plain text of statute proved Attorney General did not have sweeping authority to place *any* conditions on *all* grants). The court found that because the special conditions clause came before five other subsections giving assistant attorneys general power to “disseminate criminal justice information and coordinate with various agencies and officials,” this provision gave assistant attorneys general power only to the extent it was related to policing or criminal justice. *See id.* at 287–88. Providing assistant attorneys general more authority would be “akin to hiding an elephant in a mousehole. ‘And Congress does not, one might say, hide elephants in mouseholes.’” *See id.* at 288. (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)).

99. *See id.* at 287 (determining that a closer scrutiny of the text, structure, and history of the provision called for a rejection of the Attorney General’s broad view). *See generally* 34 U.S.C. § 10153(a)(5)(D) (2018) (requiring applicants to certify their compliance with provisions of Byrne Statute and “all other applicable federal laws”). The Attorney General argued that 8 U.S.C. § 1373, which prohibited restrictions on the sharing of residents’ immigration status, could be considered an “applicable federal law,” because it applies to federal government entities. *See City of Philadelphia*, 916 F.3d at 288–89. The court recognized the text does not explicitly identify to what or whom laws must be applicable, given that the phrase, “all other federal laws,” was not preceded by a list of *specific* federal laws in the provision. *See id.* Thus, the court found the applicable laws clause authorized only conditions that applied specifically to programs funded under the grant, not generally to the grantee. *See id.*

100. *See id.* at 290 (discussing how the “formula” nature of Byrne Grant considers only the population and violent crime statistics of a jurisdiction). The court held that approving the Attorney General’s broad discretion would threaten the “predictability and consistency embedded in the program’s design.” *See id.*

101. *See id.* at 288–89 (finding intent of Congress an important consideration in overall analysis).

102. *See id.* at 291. The court noted it did not need to consider the city’s other claims: that the conditions violated the Spending Clause, violated the Anti-Commandeering Clause of the Tenth Amendment, and that the city was in substantial compliance with the conditions. *See id.* at 284. However, the Seventh Circuit considered these claims in *City of Chicago v. Sessions*, when it affirmed the district court’s preliminary injunction against the “notice” and “access” conditions. *See* 888 F.3d 272, 279–80 (7th Cir. 2018).

Around the same time the Third Circuit heard challenges to the DOJ's grant policies, the Seventh Circuit was also considering the validity of the "notice" and "access" conditions of the Byrne Grant in *City of Chicago v. Sessions*.¹⁰³ Like Philadelphia, Chicago was a regular recipient of the Byrne Grant and planned to use its 2017 funds for new software that would help police officers quickly identify the location of shooting incidents and provide an immediate response.¹⁰⁴ The "notice" and "access" conditions directly conflicted with Chicago's 2006 "welcoming city" ordinance, which prohibited both requests and disclosures of the immigration status of residents.¹⁰⁵ The ordinance also provided that city officials would not permit ICE agents access to detainees, allow investigative interviews, or respond to inquiries regarding a person's custody status.¹⁰⁶ Chicago announced it would favor its own city ordinance over the newly imposed conditions, and filed suit, alleging the conditions were unlawful

103. *See id.* at 276–77 (explaining the relative timeline and procedural history of the case). The United States District Court for the Northern District of Illinois held in favor of the City of Chicago regarding the Byrne Grant's "notice" and "access" conditions, while ruling in favor of the Attorney General in regards to the "certification" condition. *See id.* The court enjoined the enforcement of the two conditions, finding that proper compliance with those conditions would require a large amount of state and local resources and personnel. *See id.* (noting the procedural history of the case and stating that, as a matter of statutory delegation, the Executive Branch lacks the power to deny federal funds to sanctuary jurisdictions without further congressional authorization); *see also* Somin, *supra* note 7, at 1264 (warning that if the Attorney General successfully argues he can impose new conditions in the Byrne Grant application under the guise of "applicable federal laws," the same tactic can be used to condition many other federal grants). Even the "applicable federal laws provision" was too ambiguous for the court to accept. *See City of Chicago*, 888 F.3d at 276–77. As mandated by *Pennhurst*, the federal government cannot impose conditions on grants to states and localities unless the conditions are "unambiguously" stated in the law's text. *See id.* at 231 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

104. *See id.* at 278 (describing how Chicago's use of the Byrne Grant helped finance a large portion of local law enforcement's safekeeping resources, including funding for body cameras and police cruisers). In 2017, the city planned on using the expected funds to further its ShotSpotter technology. *See id.*

105. *See id.* at 279 (acknowledging Chicago's Welcoming City Ordinance as an ode to its diverse demographic makeup, as nearly 20% of its residents are immigrants). The ordinance calls for the "cooperation of all persons, both documented citizens and those without documentation status" in order to protect life and property, prevent crime, and resolve issues within the community. *See id.*; *see also* CHL., ILL., MUN. CODE § 2-173-005 (2016).

106. *See id.* at 279 (describing components of city ordinance). *But see* CHL., ILL., MUN. CODE § 2-173-042(c) (2016) (clarifying that provisions of the ordinance do not apply when the subject of the investigation poses a threat to public safety). Specifically, Chicago agreed to cooperate with immigration enforcement authorities when asked for information involving individuals with an outstanding criminal warrant, a felony conviction, or anyone identified as a gang member. *See City of Chicago*, 888 F.3d at 279–80. The court recognized Chicago's support for undocumented immigrants is limited by the city's promise to cooperate with ICE officials when necessary for public safety reasons. *See id.*

under both the Byrne Statute and separation of powers principle.¹⁰⁷ The district court agreed and issued a preliminary injunction of the “notice” and “access” conditions.¹⁰⁸

On appeal, the Seventh Circuit focused only on whether the Attorney General had apparent authority to enact the conditions.¹⁰⁹ In its analysis, the court relied on the limit of Congress’s spending power and held that although the Executive Branch has free reign over making policies, it cannot use the “power of the purse” to mandate state or local governments to comply with policies.¹¹⁰ The court reasoned that if the Executive Branch could freely wield legislative power, the delicate notion of “checks and balances” would be tarnished.¹¹¹

In addition, the court held that letting the Attorney General withhold all Byrne Grant funds would go against the “formula” nature of the grant.¹¹² All Byrne Grant funds are allocated based on a carefully defined

107. *See id.* at 280 (acknowledging Chicago’s refusal to abide by the Attorney General’s conditions, which the city argued were inconsistent with the goals of its ordinance). The court further addressed how the Attorney General’s conditions would place the city in an unpleasant catch-22. *See id.* The city would be forced to choose between obtaining necessary funds for law enforcement and maintaining trusting relationships with the immigrant communities that often serve as close confidantes. *See id.* at 281. If local police were to collaborate with federal immigration authorities, immigrants—who are often victims and witnesses to crimes—would be reluctant to report to local police out of fear that it would lead to detainment or deportation. *See id.* at 280. Ultimately, this failure to obtain victim and witness cooperation could “allow criminals to freely target communities with a large undocumented population, knowing their crimes will be less likely to be reported,” ultimately hindering law enforcement efforts. *See id.*

108. *See id.* at 276–77 (noting procedural posture of case).

109. *See id.* at 283 (“This appeal turns on the more fundamental question of whether the Attorney General possessed the authority to impose the conditions at all.”).

110. *See id.* at 283 (declaring that the “power of the purse,” is inherently a legislative power, and unless Congress delegates its authority, the Executive Branch cannot condition the payment of federal funds to further its own political priorities).

111. *See id.* at 277 (discussing the reasoning of the case). The court stated, “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.” *Id.* The Attorney General again offered the “Duties and Functions” subsection of the Byrne Grant statute as proof of his statutory authority. *See id.* Similar to the Third Circuit, the court found the Attorney General’s broad interpretation of this provision was contrary to the plain meaning of the statutory language, as it did not provide him with open-ended authority to impose any conditions that he saw fit. *See id.* Furthermore, the court held that such a broad interpretation was inconsistent with the overall goal of the Byrne Statute, which was to support the needs of the law enforcement while providing flexibility to state and local governments. *See id.*

112. *See id.* at 285–86 (stating that granting broad discretion to the Attorney General to impose any conditions on grant recipients simply does not adhere to the “formula” aspect of the Byrne Grant). Allocation of funds is based on a meticulous calculation that determines how much should be distributed to each jurisdiction. *See id.* at 286. Congress has stated in precise terms *when* the Attorney General can deviate from the calculation. *See id.*

calculation determining the base amount each state receives; the amount increases based on the relative population and violent crime statistics of each state.¹¹³ There are statutes authorizing the Attorney General to reduce funding under certain circumstances, but even these statutes place caps on reduction.¹¹⁴ The court held the Attorney General's deviation from the precise limits prescribed by the statute was unsupported, and affirmed the district court's injunction.¹¹⁵

B. *The Ninth Circuit's Arguments in Favor of Conditions
on Federal Grant Money*

Contrary to the findings of the Seventh Circuit, the Ninth Circuit approved of the DOJ's use of immigration-related "scoring factors" for community policing grants, finding it an appropriate use of existing discretion.¹¹⁶ Congress granted the Attorney General authority to administer and distribute COPS Grants in an effort to improve crime prevention of local law enforcement.¹¹⁷ The statute codifying the COPS Grant gave

113. *See id.* at 298. As noted in 34 U.S.C. § 10156(a)(1), the Byrne Grant formula provides that 50% of the funds allocated by Congress for the grant are awarded to states that qualify based on population size, while the other 50% goes to states based on violent crime statistics. *See id.* Of the amount allotted to each state, 40% goes directly to local governments. *See id.*

114. *See* 34 U.S.C. § 10157(b) (2018) (stating in precise terms when the Attorney General can deviate from the calculation). For instance, the Attorney General has discretion to reserve up to 5% of a state's funds to give to another state to prevent or combat an extraordinary increase in crime. *See id.*

[T]he Attorney General may reserve not more than 5 percent, to be granted to 1 or more States or units of local government, for 1 or more of the purposes specified in section 10152 of this title, pursuant to his determination that the same is necessary—(1) to combat, address, or otherwise respond to precipitous or extraordinary increases in crime, or in a type or types of crime; or (2) to prevent, compensate for, or mitigate significant programmatic harm resulting from operation of the formula

Id. (describing authority granted to the Attorney General). The statute also mandates a 10% reduction in funds if the city fails to "substantially implement" the provisions of the Sex Offender Registration and Notification Act. *See City of Chicago*, 888 F.3d at 286.

115. *See id.* (rejecting any claim of statutory authorization for withholding 100% of funds from cities for noncompliance).

116. *See City of Los Angeles v. Barr*, 929 F.3d 1163, 1169 (9th Cir. 2019) (finding no issue with DOJ's inclusion of "illegal immigration" scoring factor, which asks applicants to define specifics of their plan to partner with federal law enforcement, honor detainees, and engage in information-sharing). In a 2-1 opinion, the Ninth Circuit overturned a nationwide injunction issued by a Los Angeles judge. *See City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018), *rev'd City of Los Angeles*, 929 F.3d 1163.

117. *See City of Los Angeles*, 929 F.3d at 1183 (Wardlaw, J., dissenting) (recounting history and purpose behind COPS Grant program). In 1994, Congress passed the Public Safety Partnership and Community Policing Act, which led to the creation of the "Community Oriented Police Services" Grant program, as part of a larger effort to increase the number of local police officers and to enhance their interaction and cooperation with the community. *See id.* The ultimate goal for this increased interaction was to create supportive and trusting "community partner-

the DOJ broad discretion to allocate grant money and develop a scoring system for deciding which cities qualified for grants.¹¹⁸ Typically, the application required the city to explain its need for federal assistance, provide information about its fiscal health, and agree to comply with various provisions of federal law.¹¹⁹ In 2017, the same year the DOJ imposed the Byrne Grant conditions, it also made two additions to the COPS Grant application.¹²⁰ It gave applicants the option to select “illegal immigration” as one of eight possible focus areas for spending grant money, and an option to submit a “Certification of Illegal Immigration Cooperation.”¹²¹ Cities that chose “illegal immigration” as a focus area and certified they would cooperate with federal immigration authorities gained additional points.¹²²

Los Angeles applied for a \$3.1 million grant that year, but cited “building trust and respect,” rather than “illegal immigration,” as its focus

ships” between police officers and community members. *See id.* Congress acknowledged the grant served twenty-three different purposes, but Congress only ever awarded funds to rehire officers who were laid off due to budgetary concerns for deployment in community-oriented policing and to hire and train new police officers for deployment in community-oriented policing. *See id.*

118. *See id.* at 1169 (explaining the DOJ’s authority in administering the selection process for the grant application). The DOJ may also “‘promulgate regulations and guidelines to carry out’ the grant program,” and can issue regulations or guidelines mandating the correct form and content of the grant applications. *See id.* (quoting 34 U.S.C. § 10382(b)).

119. *See id.* (examining new application requirements). The application requires completion of eleven categories of information, including the projected impact of the proposed initiative and funds on other aspects of the criminal justice system. *See id.* Applicants must also “identify related governmental and community initiatives which complement or will be coordinated with the proposal” and “explain how the grant will be utilized to reorient the affected law enforcement agency’s mission toward community-oriented policing.” *See id.* (quoting 34 U.S.C. § 10382(c)(4)).

120. *See id.* at 1171–72 (elaborating on components of the application procedure).

121. *See id.* at 1172 (describing another way for COPS Grant applicants to receive additional points in the overall calculation). A city that submitted a certification form agreed to implement rules and regulations to ensure that the DHS had access to the city’s correctional facilities to meet illegal immigrants, and mandated that these facilities provide at least forty-eight hours’ notice before an undocumented immigrant was released from custody. *See id.* Nearly identical to the Byrne Grant’s “notice” and “access” conditions, this meant extra points were given to departments that wanted to hire police officers to help federal authorities deport immigrants. *See generally* Maura Dolan, *After Several Court Losses, Trump Administration Wins a Case over ‘Sanctuary City’ Funding*, TRIB. NEWS SERV. (July 17, 2019, 8:40 AM) <https://www.governing.com/topics/public-justice-safety/tns-cops-sanctuary-cities-funding-doj-trump.html> [<https://perma.cc/2PPV-SE7J>] (describing Los Angeles’ choice to focus on “building trust and respect,” and refusal to complete certification form were deciding factors in city’s failure to receive expected police funds in 2017).

122. *See, e.g., City of Los Angeles*, 929 F.3d at 1171–72 (explaining which selections lead to a preferred application).

area, and also chose not to complete the certification.¹²³ After receiving a low score and failing to receive a COPS Grant, the city challenged the DOJ's new preferences.¹²⁴ On appeal, the Ninth Circuit permitted the DOJ's awarding of extra points in the application process, finding it did not violate the Spending Clause of the Constitution or exceed the DOJ's statutory authority, and was consistent with the goals of the program set forth by Congress.¹²⁵

1. *Spending Clause Concerns*

In its Spending Clause analysis, the Ninth Circuit cited Supreme Court precedent to showcase the federal government's broad, but not unlimited power to attach conditions to the receipt of federal funds.¹²⁶ The court held that Congress's exercise of the spending power must be: (1) "in pursuit of the general welfare," (2) sufficiently related to the federal interest of a national program, (3) stated unambiguously so that states could make an informed choice, (4) should not coerce states to comply, and (5) should not be barred by another constitutional provision.¹²⁷ The Ninth Circuit held the DOJ, as authorized by Congress in the statute, met all five

123. *See id.* at 1172 (specifying city's selection in its grant application).

124. *See id.* (noting city's argument that the DOJ's guidelines impermissibly coerced grant applicants to enforce federal immigration law). *See generally* THE ASSOCIATED PRESS, *Trump Administration Gets Court Victory in Sanctuary Cities Case*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/us/sanctuary-cities-ruling.html> [<https://perma.cc/EPG6-RW3B>] (reporting on public backlash and protests following Ninth Circuit's decision).

125. *See City of Los Angeles*, 929 F.3d at 1169. In a vigorous dissent, however, Judge Wardlaw opined that Congress intended the funds to be used for community policing, and the enforcement of federal immigration policy is "entirely unrelated to community-oriented policing." *See id.* at 1191 (Wardlaw, J., dissenting). She further noted that a focus on apprehending immigrants might not improve public safety, as it could "erode the trust and mutual respect on which community policing depend[s], and the preferential treatment to applicants who prioritize federal immigration policies is directly contrary to the "language, structure, history, and purpose" of the COPS Grant statute. *See id.* at 1195 (Wardlaw, J., dissenting). *But see* Dolan, *supra* note 121 (reporting that Los Angeles plans to pursue an appeal to a larger panel of the Ninth Circuit).

126. *See City of Los Angeles*, 929 F.3d at 1174 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012)) (describing what constitutes an impermissible use of Congress's spending power); *see also* South Dakota v. Dole, 483 U.S. 203, 206, 211 (1987) (same). For a further discussion of *Sebelius* and *Dole*, *see supra* notes 51–58 and accompanying text.

127. *See City of Los Angeles*, 929 F.3d at 1174 (listing elements required to justify use of spending power); *see also Sebelius*, 567 U.S. at 578 (describing how Congress may only offer conditional funding if the state is given a "legitimate choice" of whether to accept the conditions in exchange for funds); *Dole*, 483 U.S. at 211 (holding federal government can only induce states into federal programs that "promote the general welfare," and mere financial inducement cannot turn into extreme compulsion); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (ruling that conditions of any grant program must be stated in unambiguous terms).

of these requirements when it imposed the points system.¹²⁸ Cooperating with federal enforcement officers is in pursuit of the general welfare because it “enhances public safety” and is sufficiently related to the federal interest in addressing crime.¹²⁹ The application guidelines also stated the immigration-related conditions in clear, unambiguous terms.¹³⁰ Further, the DOJ did not financially induce applicants to cooperate on illegal immigration issues—rather, an applicant could choose one of many focus areas, and some applicants even obtained funding without selecting illegal immigration or signing the certification form.¹³¹ Lastly, the court rejected the Tenth Amendment concern that the DOJ was infringing on state autonomy.¹³² It found the scoring factors did not coerce, but merely encouraged applicants to cooperate on federal immigration matters, and thus, it did not overrule any state laws or local ordinances.¹³³

128. *See City of Los Angeles*, 929 F.3d at 1175–76.

129. *See id.* at 1175 (finding DOJ met first element of Spending Clause analysis). The court stated: “[C]ooperation relating to enforcement of federal immigration law is in pursuit of the general welfare, and meets the low bar of being germane to the federal interest in providing the funding to ‘address crime and disorder problems, and otherwise . . . enhance public safety’” *Id.* at 1176 (quoting VCCLEA § 1701(a)).

130. *See id.* (finding DOJ clearly presented the immigration-related conditions in the application guidelines and certifications).

131. *Compare id.* (declaring DOJ does not financially induce applicants to cooperate on matters of immigration in a way that is “so coercive that it is tantamount to compulsion,” as established in Supreme Court precedent), *with Sebelius*, 567 U.S. at 579–80 (finding Congress’s threat to eliminate all of a state’s existing Medicaid funding if the state chose to opt out of new universal health care plan, was essentially a “gun to the head,” and an impermissible use of Congress’s spending power).

132. *See City of Los Angeles*, 929 F.3d at 1176 (noting the court’s standing on the last element of a Spending Clause analysis). The

DOJ’s decision to give points to applicants that submit the Certification and agree to give DHS personnel access to the applicant’s correctional or detention facilities to meet with alien detainees, or to give DHS notice before an alien detainee is released, does not override state laws and therefore does not give rise to any Tenth Amendment concern.

Id. at 1177.

133. *See id.* at 1177 (finding, at best, the DOJ’s preferential treatment of applicants that selected illegal immigration as a focus area or that agreed to the certification, merely encourages applicants to focus on these federal priorities, which does not override any state laws). The court reasoned:

[B]ecause an applicant is free to select other prioritized focus areas or not to apply for a grant at all, such a subtle incentive offered by DOJ’s scoring method is far less than the coercion in *Dole*, which directly reduced the amount of funds allocated to a state, and which the Court held was consistent with Spending Clause principles.

Id.

2. *The DOJ's Statutory Authority*

In addition, the Ninth Circuit found that the DOJ's use of immigration-related scoring factors did not exceed its statutory authority.¹³⁴ Congress authorized the DOJ to "fill in gaps" for the COPS Grant program by creating an application form and enacting necessary regulations and guidelines for applicants.¹³⁵ This delegation of authority, the court held, gave significant deference to the DOJ's choices.¹³⁶ The DOJ's inclusion of immigration-related scoring factors stemmed from its understanding of illegal immigration as a public safety issue, and this determination was perfectly reasonable.¹³⁷ Nothing in the COPS Grant statute precluded the DOJ from favoring local governments that focused on combatting illegal immigration.¹³⁸ Lastly, the court held that although the DOJ's new scoring factors were furthering the immigration policy goals of the Administration, this alone was not an adequate reason to set aside the DOJ's decision-making power.¹³⁹ Ultimately, the court found the DOJ's preference for certain jurisdictions consistent with the goals of the COPS Grant program, complied with the Spending Clause restrictions, and fell within the DOJ's statutory discretion.¹⁴⁰

134. *See id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)) ("When Congress has 'explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'").

135. *See id.* (asserting why the DOJ's inclusion of illegal immigration focus area and certification should be given controlling weight, unless they are arbitrary, capricious, or contrary to the relevant grant statute).

136. *See id.* at 1181 (declaring the statute permits the DOJ to give certain localities "preferential consideration, where feasible" and that awarding grant funds to localities that intend to focus on illegal immigration is well within the statute's scope).

137. *See id.* at 1177–78 (deferring to the DOJ's interpretation and argument). The court further noted that the DOJ may give extra points to cities that agree to hire veterans, or manage early intervention systems that identify and assist officers with personal issues, or officers that have suffered school shootings. *See id.* at 1171.

138. *See id.* at 1177–78 (deferring to the DOJ's interpretation and argument).

139. *See id.* at 1180 (acknowledging Congress's expectation that the administration's policy goals would inevitably influence its application process when choosing recipients of competitive grants, but this was not wrong per se).

140. *See id.* at 1183 (noting the holding of the case). Other decisions also held in favor of the DOJ on its ability to condition funds, including the lower court in *City of Chicago*, which was ultimately appealed. *See City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 945 (N.D. Ill. 2017), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (finding that 8 U.S.C. § 1373 is a condition of the Byrne Grant because the authorizing statute states that recipients must comply with all applicable federal laws); *see also* S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (requiring localities and campuses in Texas to cooperate with ICE in sharing information about noncitizens, and assisting in their detention and transfer into federal custody). Many state governments such as Texas have expressed support for federal immigration enforcement, and have passed legislation seeking to punish sanctuary cities. *See generally* Rose Cuisson Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS. L.

IV. LAPPING THE NINTH CIRCUIT: A CRITICAL ANALYSIS OF THE COPS
GRANT POINTS SYSTEM

The Ninth Circuit's decision to uphold the DOJ policy in *City of Los Angeles* was a notable legal victory for the Trump Administration in sanctuary city litigation involving DOJ-sponsored funds.¹⁴¹ This Comment argues that *City of Los Angeles* should have little bearing on future cases because the COPS Grant preferences effectively coerce sanctuary cities into complying with federal immigration policies, thus violate the separation of powers and Spending Clause.¹⁴² At best, *City of Los Angeles* should remain a mere exception to the general tendency of courts in invalidating federal grant applications that disfavor sanctuary cities.¹⁴³ If the issue of conditioning or prioritizing DOJ-sponsored police funds reaches other courts, the Third and Seventh Circuits' sanctuary city friendly approaches should be followed in lieu of the Ninth Circuit's approach in *City of Los Angeles*.¹⁴⁴ Doing so would ensure a uniform analysis of the Spending Clause and separation of powers doctrine for two strikingly similar grants, and ultimately promote better policy objectives.¹⁴⁵

REV. 549, 551 (2018) (providing background information on the Texas law and the rise of the "counter sanctuary movement" across the country). *But see* Margulies, *supra* note 69, at 1509 (arguing that while the DOJ should be able to condition receipt of federal grants on recipients' compliance with 8 U.S.C. § 1373, courts should read that statute against the backdrop of "cooperative federalism," resulting in a narrower interpretation than the one that the DOJ seeks to impose).

141. *See* THE ASSOCIATED PRESS, *supra* note 124 (describing how the Ninth Circuit, in a two-to-one opinion, defied expectations and overturned a nationwide injunction that a federal judge issued in 2018). *See generally* *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018), *rev'd sub nom*, *City of Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019) (issuing a permanent, nationwide injunction against the DOJ's scoring system).

142. *See* *City of Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276, 279 (3d Cir. 2019) (holding in favor of Philadelphia and denouncing the DOJ's enactment of conditions for constitutional and statutory reasons); *see also* *City of Chicago v. Sessions*, 888 F.3d 272, 287 (7th Cir. 2018) (noting the wide scope of its decision).

143. *See* Somin, *supra* note 7, at 1262 (noting how so many recent court decisions have effectively strengthened state sovereignty).

144. *See* *City of Philadelphia*, 916 F.3d at 279 (finding in favor of Philadelphia regarding conditions on police funds); *see also* *City of Chicago*, 888 F.3d at 281 (recognizing new "notice" and "access" conditions could result in under-reported crime and undermine public safety).

145. *See, e.g.*, *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231–35 (9th Cir. 2018) (holding that President's attempt to further his own policy goals by using "power of the purse" was a violation of the Constitution's separation of powers, as Congress has exclusive ability to use this power). *See* Somin, *supra* note 7, at 1262 (discussing how placing conditions on federal funds and delegating power to Attorney General directly violates Supreme Court precedent that requires Congress to unambiguously establish conditions on federal grants in limited circumstances); *see also* Massaro, *supra* note 28, at 4–6 (arguing that local governments should use fundamental constitutional principles to deter against abusive federal and state power, which will ultimately give them a voice and promote checks and balances).

Both the Byrne and COPS Grant applications are, at their core, different means to the same end, which is to exclude sanctuary cities from receiving police funds they otherwise qualify for.¹⁴⁶ When the Third and Seventh Circuits invalidated the Byrne Grant conditions, the DOJ exercised a subtle change in tactics with administering the COPS Grant—rather than imposing *mandatory* conditions, it offered preferential treatment to cities as an incentive for them to cooperate.¹⁴⁷ The similarities between the Byrne Grant and COPS Grant application components, however, are easily discernible and thus, the two should be treated the same for purposes of a separation of powers and Spending Clause analysis.¹⁴⁸

In previous decisions, courts held the DOJ lacked the statutory authority to impose notice and access conditions of the Byrne Grant, and consequently, DOJ efforts to impose them violated the separation of powers doctrine.¹⁴⁹ As the Seventh Circuit notes, the power of the purse, or the spending power, lies exclusively in the hands of Congress, while the Executive Branch only has the power to determine policy.¹⁵⁰ If the Executive Branch also begins using the spending power to mandate that state and local governments comply with its policies—without receiving congressional authorization—then it exceeds the scope of its authority and violates the separation of powers.¹⁵¹ As such, the Ninth Circuit should have been stricter in its evaluation of the DOJ's new method of administering the COPS Grant program.¹⁵² Neither the text, structure, nor purpose of the Community Policing Act gave the DOJ authority to add the “illegal to cities that were willing to cooperate with federal immigration” focus area and cooperation certification, or to otherwise give preferential treat-

146. See *City of Los Angeles v. Barr*, 929 F.3d 1163, 1169–70 (9th Cir. 2019) (declaring DOJ's preferential treatment for cities that complied with federal immigration law was not as coercive as placing outright conditions on the applications).

147. See THE ASSOCIATED PRESS, *supra* note 124 (reporting on UC Hastings law professor Dan Levine's thoughts on the DOJ's sophisticated, newly adopted strategy; while the Justice Department was previously forcing cities to comply with federal immigration policies by retroactively imposing conditions, it is now attempting to provide the same federal funds with some strings attached).

148. For a further discussion of the Byrne Grant and COPS Grant application, see *supra* notes 70–83 and accompanying text. See also *City of Philadelphia*, 916 F.3d at 279 (finding in favor of City in regards to conditions on police funds, and holding that the DOJ was prohibited from requiring cities' police departments to collaborate with immigration agents in exchange for Byrne Grant funds).

149. See *City of Chicago*, 888 F.3d at 282 (discussing the holding of the case).

150. See *id.* at 277 (introducing the separation of powers doctrine as a “bulwark against tyranny”).

151. See *id.* (“If the Executive Branch can determine policy, and then use the power of the purse to mandate compliance with that policy by the state and local governments, all without the authorization or even acquiescence of elected legislators, that check against tyranny is forsaken. The Attorney General in this case used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement.”).

152. See *City of Los Angeles*, 929 F.3d at 1191 (Wardlaw, J., dissenting) (opining district court's order permanently enjoining DOJ's addition to COPS Grant application should have been affirmed).

ment authorities.¹⁵³ In fact, Congress enacted the COPS Grant program to increase the number of “cops on the beat,” build trust and respect between the community and police officers, and ultimately, further public safety.¹⁵⁴ However, Congress did not allow the DOJ to use the grant program to coerce officers into carrying out the Administration’s immigration agenda, which was entirely unrelated to the concept of community-oriented policing and trust-building with the public.¹⁵⁵ Thus, by making additions to the grant application that Congress did not explicitly permit, the DOJ exceeded its authority and violated the separation of powers.¹⁵⁶

Further, *even if* Congress delegated broad power to the DOJ to impose the points system, the Ninth Circuit should have placed a greater emphasis on the limitations of the spending power itself.¹⁵⁷ In particular, the application of the COPS Grant points system seems to conflict with the “relatedness” and “non-coercive” requirements of the Spending Clause test.¹⁵⁸ First, the government can impose only conditions that are sufficiently related to federal interests in the grant program.¹⁵⁹ Although the COPS Grant does not openly impose conditions, it awards bonus points to cities that comply with federal civil *immigration* enforcement.¹⁶⁰ Offering preferential treatment for complying with immigration agents is unrelated to the core purpose of the COPS Grant program, which is to provide assistance to local *criminal* law enforcement.¹⁶¹ As the district court in *City of Philadelphia* reasoned, “immigration law has nothing to do with the enforcement of local criminal laws,” although the reverse may certainly be true.¹⁶²

153. *See id.* at 1195 (noting lack of congressional authorization was obvious from all aspects of act codifying the COPS Grant program).

154. *See id.* (discussing Congress’s stated goals of program).

155. *See id.* (noting that while DOJ and Congress may have shared same goal of enhancing public safety, their similarities ended there).

156. *See id.* (explaining limits of Congress’s goals, and impact of DOJ exceeding those goals).

157. *See City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 639 (E.D. Pa. 2017) (discussing how Congress’s power to condition receipt of federal funds is not unbounded). For a further discussion of the Spending Clause factors, see *supra* notes 136–133 and accompanying text.

158. For a further discussion of the Spending Clause factors, see *supra* notes 136–142 and accompanying text.

159. *See id.* (elaborating on limitations of federal government’s power).

160. *See City of Los Angeles*, 929 F.3d at 1191 (Wardlaw, J., dissenting) (opining that Congress intended funds to be used for community policing, and enforcement of federal immigration policy is “entirely unrelated” to community-oriented policing).

161. *See id.* (explaining how the COPS Grant statute was designed for the purpose of enhancing community-oriented policing, not furthering immigration policy).

162. *See City of Philadelphia*, 280 F. Supp. 3d at 642 (finding that while criminal law is often an important aspect of immigration law, the reverse is not true; immigration law does not affect enforcement of local criminal laws); *see also* Somin, *supra* note 7, at 1266 (explaining criminal justice system notably contributes to immigration law because it specifies which types of noncitizens face a high risk of removal, denotes proper procedures for detaining immigrants as they wait for

Even in sanctuary jurisdictions, criminal laws apply consistently to all residents, regardless of their immigration status.¹⁶³ As the dissent in *City of Los Angeles* notes, “aside from abstract allusions to public safety,” the DOJ has never articulated exactly how the federal immigration preferences in the COPS Grant application relate to the furtherance of community-oriented policing.¹⁶⁴ Thus, because the federal interest in enforcing immigration laws falls outside the scope of the COPS Grant program, the DOJ fails to meet the relatedness prong of the Spending Clause; the resulting overreach by the Executive Branch represents a violation of the separation of powers.¹⁶⁵

Secondly, proper use of the spending power also requires that the conditions should not coerce or financially induce states to comply.¹⁶⁶ The Tenth Amendment prohibits the federal government from compelling states to enact or administer federal regulatory programs, and the anti-commandeering principle prohibits both direct and indirect coercion by the government.¹⁶⁷ The DOJ engages in *indirect* coercion when it gives preferential treatment to applicants that comply with federal immigration policies, while depriving others of anticipated police funds.¹⁶⁸

their removal proceedings, and defines which individuals federal government is trying to target when it attempts to enforce its immigration policies).

163. See Somin, *supra* note 7, at 1266 (noting Philadelphia police commissioner’s admission that the city’s law enforcement does not waver in its enforcement of local criminal laws and treats all residents “uniformly,” regardless of whether they are lawful, unlawful, victims, witnesses, or defendants of crimes, and that city has implemented certain policies to purposefully ignore immigration status of residents); see also Massaro, *supra* note 28, at 9 (“Even the mighty spending power of the federal government has its limits.”).

164. See *City of Los Angeles*, 929 F.3d at 1191 (Wardlaw, J., dissenting) (noting why district court enjoined COPS Grant preferences).

165. See *City of Philadelphia*, 280 F. Supp. 3d at 639 (acknowledging that while courts have been hesitant to invalidate grant conditions for lack of relatedness alone, this can be an important inquiry in a larger constitutional analysis).

166. See Massaro, *supra* note 28, at 48 (noting how Supreme Court precedent has evolved to hold that federalism can be violated even when federal government uses money to induce local and state cooperation). “State and local consent, therefore, must be truly voluntary even when national stakes are high, even when federal power over the subject matter is plenary, and even when the spending power is deployed.” *Id.*

167. See *City of Philadelphia*, 280 F. Supp. 3d at 647 (specifying that in context of Spending Clause, Tenth Amendment prohibits “impermissible compulsion” or “commandeering” of state to the point where it is coerced to participate in a federal spending program); see also Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 677 (2012) (elaborating on federal commandeering); Massaro, *supra* note 28, at 49–50 (“Sanctuary jurisdictions might argue that when a federal law teeters on the edge of commandeering, federal norms that drive commandeering jurisprudence should prompt courts to construe the law narrowly to give state and local governments proper breathing room.”).

168. See *City of Seattle v. Trump*, Civ. A. No. 17-497-RAJ, 2017 WL 4700144, at *1, *23 (W.D. Wash. Oct. 19, 2017) (opining that President Trump’s Executive Order places cities at risk of losing all of their federal funding, which is necessary for functioning of cities).

The cities most likely to benefit from this type of grant are the ones that choose “illegal immigration” as a focus area and sign a certification form ensuring the DHS will have access to the city’s correctional facilities.¹⁶⁹ To carry out this promise and create necessary regulations, cities would need to allocate extra resources, funds, and personnel.¹⁷⁰ Indeed, it seems counterintuitive to make applicants spend a significant portion of their existing law enforcement funds simply to qualify for more.¹⁷¹ Aside from prioritizing immigration and supporting the Administration’s immigration policy objectives, states have few other alternatives of scoring the necessary points to receive COPS Grant awards.¹⁷² When former Attorney General Jeff Sessions announced the 2017 Byrne Grant recipients, he “applauded their commitment to the rule of law and to ending violent crime, including violent crime stemming from *illegal immigration*.”¹⁷³ It has become evident that indicating support for the Administration’s immigration policy objectives has become the single most important factor in the determination of whether states are able to qualify for COPS Grants.¹⁷⁴

When assessing the constitutionality of DOJ-imposed conditions on Byrne Grant awards, circuit courts have held that withholding funds to coerce states to comply with DOJ policies is an unauthorized and improper use of the spending power, and ultimately, a violation of the separation of powers.¹⁷⁵ In creating a points system to qualify for similar COPS Grants, the DOJ has merely found a new and covert way to coerce states into following its immigration policies.¹⁷⁶ Therefore, by implement-

169. See *City of Los Angeles*, 929 F.3d at 1171 (noting how applicants can qualify for additional points when completing a COPS Grant application and gain a competitive advantage).

170. See *City of Chicago v. Sessions*, 888 F.3d 272, 276–77 (7th Cir. 2018) (finding that proper compliance with conditions, including giving federal officials access and notice regarding undocumented immigrants, would require a large amount of state and local resources and employees); see also *New York v. Dep’t of Justice*, 343 F. Supp. 3d 213, 223 (S.D.N.Y. 2018) (considering similar arguments where seven state governments and New York City challenged all three Byrne Grant conditions).

171. See *Massarro*, *supra* note 28, at 17–18 (providing justification for why many sanctuary jurisdictions decide not to cooperate with ICE). See generally *City of Chicago*, 888 F.3d at 276–77 (providing background information regarding same).

172. See *City of Los Angeles*, 929 F.3d at 1188–91 (Wardlaw, J., dissenting) (noting applicants may otherwise qualify for preferential consideration and receive bonus points only if their local law enforcement agencies have faced a “catastrophic” event significantly affecting their ability to hire new police officers).

173. See *id.* at 1191 (providing circumstantial evidence that immigration was a determinative factor in awarding the COPS Grant in fiscal year 2017).

174. See *id.* (emphasizing that 80% of 2017 COPS Grant recipients had notified in their applications they would cooperate with federal immigration authorities in their detention facilities).

175. See *City of Philadelphia*, 916 F.3d at 279 (finding in favor of the city in regards to conditions on police funds); see also *City of Chicago* 888 F.3d at 287 (same).

176. See *City of Los Angeles*, 929 F.3d at 1190 (Wardlaw, J., dissenting) (detailing the COPS Grant application procedures).

ing the points system for COPS Grants, the DOJ is still effectively violating the separation of powers as identified by the circuits in the Byrne Grant litigation.¹⁷⁷

V. DO NICE GUYS FINISH LAST?: LOSING STATE AND INDIVIDUAL AUTONOMY

Prior to *City of Los Angeles*, sanctuary city litigation prohibited the Executive Branch from using funding as a weapon to coerce states into following federal immigration policies.¹⁷⁸ But the Ninth Circuit's decision seems entirely inconsistent with this status quo, and circuits should be consistent in how they rule on grant application appeals.¹⁷⁹ Maintaining a uniform body of law is crucial in furthering good policy—if the federal government is suddenly able to give monetary advantages to cities that share its view on immigration, the future of sanctuary cities will be at stake.¹⁸⁰ Densely populated cities such as Philadelphia, Los Angeles, San Francisco, and Chicago are no strangers to crime, and they largely depend on federal law enforcement funds—of all types—in their anti-crime efforts.¹⁸¹ The COPS Grant procedure effectively induces applicants to make a decision: either stand firm on their sanctuary city status and foster trusting relationships with their immigrant populations, or keep a functioning law enforcement to ensure the safety of *all* residents.¹⁸² If sanctu-

177. *See id.* (Wardlaw, J., dissenting) (“To date, every court to consider the challenges to immigration enforcement conditions the Trump DOJ imposed on Byrne Grants has soundly rejected them as unconstitutionally exceeding DOJ’s statutory authority.”).

178. *See* Somin, *supra* note 7, at 1247 (arguing that recent court decisions have generally strengthened state sovereignty). *See generally* *City of Philadelphia*, 916 F.3d at 281; *City of Chicago*, 888 F.3d at 280 (holding in favor of sanctuary cities).

179. *See generally* *City of Los Angeles*, 929 F.3d at 1189–90 (Wardlaw, J., dissenting) (noting every court that has considered challenges to immigration enforcement conditions has rejected them as unconstitutionally exceeding DOJ’s statutory authority).

180. *See* Somin, *supra* note 7, at 1284–85 (discussing effects on federalism and the separation of powers if courts start to rule in favor of new DOJ policies). This commentator noted how power may start to shift away from localities and states to federal government, as former will be more inclined to position its local policy with federal government’s objectives in order to receive necessary funds. *See id.*

181. *See* *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) (finding that San Francisco and Santa Clara County expect a large percentage of their annual policing budget to come from federal government; for example, nearly \$1.2 million of San Francisco’s \$9.6 million annual budget comes from federal grant programs).

182. *See* *City of Chicago*, 888 F.3d at 280 (acknowledging Chicago’s argument that unlawful citizens or relatives of unlawful citizens may avoid contacting local police to report crimes; in turn, this failure to obtain witness and victim cooperation could hinder law enforcement efforts and ultimately incentivize criminals, as they become accustomed to fact that their crimes are rarely reported). The court recognized that maintaining trust with unlawful citizens or relatives of unlawful citizens is crucially important, as many of them are victims or witnesses to important crimes and are a valuable source of information. *See id.* If undocumented

ary cities continuously fail to receive enough bonus points to qualify for certain DOJ grants, they will have no choice but to change their policies to salvage depleting police funds.¹⁸³ Either way, local law enforcement agencies—the ones in charge of keeping *all* residents safe—will bear the brunt of this dangerous shift in power.¹⁸⁴

As one commentator notes, obtaining victories in such cases may also serve as an impetus for the Administration in conditioning an even wider range of grants to further other policy objectives.¹⁸⁵ City officials have raised concerns that if the COPS scoring system remains in place, the current Administration may start favoring jurisdictions that criminalize abortions or allow teachers to have guns in classrooms.¹⁸⁶ Thus, this level of unbounded discretion upheld in *City of Los Angeles* may have far-reaching consequences—giving the DOJ a renewed sense of power and motivation to condition a variety of other government benefits in exchange for furthering its own federal agenda, whether or not it involves immigration policies.¹⁸⁷

The question remains as to whether these obstacles to receiving federal policing funds would pass constitutional muster if taken up in an en banc rehearing by the Ninth Circuit, or perhaps the Supreme Court.¹⁸⁸ Ultimately, courts will be faced with complex issues, and their decisions

immigrants find out local authorities are supporting federal immigration officials, they may avoid contacting local police to report crimes, fearing that any contact with law enforcement will lead to deportation. *See id.*

183. *See* THE ASSOCIATED PRESS, *supra* note 124 (discussing how offering federal funds to cities with “strings attached” is essentially coercing cities to comply with federal immigration policies, whether they agree with them or not).

184. *See* Massarro, *supra* note 28, at 17–18 (noting how cooperation with ICE requests will result in local police having to forego the trusting relationships they have built with immigrants over time, and will require them to expend their own local funds). *But see* McCormick, *supra* note 38, at 174 (discussing how some law enforcement agencies, in opposition to federal pressure, have started to adopt policies limiting or prohibiting involvement in federal immigration enforcement efforts in order to protect public safety and preserve relationships with immigrant community).

185. *See* Somin, *supra* note 7, at 1285 (warning that if DOJ successfully attaches new conditions on federal grants, it may use same tactic to condition a variety of other grants beyond immigration law, including environmental, education, or health policy).

186. *See* Dolan, *supra* note 121 (reporting on a City of Los Angeles attorney’s prediction that Trump Administration may use this momentum to condition other longstanding grant programs in accordance with Administration’s policies).

187. *See* Somin, *supra* note 7, at 1285 (noting negative implications of a DOJ victory would extend beyond just Trump Administration; for example, conservatives would be concerned if a liberal president conditioned federal funds on compliance with traditionally liberal policies pertaining to gun control, transgender bathrooms, etc.); *see also* Dolan, *supra* note 121 (further discussing the far-reaching concerns stemming from the Ninth Circuit’s decision).

188. *See* Dolan, *supra* note 121 (reporting that Los Angeles plans to pursue an appeal to a larger panel of Ninth Circuit).

will implicate a variety of actors.¹⁸⁹ The autonomy of cities and local agencies will be at stake, as well as the safety of citizens and immigrants alike.¹⁹⁰ And for the most vulnerable individuals—the undocumented immigrants—a mere slip-up may result in a permanent return to a darker past: the persecution, the poverty, or the war they once crossed an ocean to escape.¹⁹¹

189. See McCormick, *supra* note 38, at 174 (noting how anti-sanctuary city laws could lead to dire consequences for public safety and health in sanctuary cities, affecting virtually all residents, regardless of their immigration status).

190. See *id.* (recounting history of sanctuary cities, and how states' and cities' efforts to refrain from sharing immigration status of individuals was promoting safety and well-being of entire community).

191. See Vargas, *supra* note 6, at 188 (describing how undocumented immigrants live in constant fear and apprehension, and can be detained and deported back to their home country even after a mere slip-up with law enforcement). See generally Robbins, *supra* note 2 (describing the story of twenty-seven-year-old undocumented immigrant Aboubacar Dembele who was deported back to his home country after being charged with a misdemeanor).