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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

JEFFERSON B. SESSIONS, III, Attorney General of the United States, *et al.*,

Defendants.

Civil Case No.: 17-4642-SBA

CITY OF LOS ANGELES' MOTION TO INTERVENE; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF THAT MOTION TO INTERVENE

Date: October 11, 2017

Time: 1:00 pm

Before: Hon. Saundra Brown Armstrong

Courtroom: TBA

MOTION

PLEASE TAKE NOTICE that, pursuant to Local Rule 7-2, on October 11, 2017, at 1:00 p.m. or as soon as can be heard,[1] in the above-captioned court located at 1301 Clay Street, Oakland, California, the City of Los Angeles (the "City" or "Los Angeles") will and hereby does respectfully seek the Court's permission to intervene in this matter under Federal Rule of Civil Procedure 24(b). Fed. R. Civ. P. 24(b)(1)(B). This Motion is based on the pleadings and papers on file herein, and the accompanying points and authorities.

Undersigned counsel certifies that counsel for the City has met and conferred with all parties prior to the filing of this Motion. Plaintiff City and County of San Francisco consents to the City of Los Angeles' intervention. Defendants Sessions, Hanson, and the U.S. Department of Justice responded that they would need to see the instant motion before deciding what position to take.[2]

The City of Los Angeles respectfully requests that the Court grant its Motion to Intervene and allow the City to submit its proposed Complaint-in-Intervention, attached hereto as **Exhibit A**.

[1] The City of Los Angeles is concurrently filing an administrative motion to request an expedited ruling on this motion without oral argument, to expedite the briefing schedule for this motion, and if necessary, to shorten the time for hearing.

[2] The State of California is not a party to the present action, but has filed a separate lawsuit and a motion to relate the cases. Counsel for the City of Los Angeles has also met and conferred with counsel for the State of California, and the State of California consents to the City of Los Angeles's intervention.

Dated: August 22, 2017

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Background[3]

A. Defendants' Imposition of DOJ Conditions on Byrne JAG Funds

This case concerns new conditions the United States Department of Justice ("DOJ") has decided it can impose on federal funds awarded pursuant to the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") Program.

On July 25, 2017, Defendant Jefferson B. Sessions, III, in his role as Attorney General of the United States announced that, "[f]rom now on, the Department will only provide Byrne JAG grants to cities and states that [1] comply with federal law, [2] allow federal immigration access to detention facilities, and [3] provide 48 hours' notice before they release an illegal alien wanted by federal authorities." Proposed Compl. Ex. 1.[4] This pronouncement was accompanied by a one-page "Byrne JAG Grant Policy Backgrounder," reiterating that State and local governments would need to satisfy these conditions to receive their Byrne JAG funding. Proposed Compl. Ex. 2.[5] On August 3, 2017, DOJ's Bureau of Justice Assistance ("BJA"), which administers the Byrne JAG Program, solicited applications from local governments for FY 2017 Byrne JAG funding, and included the new conditions Defendant Sessions had announced. Proposed Compl. Ex. 3.[6]

The Solicitation requires applicants to certify compliance with 8 U.S.C. § 1373 (the "Section 1373 Condition"). It also states that individual awards "will include two new express conditions."

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[3] The discussion below briefly summarizes the allegations in the City of Los Angeles' proposed complaint in order to provide relevant background, with citations to the proposed complaint and its exhibits. The City respectfully submits that no factual issues need to be resolved for purposes of the present motion, beyond the fact that these allegations and supporting legal arguments have been made.

[4] Department of Justice Office of Public Affairs, "Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs," Justice.gov (July 25, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial ("Press Release").

[5] Department of Justice, Backgrounder on Grant Requirements, *available at* https://www.justice.gov/opa/press-release/file/984346/download ("Backgrounder").

[6] Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant Program: FY 2017 Local Solicitation," *available at* https://www.bja.gov/Funding/JAGLocal17.pdf ("Solicitation").

Proposed Compl. Ex. 3, at 30. Specifically, the Solicitation requires that grant awardees must "permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States." *Id.* Movant refers to this as the "Access Condition." Further, the Solicitation states that grant awardees must "provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act." *Id.* Movant refers to this as the "48-Hour Condition." The Solicitation provides that these two new conditions "will be an authorized and priority purpose of the award," and that all conditions are considered "award requirements." *Id.*

B. The Edward Byrne Memorial Justice Assistance Grant Program

Defendants administer and oversee the Byrne JAG Program, a federal government grant program established by Congress to fund "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." 42 U.S.C. §§ 3750-58. Each fiscal year, the BJA, a component of DOJ's Office of Justice Programs ("OJP"), under the authority of Defendants, solicits applications from States and local governments for the Byrne JAG program, and allocates grant monies to eligible applicants on the basis of a statutory formula. *See id.* § 3755(a)-(d).

Congress structured the Byrne JAG Program as a formula grant. This means that BJA is required, by congressional mandate, to allocate funds based on a prescribed formula that takes into account a State's population, and the violent crime rates in a given State or locality. *Id.* § 3755(a), (d).

C. The City of Los Angeles' Application For FY 2017 Funding

Defendants released their Solicitation for applications for Byrne JAG funding on August 3, 2017, and set the due date for submission of applications on September 5, 2017. Proposed Compl. Ex. 3, at 2. The City of Los Angeles intends, as it has done successfully in prior years, to apply for Byrne JAG funding. Proposed Compl. ¶ 56. As such, in order to receive this funding, the City will be required to agree to and confirm its compliance with the new DOJ conditions, no later than 45 days after receiving the award. *See* Proposed Compl. ¶ 62 (alleging that as part of the online application process, the City

will have to provide an "assurance" of compliance with all "award requirements," including the new conditions); Defendant Sessions' Opposition to Plaintiff's Motion to Expedite Briefing Schedule at ¶ 5, *City of Chicago v. Sessions*, No. 1:17-cv-05720 (N.D. Ill. 2017), attached hereto as **Exhibit B** (stating that OJP aims to make award determinations by September 30, 2017, and that recipients will have 45 days to accept the award, including the new conditions).

The City complies with, and can certify its compliance with, Section 1373, without conceding DOJ's authority to impose that condition. Proposed Compl. ¶ 57.

The 48-Hour Condition does not offer unambiguous notice as to Los Angeles' obligations. For example, it does not indicate what is meant by a DHS "request," what Los Angeles must do if a detainee is in its custody for less than 48 hours and notice cannot be provided during that window of time, or what showing DHS will be required to make to establish that Los Angeles is authorized to continue detention during that period. Proposed Compl. ¶ 59. This ambiguity is particularly concerning because, if it were resolved in the way DOJ appears to require, the 48-Hour Condition puts the City in the position of choosing between acting in an unconstitutional manner or foregoing critical law enforcement funding. Proposed Compl. ¶ 61. In practice, persons arrested by the Los Angeles Police Department ("LAPD") generally are kept in LAPD custody for no more than 48 hours after arrest due to the time limitations imposed by state law and the Constitution. Proposed Compl. ¶¶ 28-29. However, one reading of the 48-Hour Condition would require Los Angeles to prolong the detention of an individual in its facilities in order to provide 48 hours of notice to DHS prior to releasing the individual. Proposed Compl. ¶ 61. In those instances, continuing to detain these individuals in order to satisfy the 48-Hour Condition would place the City at risk of being found in violation of the Fourth Amendment to the United States Constitution. *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015).

Los Angeles believes it complies with the Access Condition. Proposed Compl. ¶ 58. The City does not prevent access to its detention facilities, consistent with state statutory law requiring that detainees receive notice of their rights in relation to requested interviews by federal authorities, and LAPD practice in implementing this law by determining the arrestee's willingness to be interviewed. *See* TRUTH Act, Cal. Gov. Code § 7283 *et seq.*; Proposed Compl. ¶ 58. The City is nonetheless

concerned that DOJ is demanding a form of "access" that is inconsistent with state law and LAPD's related operational policy for its jails. Proposed Compl. ¶ 58.

As it stands, the City cannot properly determine whether it is able and willing to comply with the 48-Hour Condition and the Access Condition, placing Los Angeles at risk of not receiving federal funding under the Byrne JAG Program. Proposed Compl. ¶ 65. Since August 4, 2017, the City has been attempting to seek clarification from DOJ, but no further guidance has been forthcoming to date. Proposed Compl. ¶ 63.

D. Legal Challenges to DOJ's Conditions

In light of these circumstances, the City of Los Angeles has determined it needs to bring an action to seek a declaration that the 48-Hour Condition and Access Condition are unconstitutional or otherwise unlawful, and an injunction against these conditions. As set forth in the Proposed Complaint, the City maintains that Defendants' actions are unlawful because they violate the Separation of Powers and are beyond DOJ's authority to establish, because they violate the Spending Clause and Tenth Amendment of the United States Constitution, and because they are arbitrary and capricious in violation of the Administrative Procedure Act. Proposed Compl. ¶¶ 66-91.

San Francisco instituted this action on August 11, 2017, to challenge the same conditions. San Francisco contends that the conditions violate the Separation of Powers and are not statutorily authorized, and violate the Spending Clause. San Francisco Compl. ¶¶ 90-100. The State of California has also filed a lawsuit in this District challenging DOJ's new conditions, and an administrative motion to relate these cases. *State of California v. Sessions*, No. 17-cv-4701.

II. The Court Should Grant The City Of Los Angeles Permissive Intervention Under Federal Rule Of Civil Procedure 24(b).

A party may be granted permissive intervention under Rule 24(b) when the moving party: (1) has an independent ground for jurisdiction; (2) brings a timely motion; and (3) demonstrates that it has a claim or defense that shares a common question of law or fact with the main action. *Blum v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013). In determining whether to exercise its discretion to grant permissive intervention, the Court considers "whether the intervention

will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Los Angeles meets the requirements for permissive intervention.

First, jurisdiction is readily established because this is a federal question case. 28 U.S.C. § 1331; *see Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir 2011) (explaining that jurisdictional requirement of permissive intervention satisfied where case presented federal question). Los Angeles challenges an action of the DOJ as unconstitutional, in excess of its statutory authority, and as arbitrary and capricious agency action under the Administrative Procedure Act. *See* Proposed Compl. ¶¶ 66-91.

Second, Los Angeles' motion is timely. Courts weigh three factors in determining whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). As the City of Los Angeles is filing this motion only shortly after Plaintiff filed its complaint, and before any response by Defendants, there has been no delay and no potential prejudice to other parties. *Cf. Day v. Apoliona*, 505 F.3d 963, 965-66 (9th Cir. 2007) (finding motion timely when made two years after the case was filed). For the same reason, intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Third, this case presents common questions of law. San Francisco challenges the 48-Hour Condition and Access Condition that DOJ has imposed on Byrne JAG applicants, arguing that these conditions are: (1) in violation of the Separation of Powers and not statutorily authorized, *see* San Francisco Compl. ¶¶ 90-97; and (2) in violation of the Spending Clause, because the conditions are (a) ambiguous, (b) not germane, and (c) would induce unconstitutional acts, *see* San Francisco Compl. ¶¶ 98-100. The first two counts of Los Angeles' complaint overlap substantially with the claims San Francisco advances. *See* Proposed Compl. ¶¶ 66-80; 81-88 ("Violation of Separation of Powers / Ultra Vires Agency Action"; ("Tenth Amendment and Spending Clause").[7] These cases will involve common issues of law concerning DOJ's constitutional authority to unilaterally condition the federal funds

[7] The City of Los Angeles also brings a third count for agency action that is arbitrary and capricious in violation of the Administrative Procedure Act. Proposed Compl. ¶¶ 89-91.

awarded through the Byrne JAG Program; whether Congress has authorized DOJ to do so; and whether the conditions are ambiguous, non-germane, or would induce violations of the Fourth Amendment.

All three factors supporting permissive intervention are therefore met here. Granting permissive intervention would also be in the interest of justice and efficiency. There is significant (although not complete) overlap in the claims being advanced, as well as in the relief requested. *See* San Francisco Compl. p. 24 (requesting a declaration that the Access Condition and 48-Hour Condition are unconstitutional, and an injunction against their enforcement); Proposed Compl., p. 27 (same). Permitting Los Angeles to intervene, rather than proceeding in a separate action, will conserve judicial resources and avoid the potential of conflicting rulings and potentially overlapping injunctions.

Intervention may also aid in this Court's deliberations because it will permit the Court to consider DOJ's conditions in light of differing local policies. For example, San Francisco states that its Administrative Code prohibits its officials from responding to a federal immigration officer's request for advance notification of a detainee's release, unless the individual meets certain criteria. San Francisco Compl. ¶ 21. Los Angeles does not have a similar policy; its objection to the 48-Hour Condition focuses on the potential of being required to unconstitutionally prolong an individual's detention. Proposed Compl. ¶ 61. Similarly, San Francisco indicates that its policy is to deny immigration officers' access to city detention facilities. San Francisco Compl. ¶ 21. Los Angeles does not have a similar policy, but grants access consistent with the procedures required by state law. Proposed Compl. ¶ 58. These differences both support this Motion and highlight a key point in this litigation: that these are appropriately local decisions regarding how best to promote public safety, and DOJ's attempt to override those decisions is unconstitutional. Permitting Los Angeles to intervene would provide the Court additional perspective on the issues in the case as they apply to varied factual settings, thereby allowing it to consider the legal arguments of both cities as they apply to policies and practices followed in each of them.

For all of these reasons, the Court should grant the City of Los Angeles permission to intervene in this action.[8]

Los Angeles' motion should be granted and it should be given leave to file its Complaint-in-Intervention, attached hereto as **Exhibit A**.

Dated: August 22, 2017

By: _____
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[8] The State of California has separately filed a case challenging DOJ's new conditions on the Byrne JAG Program, *State of California v. Sessions*, No. 17-cv-4701, and has filed a motion to relate its action with the present one. Los Angeles agrees with the reasons California presents for relating the cases, and submits that the potential for consideration of San Francisco's and California's claims together provides added reason for the Court to allow Los Angeles to intervene and have its claims decided together with those of San Francisco and California.

EXHIBIT A

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States, ALAN R. HANSON, Acting Assist. Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE, DOES 1-100,

Defendants.

Case No.: 17-4642-SBA

INTERVENOR-PLAINTIFF'S PROPOSED COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

Hon. Saundra Brown Armstrong

CITY OF LOS ANGELES,

Intervenor-Plaintiff,

v.

JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Acting Assistant Attorney General of the Office of Justice Programs; UNITED STATES DEPARTMENT OF JUSTICE.

Defendants.

INTRODUCTION

1. In this Complaint, the City of Los Angeles seeks declaratory and injunctive relief to prevent an arm of the Executive Branch of the United States Government from unconstitutionally seeking to wield authority it does not have to advance policy objectives it cannot lawfully effectuate—all at the potential expense of public safety in Los Angeles and other cities as well.

2. Ironically, the offending edict issues from the United States Department of Justice ("DOJ" or "Department"), which seeks to impose unconstitutional conditions on a formula-based program enacted by Congress to assist state and local law enforcement to prevent and reduce violent crime. As a consequence, DOJ puts these crime-fighting agencies to a Hobson's choice: commit to become instruments of federal civil immigration policy, or sacrifice public safety funds on which they have relied for years.

3. The sums at issue are part of the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") Program. The Byrne JAG Program was established by Congress specifically to fund "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." 42 U.S.C. § 3751(a)(1). Byrne JAG grants are awarded through a statutory formula based on population and crime rates. They are administered by a component of DOJ, but nothing in the legislation creating the program permits the Department to impose conditions like these—including a requirement of broad federal access to local jails for federal civil immigration purposes, and compelling 48-hours' notice to federal immigration officials before a detainee is released from custody. To the contrary, these conditions undermine Congress's intent in fashioning the program.

4. Both of these new conditions DOJ has promulgated purport to require potential grantees to assist federal authorities in their investigation of federal civil immigration violations. One of the new conditions would require local law enforcement agencies to allow personnel of the Department of Homeland Security ("DHS") potentially unfettered access to any individual in the custody of those

agencies (the "Access Condition").

5. The other new condition is ambiguous, and one reading of it would have the practical effect of compelling local law enforcement agencies to keep an individual in custody for at least 48 hours after receiving notification from DHS that it has some purported reason to believe the arrestee is in the United States unlawfully (the "48-Hour Condition"). The DOJ mandate would require compliance with the 48-Hour Condition without regard to whether local laws or policies—and even more importantly, the United States Constitution—would permit that extension of custody beyond the detainee's scheduled release.

6. Both new DOJ conditions are unconstitutional on their face. ***First***, both conditions violate the constitutional doctrine of Separation of Powers. The constitutional authority to spend government money, and (with constitutional limitations) to attach conditions to the receipt of federal funds, belongs to Congress, not the Executive Branch. An agency of the Executive Branch may not unilaterally impose conditions on federal grants in the absence of a specific and unambiguous delegation from Congress, which has not occurred with respect to either new condition. On this basis alone, the new conditions on federal funding violate the Constitution.

7. In addition, DOJ's conditions offend the basic Separation of Powers principle that, as a general matter, an Executive Branch agency has no power to act unless Congress has conferred on it authority to do so. In this case, DOJ's conditions are not just unauthorized—they are profoundly incompatible with the law Congress enacted to establish the Byrne JAG Program. The conditions cannot be reconciled with Congress's directive that Byrne JAG funds be allocated through an explicit funding formula, rather than provided only to jurisdictions that succumb to federal civil immigration conditions. In addition, though Congress expressly directed that the Byrne JAG Program not empower any federal agency or officer to exercise *any* direction or control over a local police force, these conditions would allow DOJ to do precisely that. Further, DOJ attempts to usurp Congress's authority

and flout its intent by redirecting Byrne JAG grant funds away from the local law enforcement and criminal justice programs identified by Congress as intended funding recipients, and toward, instead, provision of services to the federal government in support of federal civil immigration investigations.

8. ***Second,*** even if the new conditions had been imposed by Congress, they would be unconstitutional under the Spending Clause and Tenth Amendment to the United States Constitution, which limit the power of the federal government to condition funding to the States (and hence their municipalities) regarding matters of law and policy properly reserved to the States. When Congress wishes to attach conditions to federal funds, it must meet several requirements designed to ensure that it is not abusing the spending power to improperly regulate and commandeer state and local officials.

9. At a minimum, such conditions must be unambiguous, so state and local governments know to what they are agreeing. Here, however, both DOJ conditions exceed federal Spending Clause authority because Los Angeles cannot know precisely what is expected of it. For example, the 48-Hour Condition does not address what Los Angeles is to do when the Los Angeles Police Department ("LAPD") does not have 48 hours' advance notice of when an arrestee is to be released – on bail, or for a host of other reasons.

10. The 48-Hour Condition suffers from another fatal deficiency. A federal funding condition violates Spending Clause and Tenth Amendment principles if it requires "activities that would themselves be unconstitutional." *South Dakota v. Dole,* 483 U.S. 203, 210 (1987). Courts have concluded that a jurisdiction that detains a person for civil immigration purposes beyond the time he or she otherwise would be released violates the Fourth Amendment. Los Angeles, whose jail facilities are designed and intended to be used for short term, post-arrest custody, and do not house post-conviction inmates, is generally required to release inmates within 48 hours. Given the time that elapses before federal officials request to hold an inmate, the 48-Hour Condition would, in practice, require the LAPD to hold a detainee beyond his or her required release time, risking a Fourth Amendment violation.

11. The constitutional defects in DOJ's conditions run even deeper. Another important limit on the Spending Clause is that conditions imposed on the expenditure of federal funds must be sufficiently related to the purpose of those funds. Congress's express purpose for creation of the Byrne JAG Program was to fund local criminal justice efforts. DOJ's two new conditions do not relate to that purpose, but rather attempt to use the Byrne JAG Program to advance interests concerning federal civil immigration investigations.

12. Further, in promulgating these conditions, DOJ did not rely on any analysis or findings to support the implicit premise that individuals subject to removal commit more crime than do individuals legally resident in the United States. In fact, there is substantial evidence to the contrary. For this reason, DOJ's attempt to attach the new conditions is arbitrary and capricious in violation of the Administrative Procedure Act.

13. In short, DOJ's unilateral and unauthorized attempt to hold criminal justice assistance funds hostage, in order to compel state and local assistance with federal civil immigration investigations, is unconstitutional and unlawful, and cannot be allowed to stand.

JURISDICTION AND VENUE

14. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question). The Court also has authority to award declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201–2202.

15. Venue is proper in this District under 28 U.S.C. § 1391(e).

16. The City of Los Angeles intervenes in this action pursuant to Fed. R. Civ. P. 24(b).

PARTIES

17. Intervenor-Plaintiff City of Los Angeles ("City" or "Los Angeles") is a municipal corporation organized and existing under the laws of the State of California, and is a charter city pursuant to Article XI of the California Constitution.

18. Defendant Jefferson B. Sessions, III, is the Attorney General of the United States. The

Attorney General is charged with the administration and enforcement of federal criminal law and policy, and oversees the U.S. Department of Justice, which administers the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") Program. Defendant Sessions has supervisory responsibility and is sued in his official capacity.

19. Defendant U.S. Department of Justice ("DOJ") is an agency of the United States. The Bureau of Justice Assistance ("BJA") is a component of the Office of Justice Programs of DOJ. BJA's stated mission is "to provide leadership and services in grant administration and criminal justice policy development to support local, state, and tribal justice strategies to achieve safer communities." BJA administers the Byrne JAG Program.

20. Defendant Alan Hanson is the Acting Assistant Attorney General for the Office of Justice Programs at DOJ. He oversees BJA, which administers the Byrne JAG Program. Defendant Hanson has supervisory responsibility and is sued in his official capacity.

FACTUAL ALLEGATIONS

A. Police Policies and Practices in the City of Los Angeles

21. For nearly four decades, the LAPD has implemented policies and practices designed to promote the public safety of all Los Angeles residents by engendering cooperation and trust between members of the City's many immigrant communities and law enforcement. The fundamental goal of these local policies and practices has been to encourage victims of and witnesses to crime to collaborate with LAPD, irrespective of immigration status. Central to these policies has been the decision by local law enforcement and its civilian overseers to place strict limits on LAPD's role with respect to federal civil immigration investigations and enforcement.

22. For example, in 1979, the LAPD began a policy – adopted by the Los Angeles Board of Police Commissioners and signed by then-Chief of Police Daryl Gates – that restricts an officer from initiating a police action with the objective of discovering a person's immigration status, and also

prohibits arrests based solely on civil immigration status.

23. This policy, known as Special Order 40, resulted in the addition of Section 1/390 (Undocumented Aliens) to the LAPD Manual, and an amendment to Section 4/264.50 of the Manual (Enforcement of United States Immigration Laws). Section 1/390 provides that "[u]ndocumented alien status in itself is not a matter for police action" and proclaims that LAPD personnel are required to enforce the law and serve members of the public equally without regard to immigration status. Section 1/390 also recognizes that participation by undocumented persons in police activities and investigations increases the LAPD's ability to protect and serve the entire community.

24. Manual Section 4/264.50 provides that "[o]fficers shall not initiate police action where the objective is to discover the alien status of a person." This section also specifies that "[o]fficers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."

25. The LAPD policies promulgated by Special Order 40 are compliant with existing federal law. For example, in the 2009 case *Sturgeon v. Bratton*, the California Court of Appeal rejected a legal challenge to Special Order 40 – as set forth in Section 4/264.50 of the LAPD Manual – finding that the language of the policy did not conflict with 8 U.S.C. § 1373 ("Section 1373"), and should not, therefore, be invalidated. As the Court of Appeal recognized, Section 1373 addresses certain communications between federal and state or local authorities; Special Order 40 does not address that issue, but rather prohibits police officers from initiating police action regarding immigration status and making arrests for illegal entry. 174 Cal. App. 4th 1407 (Cal. Ct. App. 2009). It has nothing to do with communications between the LAPD and federal authorities.

26. In 2014, LAPD adopted a practice of refusing to detain individuals in response to requests from U.S. Immigration and Customs Enforcement ("ICE"), which asks local authorities to hold individuals otherwise eligible for release from custody. LAPD does not detain individuals in response to

such requests unless they are supported by a judicial determination of probable cause, or a valid warrant from a judicial officer. This practice was developed in response to judicial decisions declaring compliance with such "detainer" requests to be unconstitutional, potentially subjecting LAPD to significant liability for violating the Fourth Amendment. *See, e.g.*, *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014).

27. Today, when a member of the LAPD arrests an individual in connection with a criminal offense, the arrestee may be cited and released in the field, or taken to one of the LAPD's ten jail detention facilities for booking.

28. The LAPD's jail facilities are categorized by the State of California as Type I facilities, which are local detention facilities used for the temporary, short-term detention of persons who may be held for no more than 96 hours. In practice, given the time limitations imposed by state law and the Constitution with respect to the period of time within which law enforcement agencies must: 1) obtain probable cause determinations of a criminal offense ("PCD") to support the detention of persons arrested without a warrant; and 2) transfer all detainees to court for arraignment, persons arrested by members of the LAPD generally are kept in LAPD custody for no more than 48 hours after arrest. *See* Cal. Pen. Code § 825; *Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

29. With respect to obtaining a PCD, when an LAPD officer conducts a warrantless arrest and the arrestee is booked, LAPD policy – which incorporates the time limitations imposed by state law and the Constitution – requires that the arrestee be subjected to a PCD, finding probable cause of a criminal offense, by a neutral and detached magistrate within 48 hours of his or her arrest, including weekends and holidays. *See* LAPD Jail Operations Manual § 2/112.04. If the magistrate returns a finding of "No Probable Cause" within that time, or if a PCD is not rendered within 48 hours following arrest, LAPD must release the arrestee from custody without unnecessary delay.

30. For every arrestee booked into LAPD custody, whether or not he or she was arrested

pursuant to a warrant, LAPD policy requires that the arrestee be transferred to a court for arraignment within 48 hours after arrest, excluding weekends and holidays. *See* LAPD Jail Operations Manual §§ 2/110.03 and 2/110.11.

31. These scenarios assume that the arrestee has not posted bail or bond, or otherwise been released first. Indeed, in many situations, arrestees are eligible for release from custody within a few hours of arrest and booking, including by posting bail or bond, on their own recognizance ("O.R."), or by a certificate of release.

32. Arrestees who are not released from custody on bail, bond, O.R., for lack of a PCD, or the absence of charges, will remain in the LAPD's detention facilities up until the time of arraignment which, as a matter of practice, normally occurs within 24 to 48 hours of arrest. Arrestees who remain in the LAPD's custody until arraignment are generally transported to arraignment court by the Sheriff's transportation detail, and will be transferred to the County's custody after the arraignment, if the court orders a continuation of detention. *See* LAPD Jail Operations Manual § 2/110.11.

33. While arrestees are in LAPD custody, LAPD permits DHS and ICE personnel access to LAPD detention facilities to interview individual arrestees regarding civil immigration violations. LAPD does so consistent with the state statutory requirement that such persons be provided with advance written notice explaining the purpose of the interview, that the interview is voluntary, and that the person may decline to speak or opt to be interviewed only in the presence of his/her attorney. *See* TRUTH Act, Cal. Gov. Code § 7283 *et seq.* LAPD implements this state law by obtaining a written expression of the arrestee's willingness prior to any such interview.

B. The Edward Byrne Memorial Justice Assistance Grant Program

34. Congress established the Byrne JAG Program to fund "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." 42 U.S.C. § 3751(a)(1). Congress directed that these funds be used "for any one or more of the

following programs":

- "Law enforcement programs."
- "Prosecution and court programs."
- "Prevention and education programs."
- "Corrections and community corrections programs."
- "Drug treatment and enforcement programs."
- "Planning, evaluation, and technology improvement programs."
- "Crime victim and witness programs (other than compensation)."
- "Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams."

42 U.S.C. § 3751(a)(1)(A)-(H).

35. Byrne JAG funding is administered by BJA within the U.S. Department of Justice's Office of Justice Programs. *See* 42 U.S.C. §§ 3750-58. Each fiscal year, BJA selects state and local government awardees to receive funds that, in general, may be used over a period of four years.

36. In awarding funds, BJA employs a congressional formula to allocate funds to eligible States and local governments. By statute, funding is allocated based on two factors: population and rate of violent crime. The Attorney General must allocate 50 percent of the available funds to each State in amounts proportionate to its population and its crime statistics. *Id.* § 3755(a). The remaining 50 percent of the funds is allocated to each State in amounts proportionate to its rate of violent crime. *Id.* Of the total amount allocated to a State, 60 percent is provided as a direct grant to the State, and 40 percent as grants for local governments. *Id.* § 3755(b)(2), (d).

37. Local governments wishing to receive a grant must submit an award application to BJA. In order to be eligible for an award, applicants must furnish certain certifications and assurances related to the application or administration of the grant, or use of the grant funds. Specifically, Congress

enumerated two certifications and three assurances that an applicant must make:

- "A certification that Federal funds made available under this part will not be used to supplant State or local funds, but will be used to increase the amounts of such funds that would, in the absence of Federal funds, be made available for law enforcement activities." 42 U.S.C. § 3752(a)(1).
- "An assurance that, not fewer than 30 days before the application (or any amendment to the application) was submitted to the Attorney General, the application (or amendment) was submitted for review to the governing body of the State or unit of local government (or to an organization designated by that governing body)." *Id.* § 3752(a)(2).
- "An assurance that, before the application (or any amendment to the application) was submitted to the Attorney General (A) the application (or amendment) was made public; and (B) an opportunity to comment on the application (or amendment) was provided to citizens and to neighborhood or community-based organizations, to the extent applicable law or established procedure makes such an opportunity available." *Id.* § 3752(a)(3).
- "An assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." *Id.* § 3752(a)(4).
- "A certification . . . that (A) the programs to be funded by the grant meet all the requirements of this part; (B) all the information contained in the application is correct; (C) there has been appropriate coordination with affected agencies; and (D) the applicant will comply with all provisions of this part and all other applicable Federal laws." *Id.* § 3752(a)(5).

38. Byrne JAG applications are accepted through an online program. In order to complete the application, a representative of the applicant is required to electronically sign a page stating that the

applicant will comply with standard "assurances" promulgated by the Office of Management and Budget. These assurances include that, "throughout the period of performance for the award," "the Applicant will comply with all award requirements."

39. When BJA grants an application for a Byrne JAG award, BJA requires the recipient to agree to an additional set of "Special Conditions." These conditions generally relate to the administration of the grant or the use of grant funds. The "Special Conditions" imposed in Los Angeles' FY 2016 grant award governed various aspects of how the City would be required to administer its Byrne JAG award, such as a "[r]equirement for data on performance and effectiveness under the award," "[r]equirements related to System for Award Management and Unique Entity Identifiers," compliance with civil rights and nondiscrimination regulations in the administration of the award, and reporting of any fraud, waste and abuse in the award implementation.

C. Los Angeles Uses Byrne JAG Funds For Critical Local Law Enforcement Needs

40. Each year, since 1997, the City of Los Angeles has received over $1 million in funding under the Byrne JAG Program (and its predecessor). Every year that Los Angeles has applied for Byrne JAG funds, it has been approved for funding.

41. In the fiscal year ("FY") 2016 application cycle, Los Angeles applied for and received approximately $1.8 million in Byrne JAG funding for FY 2016 through FY 2019. Approximately $800,000 of the funding went to the County of Los Angeles as a sub-grantee, and $1 million remained with the City. For FY 2016, Los Angeles received its funding directly from the federal government as part of a formula grant, *see* 42 U.S.C. § 3755(d), not as a distribution from the Byrne JAG funds awarded separately to the State of California.

42. Byrne JAG funds support important law enforcement programs in Los Angeles. Specifically, the City's FY 2016 Byrne JAG funds assist in funding its Community Law Enforcement and Recovery ("CLEAR") program, which aims to reduce gang activity in Los Angeles and rehabilitate

communities that have experienced significant criminal activity. Through effective collaboration among several city, county, and state criminal justice agencies, the program targets high crime areas and promotes community recovery by working closely with special criminal investigative units, an aggressive vertical prosecutorial program, probation and parole officers, youth intervention organizations, and schools.

43. The CLEAR program has been successful. In 2014, the CLEAR program areas had 22 percent less gang crime over a three-year period than similar non-CLEAR areas. For FY 2016, the Byrne JAG funds supported 20 to 30 percent of the salaries for nine Deputy City Attorneys, nine Deputy District Attorneys, and nine Deputy Probation officers related to the CLEAR program.

44. The City's use of Byrne JAG funds to support the CLEAR program and reduce violent crime advances the core law enforcement and criminal justice mission of the Byrne JAG Program. The CLEAR program's key to success in reducing violent crime in targeted neighborhoods has been the dedication of various agency assets to the goal of reducing crime in CLEAR sites. Each CLEAR site includes an operational team made up of representatives from LAPD, the County District Attorney's Office, the City Attorney's Office, and the County Probation Department. In addition to their focus on reducing crime, the CLEAR team members collaborate with residents within each CLEAR site through the creation of a Community Impact Team ("CIT"). The CIT's focus is specifically on quality of life issues such as graffiti, litter, and juvenile loitering. Community members on the CIT identify effective community organizations in their CLEAR area and facilitate a relationship between those organizations and CLEAR team members to secure support from individuals and businesses within the community.

45. The year-over-year federal funding for the CLEAR program has been a catalyst for turning Los Angeles into a leader on coordinated approaches to seemingly intractable issues related to violent crime. The CLEAR model was innovative and went beyond the traditional methods of criminal suppression. It combined, in one program, elements which have been copied by numerous other

jurisdictions and are now a common approach to addressing not only gang violence but violent crimes generally. These elements, such as vertical prosecution of all cases, regular sharing of best practices from public safety teams in various parts of the City, and community outreach, have significantly informed the creation of other innovative approaches to criminal justice in the City, such as the City Attorney's neighborhood prosecutor program.

46. If Los Angeles were to lose its Byrne JAG funding, it would be deprived of valuable resources that enhance Los Angeles' local criminal law enforcement efforts and advance public safety. Continued Byrne JAG funding ensures that CLEAR staff can continue to dedicate their time to their roles within the CLEAR team. The funding also ensures that a continued dedication to cross-agency collaboration will pave the way for future successes and innovations still to come.

D. Defendants' Creation Of Conditions To Be Imposed On States' And Local Governments' Ability To Receive Byrne JAG Funding

47. On January 25, 2017, shortly after being sworn in, President Trump issued Executive Order 13768, entitled "Enhancing Public Safety in the Interior of the United States,"[1] announcing that the policy of the Executive Branch is to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds." Order, § 2(c). The Executive Order directed the Attorney General and Secretary of Homeland Security to ensure, among other things, that jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373" not receive Federal grants. *Id.* § 9(a). It also instructed the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." *Id.* President Trump contemporaneously referred to federal funds as "a weapon" he

[1] The White House Office of the Press Secretary, "Executive Order: Enhancing the Public Safety on the Interior of the United States," Whitehouse.gov (Jan. 25, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united ("Order").

might use against so-called "sanctuary" jurisdictions.[2] On April 25, 2017, a federal court entered a preliminary injunction barring implementation of Section 9(a) of the Executive Order. *County of Santa Clara v. Trump*; *City and County of San Francisco v. Trump*, No. 17-cv-00574-WHO, No. 17-cv-00485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

48. Through a July 25, 2017, press release, the Attorney General announced "immigration compliance requirements" that BJA would be imposing for the Byrne JAG Program to render certain jurisdictions ineligible for funds if they did not change their policies.[3] The Press Release explained that, "[f]rom now on, the Department will only provide Byrne JAG grants to cities and states that comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours' notice before they release an illegal alien wanted by federal authorities." Defendant Sessions further stated that the conditions were intended to encourage jurisdictions that he described as "sanctuary jurisdictions" to change their policies.

49. The Press Release was accompanied by a one-page "Byrne JAG Grant Policy Backgrounder" that was "attributable to a DOJ official."[4] The Backgrounder provides that States and local governments will be required to satisfy three conditions in order to receive Byrne JAG funding. *First*, they must "certify compliance with section 1373, a federal statute applicable to state and local governments that generally bars restrictions on communications between state and local agencies and

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[2] Harriet Taylor, *Trump to Fox News: I may defund California as 'a weapon' to fight illegal immigration*, CNBC.com (Feb. 5, 2017), *available at* https://www.cnbc.com/2017/02/05/trump-threatens-to-defund-california-in-fight-against-sanctuary-cities.html.

[3] Department of Justice Office of Public Affairs, "Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs," Justice.gov (July 25, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial ("Press Release") (attached hereto as Exhibit 1).

[4] Department of Justice, Backgrounder on Grant Requirements, *available at* https://www.justice.gov/opa/press-release/file/984346/download ("Backgrounder") (attached hereto as Exhibit 2).

officials at the Department of Homeland Security" (the "Section 1373 Condition"). Section 1373 pertains to providing information regarding the "citizenship or immigration status, lawful or unlawful," of an individual. 8 U.S.C. § 1373. *Second*, Byrne JAG funding recipients must permit Department of Homeland Security ("DHS") personnel to "access any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States" (the "Access Condition"). *Third*, they must "provide at least 48 hours advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien" (the "48-Hour Condition").[5]

50. Neither the Press Release nor the Backgrounder provides a colorable justification for the Access Condition or the 48-Hour Condition. And neither document explains how the purposes of the Byrne JAG Program to help fund critical criminal justice programs at the state and local level relate to the three conditions imposed, which instead are directed to facilitating efforts by DHS to investigate federal civil immigration violations against individuals, regardless of whether the individuals have committed any crime.

51. The sole rationale provided for the grant conditions is an unsupported assertion in the Press Release that the conditions are "part of accomplishing the Department of Justice's top priority of reducing violent crime." *See* Press Release. But no evidence is cited in either the Press Release or the Backgrounder to support the implied premise that undocumented immigrants or other non-citizens commit violent crimes at higher rates than the general population, or to indicate that the investigations of federal civil immigration violations facilitated by the new DOJ conditions are focused on individuals involved in violent crime.

[5] The Access Condition and 48-Hour Condition are phrased differently in the Backgrounder and the Press Release. *See* ¶¶ 48-49.

52. Defendant Sessions did deliver a speech on July 12, 2017, to law enforcement in which he cited a University of California Riverside study for the proposition that cities with sanctuary policies "have more violent crime on average than those that don't,"[6] but the authors of that study immediately disputed that characterization of their research.[7] They clarified that their study showed there was no relationship between a city's so-called "sanctuary" policies and that city's crime rate.[8] One of the authors explained: "All of the data to date suggests that either there's no relationship, which is what our study found, or there's an inverse relationship."[9]

E. Applications for FY 2017 Byrne JAG Grants

53. BJA has implemented the Attorney General's announcement by including the new DOJ conditions in its solicitations for the current Byrne JAG application cycle. On August 3, 2017, BJA solicited applications from local governments for FY 2017 Byrne JAG grants. That Solicitation, attached hereto as Exhibit 3, states that applicants must certify compliance with Section 1373 in order to qualify for Byrne JAG funding.[10] An application will not be considered complete without such certification.

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[6] U.S. Department of Justice Office of Public Affairs, "Attorney General Jeff Sessions Delivers Remarks in Las Vegas to Federal, State and Local Law Enforcement About Sanctuary Cities and Efforts to Combat Violent Crimes," Justice.gov (July 12, 2017), *available at* https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-las-vegas-federal-state-and-local-law.

[7] Nick Roll, *Correcting Jeff Sessions*, INSIDE HIGHER ED (July 17, 2017), *available at* https://www.insidehighered.com/news/2017/07/17/academics-push-back-against-attorney-generals-misrepresentation-their-study.

[8] Loren Collingwood, Benjamin Gonzalez-O'Brien and Stephen El-Khatib, *Sanctuary cities do not experience an increase in crime*, THE WASHINGTON POST (Oct. 3, 2016), *available at* https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/sanctuary-cities-do-not-experience-an-increase-in-crime.

[9] Roll, *supra* note 7.

[10] Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant Program: FY 2017 Local Solicitation," *available at* https://www.bja.gov/Funding/JAGLocal17.pdf ("Solicitation").

54. Separately, the Solicitation states that individual awards "will include two new express conditions." These conditions "are designed to ensure" that local governments that receive JAG funds:

a. "permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States"; and

b. "provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act."

55. The Solicitation states that these two new conditions (the "Challenged Conditions") "will be an authorized and priority purpose of the award," though Congress made no mention of federal civil immigration investigation or enforcement activities in enacting the Byrne JAG Program. Indeed, none of the program priorities set by Congress contemplate these activities. The Solicitation also specifies that the costs of complying with these "requirements" are "allowable costs under the award." The Solicitation further states that "all award conditions" are included in the "award requirements"—that is, the same requirements that an applicant must agree to abide by in submitting its application. *See* ¶ 38.

F. The New Conditions Place The City of Los Angeles In An Untenable Situation.

56. In prior years, Los Angeles has established eligibility for and received funds under the Byrne JAG Program. The City intends to seek Byrne JAG funding in the FY 2017 cycle and is currently preparing an application in response to the Solicitation, which must be submitted by the September 5, 2017, deadline. Based on the statutory funding formula and Los Angeles' track record, Los Angeles anticipates that the City would receive an award and funding but for any complications posed by the new conditions. BJA has already calculated that Los Angeles is eligible to receive $1.9 million in Byrne

JAG funds, an amount it divides with the County of Los Angeles as a sub-grantee.[11] The City has authority to further adjust the division of Byrne JAG funds, and the funds are generally divided evenly between the City and County.

57. Although Los Angeles does not concede that DOJ has authority to impose the Section 1373 Condition, Los Angeles will certify its compliance with 8 U.S.C. § 1373.

58. Los Angeles also believes its policies are consistent with the Access Condition. The City does not prevent access to its detention facilities, consistent with state statutory law requiring that detainees receive notice of their rights in relation to requested interviews by federal authorities, and LAPD practice in implementing this law by determining the arrestee's willingness to be interviewed. However, in light of Defendants' actions and rhetoric, the City is concerned that DOJ is demanding a form of "access" that is inconsistent with state law and LAPD's related operational policy for its jails. As a result, if this Condition is not enjoined, the ambiguity as to what Defendants intend the Condition to require of the City will force the City to submit a qualified assurance, since DOJ has made it impossible to ascertain what the Condition actually requires.

59. Separately, the Backgrounder and Solicitation provide that States and cities must "provide at least 48 hours' advance notice to DHS" regarding scheduled released dates and times "when DHS requests such notice in order take custody of the alien." *See* Solicitation, at 32. But they do not provide sufficient information to make the Condition unambiguous. For example, they do not indicate what is meant by a DHS "request," what Los Angeles must do if a detainee is in its custody for less than 48 hours and notice cannot be provided during that period, or what showing DHS will make to demonstrate that Los Angeles is authorized to continue detention during that period.

[11] Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, "2017 California Local JAG Allocations," *available at* https://www.bja.gov/Programs/JAG/jag17/17CA.pdf (attached hereto as Exhibit 4).

60. The ambiguity of the 48-Hour Condition is amplified by the wording of DHS Form I-247A, which, in addition to being ICE's immigration "detainer" form, is provided to law enforcement agencies when ICE seeks advance notice of an arrestee's impending release. Specifically, the form asks local law enforcement to "[n]otify DHS as early as practicable (at least 48 hours, if possible) before the alien is released from your custody." The conspicuous absence of this "if possible" clause from the Condition, despite the fact that the clause is included on the current ICE form, intensifies the City's concerns.

61. The 48-Hour Condition leaves Los Angeles in an essentially impossible position, because if the ambiguity were resolved in the way DOJ appears to require, it would force the City to choose between acting in an unconstitutional manner or foregoing critical law enforcement funding. Where an individual is detained for less than 48 hours, or becomes entitled to immediate release under state and local law within that timeframe, a strict interpretation of the Condition by DOJ could require Los Angeles to prolong the detention of the individual in its facilities in order to provide 48 hours of notice to DHS prior to releasing the individual. In those instances, continuing to detain these individuals in order to satisfy the 48-Hour Condition would place the City at risk of being found in violation of the Fourth Amendment to the United States Constitution. *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015).

62. Los Angeles' application for FY 2017 Byrne JAG funding is due September 5, 2017, and funding decisions are typically made shortly thereafter. The current Byrne JAG Program online application requires the City to complete certain "assurances and certifications" prior to submission of the application. One such assurance is the "U.S. Department of Justice Office of Justice Programs Certified Standard Assurances," which requires a city employee to "certify under penalty of perjury" that "the applicant will comply with all award requirements." The Solicitation defines "award requirements" as including all award conditions, including the Challenged Conditions.

63. On August 4, 2017, shortly after receiving the Solicitation, Los Angeles contacted DOJ, by telephone, by email, and by letter, to seek clarification of the 48-Hour Condition. In light of the impending deadline for applications, the City requested that the Department provide an answer within seven days. As of the date of this filing, DOJ has not provided clarification.

64. On August 16, 2017, however, Defendant Sessions delivered a speech in Miami, criticizing the City of Chicago's lawsuit challenging the new Byrne JAG conditions.[12] During this speech, he repeatedly referenced "detainers" in connection with DOJ's new conditions on federal grants, giving the City added concern that DOJ intends to enforce the 48-Hour Condition in an unconstitutional manner. The Attorney General also called Chicago's actions "malfeasance" and noted that cities with police departments who abide by Fourth Amendment jurisprudence were rejecting our nation's immigration laws.

65. Given all of this ambiguity, when the City applies for the grant, it will not be able to make an unqualified "assurance" of its compliance with "all award requirements" when it submits its application, nor will it be able to make an unqualified certification of its compliance with the conditions after any award is made; that inability may jeopardize the City's eligibility for the grant funds, and could deprive it of valuable resources to enhance the funding of criminal justice programs at the local level. This Court's intervention is required to invalidate these unlawful conditions.

COUNT ONE

(Violation of Separation of Powers / Ultra Vires Agency Action)

66. Los Angeles incorporates and re-alleges each and every allegation contained above as if fully set forth herein.

[12] U.S. Department of Justice Office of Public Affairs, "Attorney General Sessions Delivers Remarks on Sanctuary Policies," Justice.gov (August 16, 2017), *available at* https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-sanctuary-policies.

67. Defendants' imposition on Byrne JAG grant applicants of the Access Condition and the 48-Hour Condition (the "Challenged Conditions") violates constitutional principles of Separation of Powers and exceeds DOJ's lawful authority.

68. The Constitution confers the power of the Spending Clause on Congress, not the Executive Branch. *See* U.S. Const. art. I, § 8, cl. 1. It is thus Congress, not any Executive Branch agency, that has the constitutional authority – within limits – to impose conditions on the receipt of federal funds. Defendants here are attempting to wield authority that is vested in Congress, not in DOJ.

69. While Congress may have limited authority to delegate its Spending Clause powers, it must at a minimum speak clearly and unmistakably when it does so, with specific guidance as to the conditions the Executive Branch may attach. This requirement is critical, especially when federalism concerns come into play, as they do here. Absent a clear statement, it cannot lightly be presumed that Congress permitted an agency to invent conditions on federal funds, tying those funds to that agency's views on what federal immigration policies state and local governments should be required to adopt.

70. Moreover, Congress has made no specific and unambiguous delegation of authority to DOJ, and under our system of government, a federal agency "has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "[W]hen the [Executive] takes measures incompatible with the expressed or implied will of Congress, [its] power is at its lowest ebb . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Here, DOJ is exceeding its delegated authority and contravening the text and structure of the statute establishing the Byrne JAG Program.

71. Congress specifically directed that Byrne JAG funds be used "to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." 42 U.S.C. § 3751(a)(1). In so doing, Congress enumerated the types of "criminal justice" programs that could receive funding, such as "law enforcement programs,"

"prosecution and court programs," and "prevention and education programs." *Id.* § 3751(a)(1)(A)-(H).

72. The programs to which Congress expressly directed Byrne JAG funding do *not* include inducing state and local support for federal investigations of civil immigration violations. Yet in imposing the Challenged Conditions, Defendants attempt to divert federal funds to exactly that purpose. DOJ goes so far as to convert these immigration-related requirements into a "priority purpose" of the Award – and to permit award recipients to dissipate Byrne JAG funds on changing local laws and policies to comply with the federal immigration conditions on the funds, and even to spend Byrne JAG funds on the costs to the recipient of "honor[ing] any duly authorized request from DHS that is encompassed by the[] conditions," thereby expressly authorizing the shifting of money that Congress appropriated to advance local criminal justice programs away from that clear statutory purpose to fund, instead, federal civil immigration investigations. This is an unprecedented departure from the way Congress has chosen to exercise its Spending Clause power.

73. While the 2005 legislation creating the program has a limited legislative history, what little record there is shows that Congress specifically recognized the sovereign police power of state and local governments to control the public health and safety of their residents by desiring to provide police departments with the "flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005). The record also shows Congress intended to "lessen the administrative burden of applying for the grants." *Id.* DOJ's blatant attempt to syphon monies from creative, locally driven Byrne JAG funded programs, like the City's CLEAR program, Chicago's Force for Good and police vehicle purchasing programs, or San Francisco's drug court and drug diversion programs, into a complex, "one size fits all" effort to support federal civil immigration investigations, clearly runs afoul of this congressional intent.

74. The Challenged Conditions are also grossly inconsistent with the funding formula established in 42 U.S.C. § 3755. BJA is required, by congressional mandate, to allocate funds based on

a prescribed formula that takes into account a State's population, and the violent crime rates in a given State or locality. 42 U.S.C. § 3755(a), (d). Congress enumerated specific certifications and assurances the applicant must make to access these funds. Again, Congress did not include any condition concerning participation in federal civil immigration investigations.

75. Not only are the Challenged Conditions incompatible with the basic structure of the Byrne JAG Program, but they violate an express rule of construction, which Congress adopted. Congress directed that the statute creating the Byrne JAG Program not be construed to authorize DOJ to exercise "any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof." 42 U.S.C. § 3789d(a). The Challenged Conditions attempt to do just that, asserting federal control over Los Angeles and its police department in the operation of its custodial facilities.

76. The apparent basis of DOJ's attempt to defeat this carefully-structured statutory scheme is 42 U.S.C. § 3712(a)(6). Section 3712(a)(6) states, under the heading of "Duties and functions of Assistant Attorney General," that the Assistant Attorney General "shall . . . exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." *Id.*

77. This glancing reference to "special conditions" evinces no congressional intent to give DOJ the authority it now asserts. The statute does not give blanket authority to Defendants to place *any* conditions on *any* grants; it simply defines the Assistant Attorney General as the representative within the DOJ's hierarchy who is able to place special conditions on a grant whenever that authority "may be vested in him." When Congress wishes to actually vest authority to create new conditions, it does so expressly, for example, authorizing BJA to impose "reasonable conditions" on grant awards under the Violence Against Women Act, so long as those conditions were limited "to ensure that the States meet

statutory, regulatory, and other program requirements." 42 U.S.C. § 3796gg-1(e)(3). By contrast, the only authority Congress vested in the Attorney General with respect to the Byrne JAG Program was to specify the "form" of the application and the "data, records, and information (programmatic and financial)" that an applicant must report and maintain. *Id.* § 3752(a), (a)(4).

78. To the extent DOJ does have authority to impose conditions on Byrne JAG grants, that authority is limited. Conditions on Byrne JAG grants must relate to the administration of the grant or the use of grant funds, such as providing funds on a reimbursement basis, requiring additional, more detailed financial reports, or requiring the grantee to comply with statutory mandates of nondiscrimination in connection with grant programs. *See, e.g.*, 29 U.S.C. § 794. Congress did not, in an innocuous grant administration provision, hide an "elephant[] in [a] mousehole[]," *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) – permitting DOJ to demand significant policy commitments on federal immigration matters in exchange for criminal justice assistance.

79. All of these limits on DOJ's delegated authority are confirmed by the fact that Congress has considered – and rejected – attempts to link Byrne JAG funding to state and local participation in federal civil immigration investigations. *See, e.g.*, Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2(b)(2) (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3(b) (2015).

80. In sum, DOJ is attempting to exercise a power it does not have. Defendants' attempt to condition criminal justice funding intended for cities like Los Angeles violates the Separation of Powers enshrined in our Constitution.

COUNT TWO

(Tenth Amendment and Spending Clause)

81. Los Angeles incorporates and re-alleges each and every allegation contained above as if fully set forth herein.

82. Even if Congress could have delegated the spending power to DOJ to impose the

Challenged Conditions, and even if it had intended to do so, the delegated power would still be subject to constitutional restrictions. It is well-established that the Spending Clause requires that conditions on federal funds to States and local governments must, *inter alia*, not require unconstitutional acts, be unambiguous, and be sufficiently germane to the purpose of the federal funds. Otherwise, the "condition" amounts to impermissible regulation and commandeering of States and local governments, in violation of the Tenth Amendment. The Challenged Conditions fail each of these requirements.

83. The federal government is prohibited from using the power of the purse to "induce States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole,* 483 U.S. at 210. As written, the 48-Hour Condition could be read, particularly in the context of the rhetoric of Defendant Sessions and others in the Administration, to require Los Angeles to violate the Constitution. Because DOJ has declined to clarify the scope of that Condition, and Defendant Sessions has publicly appeared to link Byrne JAG grant funding with "detainer" requests, Los Angeles must wonder whether it is being asked to detain individuals after they otherwise would be entitled to release, in order to provide 48 hours' notice to DHS. Courts have ruled that detaining a person for federal civil immigration purposes after that person would otherwise have been released, without probable cause of criminality, will not support the new "seizure" of that person, and violates the Fourth Amendment. *See, e.g.*, *Miranda-Olivares*, 2014 WL 1414305, at *11.

84. If DOJ were to interpret the Access Condition to require LAPD to postpone the release of an arrestee in order to afford DHS an opportunity to effectuate its "inquiry," similar Fourth Amendment concerns would be presented.

85. Conditions on federal funds must also be stated unambiguously. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts" the conditions, and there can be "no knowing acceptance if a State [or city] . . . is unable to ascertain what is expected of it." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17

(1981). It is Congress, not an agency, that must speak clearly in defining the type of conditions at issue. But even if DOJ could satisfy this requirement by speaking with the requisite clarity, it has not done so here.

86. The 48-Hour Condition contains important ambiguities. It does not clearly state what is expected of the City when, as would generally be the case in city jails, a detainee is in custody for less than 48 hours, or when the City itself does not have 48 hours' advance knowledge of when the detainee will be released. Notably, and as stated earlier, this Condition lacks a qualification DHS presently includes on its DHS Form I-247A, where it requests 48 hours' notice "if possible," suggesting that, because of the lack of that qualification here, DOJ does mean to require an unconstitutional prolongation of detention. At the same time, DOJ conspicuously avoids framing this Condition as requiring compliance with "detainer" requests, speaking only in terms of "notice." If DOJ does mean to require detention, its attempt to hide a wolf in sheep's clothing is far too subtle to put Los Angeles on clear notice of the Condition to which it must agree to receive Byrne JAG funding to combat local crime. This ambiguity is only compounded by other uncertainties, such as what form the "request" can take and what showing, if any, will justify any potential detention.

87. The Access Condition also does not unambiguously require unfettered access to local detention facilities, even when a detainee is informed of the request and declines to be interviewed in accordance with state law. Indeed, Los Angeles does not interpret the Access Condition as preventing it from delivering to detainees the required "know-your-rights" form, or requiring the City to facilitate meetings that have been declined by the detainees. But if, as Defendants' rhetoric has suggested, DOJ intends to view and enforce this Condition expansively, it would have to have been written in much clearer and more explicit terms. Moreover, the Access Condition does not explain what is meant by an "inquiry" triggering the obligation, and includes no reasonableness requirement or limiting language to prevent DHS from consuming hours of LAPD staff time or tying up LAPD interrogation space.

88. Finally, conditions must also "bear some relationship to the purpose of federal spending." *New York v. United States*, 505 U.S. 144, 167 (1992). The Challenged Conditions concern federal civil immigration investigations, which are not sufficiently related to the purpose of the Byrne JAG Program to support state and local criminal justice efforts. Indeed, in announcing the new conditions, DOJ made no effort to substantiate any connection between these spheres of policy that Congress has treated as distinct.

COUNT THREE

(Violation of the Administrative Procedure Act - Arbitrary and Capricious Agency Action)

89. Los Angeles incorporates and re-alleges each and every allegation contained above as if fully set forth herein.

90. Agency actions are unlawful if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

91. The decision to impose the Challenged Conditions is arbitrary and capricious because DOJ adopted it without any reasoned basis, provides no support for its linkage of state cooperation in federal immigration enforcement with violent crime, provides no support for potential unconstitutional detention that could arise from certain interpretations of the 48-Hour Condition, and appears to rely on clearly erroneous and debunked interpretations of existing studies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff City of Los Angeles respectfully requests that this Court enter judgment in its favor, and grant the following relief:

1. Declare that the Challenged Conditions are unconstitutional;

2. Permanently enjoin Defendants from imposing or enforcing the Challenged Conditions;

3. Award Plaintiff City of Los Angeles reasonable fees and costs; and,

4. Grant any further relief that this Court may deem fit and proper.

Dated: August 22, 2017

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