No. 18-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CITY OF EVANSTON,

Plaintiff,

and THE UNITED STATES CONFERENCE OF MAYORS,

Plaintiff-Appellant

v.

JEFFERSON BEAUREGARD SESSIONS III,
Attorney General of the United States,

Defendant-Appellee.

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

THE UNITED STATES CONFERENCE OF MAYORS' EMERGENCY MOTION TO LIFT STAY ON PRELIMINARY INJUNCTION ORDER IN LIGHT OF DEFENDANT'S AUGUST 10, 2018 DEADLINE

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INTRODUCTION

This action filed by the United States Conference of Mayors (the "Conference") and the City of Evanston to vindicate the right of hundreds of cities across the United States to be free from the unconstitutional and legally unauthorized conditions that the Attorney General has placed on the receipt of federal Byrne JAG funds. The Attorney General has imposed a deadline by which cities, including hundreds of the Conference's members, must either accept Byrne JAG funds with unconstitutional and illegal conditions attached, or else forego those funds. That deadline is **August 10, 2018**. The district court correctly found on August 9, 2018, that the Conference and the City of Evanston are entitled to a preliminary injunction that would prohibit the Attorney General from forcing the City of Evanston and the Conference's other member cities from imposing the August 10 deadline by which they otherwise would be required to make the Hobson's choice described above. In deference to this Court's order of June 26, 2018 in *City of Chicago v. Sessions* (Case No. 17-2991, Dkt. 134), however, the district court stayed the effect of its preliminary injunction order as to the Conference. (A true and correct copy of the district court's August 9, 2018 order is attached as Exhibit A.)

Accordingly, unless this motion is granted, hundreds of cities across the United States will be forced to make an untenable choice by the close of business tomorrow, August 10, 2018: whether to accept conditions on the receipt of Byrne JAG funds that this Court already has held to be illegal, or else forego those funds. The district court correctly held that the Conference's members will suffer irreparable harm if they are forced to make this choice on August 10. There is no just reason to stay the effect of the

district court's preliminary injunction order. The Conference therefore respectfully requests that this Court lift the stay that the district court imposed on its own preliminary injunction order, and allow that preliminary injunction to take full effect immediately.

BACKGROUND

A. The Byrne JAG Program, the Attorney General's Illegal Conditions, and the *City of Chicago v. Sessions* Litigation

This case involves the Byrne JAG program, which was the subject of this Court's opinion in *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018). Congress established the Byrne JAG program in 2005 to serve as the primary source of federal criminal justice funding for states and localities. The Office of Justice Programs ("OJP") within the Department of Justice ("Department") oversees the program.

The goal of the Byrne JAG program is to allow states and local governments the "flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" for local policing. *See* H.R. Rep. No. 109-233, at 89 (2005). To that end, the Byrne JAG program is structured as a formula grant, which awards funds to all eligible grantees according to a prescribed formula. *See* 34 U.S.C. § 10156(d)(2)(A) (providing that the Attorney General "shall allocate to each unit of local government" funds consistent with the established formula). Byrne JAG funds are distributed across states and localities based on their population and relative levels of violent crime. The Byrne JAG distribution formula for states is a function of population and violent crime. 34 U.S.C. § 10156(a). The formula for local governments is a function of the state's

allocation and the ratio of violent crime in the locality to violent crime in the state. *Id.* § 10156(d). The formula-based approach entitles cities to their share of the Byrne JAG formula allocation so long as their proposed programs meet at least one of eight broadly defined goals, *see* 34 U.S.C. § 10152(a)(1)(A)-(H) (listing eligible programs such as general law enforcement, prevention and education, drug treatment, and mental health), and their applications contain a series of statutorily required certifications and attestations. *Id.* § 10153(a).

For over a decade, the Department administered the Byrne JAG program as Congress intended: funding critical local law enforcement initiatives without seeking to leverage funding to conscript local agencies to enforce federal immigration law. But now the Department seeks to impose three conditions on FY 2017 Byrne JAG funds under a cloud of uncertainty created by the Department's increasingly aggressive positions: (1) the notice condition; (2) the access condition; and (3) the compliance condition. Each condition is unauthorized and unlawful.

The Notice Condition: The FY 2017 Byrne JAG solicitation stated that the awards would be conditioned on grant applicants providing "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." (*See* Dkt. 10-4 at p. 30.) The FY 2017 Byrne JAG award documents, which the Department recently sent jurisdictions around the country, revise and expand on what the notice condition entails. From the date a city accepts the award and throughout the time of the award's performance, each

city must have in place an "ordinance, -rule, -regulation, -policy, or -practice . . . designed to ensure that, when a local-government (or local-government-contracted) correctional facility receives from DHS a formal written request . . . that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and – as early as practicable . . . provide the requested notice to DHS." (Dkt. 10-2 at p. 19.) The award document specifies that DHS currently requests notice "as early as practicable (at least 48 hours, if possible)." (*Id.* at p. 18.)

The Access Condition: The FY 2017 Byrne JAG solicitation stated that the awards would also be conditioned on grant applicants permitting "personnel of the [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." (Dkt. 10-4 at p. 30.) The FY 2017 Byrne JAG award documents revise and expand on what the notice condition entails. From the date a city accepts the award and throughout the time of the award's performance, the city must have in place an "ordinance, -rule, -regulation, -policy, or -practice . . . designed to ensure that [any, not just DHS] agents of the United States are given access [to] a local-government (or local-government-contracted) correctional facility" to permit the federal "agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States." (Dkt. 10-2 at p. 19.)

The Compliance Condition: The FY 2017 Byrne JAG solicitation stated that to validly accept an award, a local government must certify compliance with 8 U.S.C. §

1373. (*Id.*, at pp. 15-17.) In fact, the application required certifications of compliance by both a city's chief legal officer and its chief executive. (*Id.*) Section 1373 provides that state and local entities may not "prohibit, or in any way restrict" their entities and officials from sending or receiving citizenship or immigration status information from or to DHS. 8 U.S.C. § 1373(a). Section 1373 further states that no person or agency may "prohibit, or in any way restrict" state and local entities from sending, requesting, or receiving immigration status information from or to DHS; maintaining immigration status information; or exchanging immigration status information with other entities. 8 U.S.C. § 1373(b). The FY 2017 Byrne JAG award documents revise and expand on what the compliance condition entails. The compliance condition is set forth in three separate award conditions— Conditions 52, 53, and 54. (Dkt. 10-2 at pp. 15-17.) Condition 52 requires a local government to submit a certification of compliance with Section 1373 signed by the city's chief legal officer. (*Id.*) Condition 53 requires ongoing compliance with Section 1373, and requires subrecipients (*i.e.*, those who receive their funds through another applicant) to certify compliance with Section 1373. (*Id.*)

On April 19, 2018, in *City of Chicago v. Sessions* (Case No. 17-2991), this Court affirmed the district court's grant of a nationwide injunction as to the notice and access conditions. *City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018). The panel unanimously concluded that "the district court did not err in determining that the City established a likelihood of success on the merits of its contention that the Attorney General lacked the authority to impose the notice and access conditions on receipt of the Byrne JAG grants," and two of the three judges on the panel held that the district court

"did not abuse its discretion in granting the nationwide preliminary injunction." *Id.* at 287, 293.

The Attorney General subsequently filed a petition for rehearing en banc as to the scope of the preliminary injunction. *Chicago*, No. 17-2991, Dkt. 119. Notably, the Attorney General did not request rehearing on this Court's decision that Chicago established a likelihood of success on its claims that the Attorney General lacked authority to impose the notice and access conditions.

On June 4, 2018, this Court voted to "partially rehear the case en banc only as to the geographic scope of the preliminary injunction entered by the district court." *Chicago*, No. 17-2991, Dkt. 128. On June 26, 2018, this Court stayed the preliminary injunction issued by the district court "as to geographic areas in the United States beyond the City of Chicago pending the disposition of the case by the en banc court." *Chicago*, No. 17-2991, Dkt. 134.

Even though the Attorney General did not contest this Court's decision that Chicago was likely to succeed on the merits of its claims that the Attorney General lacks the authority to impose the notice and access conditions, the Department began issuing FY 2017 Byrne JAG award notification documents as soon as this Court stayed the preliminary injunction as to geographic areas outside the City of Chicago. A few hours after this Court stayed the nationwide injunction, on June 26, 2018, the Department issued FY 2017 Byrne JAG award notifications to hundreds of cities and local jurisdictions, including many Conference member cities.

B. The District Court's Preliminary Injunction Order in this Case

Over 250 Conference cities, which collectively await receipt of tens of millions of dollars in Byrne JAG funds, must decide by this Friday, August 10, whether to accept the funds with the Attorney General's conditions or forego them entirely. (Dkt. 10-1, ¶47; Dkt. 10-2.) In light of this imminent deadline, the plaintiffs in this case moved in the district court for emergency injunctive relief. In its response brief, the Attorney General made a cursory argument that any preliminary injunction should be stayed. (Dkt. 15 at p. 15.) Because the Conference represents hundreds of affected cities nationwide, it sought injunctive relief that would apply nationwide across the application of the Byrne JAG program or, at a minimum, to each of the Conference's member cities. (Dkt. 10 at p. 15; Dkt. 19 at pp. 14-15.)

On August 9, 2018, the district court entered an order granting the plaintiffs' motion for a preliminary injunction. (Ex. A.) The district court recognized that when this Court "stayed the nationwide scope of the injunction, the Attorney General demanded that Evanston and many members of the Conference agree to the Conditions or else forego the Financial Year 2017 award." (*Id.*, at p. 3.) The district court held that the plaintiffs have standing to seek the requested injunctive relief (*id.*, at pp. 3-7), and it held that the plaintiffs "are likely to prevail on the merits of their claims" that the Attorney General lacks authority to impose the conditions on Byrne JAG funds (*id.*, at p. 8). The district court further held that the plaintiffs had "cleared" the "hurdle" of establishing that "they face irreparable harm absent injunctive relief." (*Id.*) The district court explained: "[T]he Attorney General has imposed August deadlines by which

Plaintiffs must either accept the grant and its Conditions or else decline the funds outright. Because this Court has already found that the Attorney General lacks the authority to impose *any* of these Conditions, however, the choice Plaintiffs face—to decline funds or accept them upon pain of sacrificing their sovereign powers—is no choice at all and is itself sufficient to establish irreparable harm." (*Id.*)

"The difficulty here," the district court went on, "arises from the scope of relief necessary to protect the Conference's members from the imposition of the Conditions." (*Id.*, at p. 9.) The district court recognized "that unlike in *Chicago v. Sessions*, the party requesting relief is not a single city—but an association comprised of many—and the injunction Plaintiffs seek is designed to protect their interests—rather than the interests of non-parties nationwide." (*Id.*, at p. 10.) Yet the district court noted that this Court "has signaled it may have a different perspective." (*Id.*) For that reason, and notwithstanding its finding that the elements of injunctive relief had been established with respect to the Conference's members, the district court was "disinclined to issue another, similarly-broad injunction absent further guidance from the court of appeals." (*Id.*) Noting its own "keen interest in deferring to the guidance of higher courts" (*id.*), the district court "issue[d] the sought-after injunction as to both Evanston and those members of the Conference who face the Attorney General's August deadlines," but it "also stay[ed] the injunction as to the Conference, which, by virtue of its membership, demands an injunction of near-nationwide effect" (*id.*, at p. 11).

"Should the Conference believe this stay is improvidently imposed," the district court continued, "it may raise the issue with the Seventh Circuit in short order." (*Id.*, at

p. 12.) Explaining that it "must hew closely to the deference required of it for higher authority," the district court held that the "requested injunction is now ordered, though immediately stayed as to the Conference." (*Id.*)

ARGUMENT

With mere hours left on an August 10, 2018 deadline, cities that should have breathed a sigh of relief as a result of the district court's injunction were instead thrown into panic because the district court immediately stayed the injunction, leaving those cities to fend for themselves in the face of the deadline. The district court's stay of its own relief is unjust and improper under the circumstances, and the district court abused its discretion in granting the stay, for three reasons:

First, the district court erred in staying the preliminary injunction without finding that the Attorney General has any likelihood of succeeding on the merits or that he would suffer any harm if the stay were denied. This error alone justifies lifting the stay. The stay will cause the Conference's members severe and irreparable harm, while the Attorney General will suffer no harm at all in the absence of a stay.

Second, the district court improperly balanced the equities when it based its balancing not upon any harm to the Attorney General, but upon notions of judicial economy.

Third, the district court's deference to this Court's pending review in *Chicago v. Sessions*, is misplaced here because, as the district court recognized, "unlike in *Chicago v. Sessions*, the party requesting relief is not a single city—but an association comprised of

many—and the injunction Plaintiffs seek is designed to protect their interests-rather than the interests of non-parties nationwide." (Ex. A, at p. 10.)

I. The stay should be lifted because the Attorney General has no likelihood of success on the merits and has not established that the injunction will cause him any harm.

In deciding whether to grant a stay pending appeal, "courts consider the following four factors: 1) whether the appellant is likely to succeed on the merits of the appeal; 2) whether the appellant will suffer irreparable injury absent a stay; 3) whether a stay would substantially harm other parties in the litigation; and 4) whether a stay is in the public interest." *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). "These factors mirror the factors to be considered in ruling on an application for preliminary injunction." *Id.* As with applicants for preliminary injunctions, applicants for a stay "have threshold burdens to demonstrate the first two factors: they must show that they have some likelihood of success on the merits and that they will suffer irreparable harm if the requested relief is denied." *Id.* If the applicant makes those threshold showings, "the court then moves on to balance the relative harms considering all four factors using a 'sliding scale' approach." *Id.* at 1300-01. However, if the threshold showings of likelihood of success and irreparable harm are not made, "the court's inquiry into the balance of harms is unnecessary, and the stay should be denied without further analysis." *Id.* at 1301 (citing *Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359, 361 (7th Cir. 1993); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)).

A. The Attorney General demonstrated no likelihood of success on appeal.

To obtain a stay pending appeal, an applicant must make a "strong" and "substantial" showing of likelihood of success on appeal. *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973). That is because the district court already evaluated the applicant's likelihood of success. *In re Forty-Eight Insulations, Inc.*, 115 F.3d at 1301 (citing additional cases). This Court reviews that question *de novo*. *Id.*

In this case, the Attorney General has established no likelihood of success on the merits. To the contrary, the district court, a panel of this Court, and at least one additional court have held that the challenged conditions are unauthorized and unconstitutional. *Chicago v. Sessions*, 888 F.3d at 293; *City of Chicago v. Sessions*, No. 17 C 5720, 2018 WL 3608564, at *12-13 (N.D. Ill. July 27, 2018); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 344 (E.D. Pa. 2018). No court has held to the contrary. The Attorney General can thus make no showing of likelihood of success, much less a "strong" or "substantial" showing.

Additionally, while the district court's ruling in *Chicago v. Sessions* that the statute underlying the compliance condition, 8 U.S.C. § 1373, was unconstitutional as violative of the anti-commandeering doctrine has not yet been reviewed by this Court and was in the district court's estimation a "closer question" than the court's ruling on the notice and access conditions, that is no reason to stay the injunction. (Ex. A, at p. 9.) The district court cited no authority for the proposition that the desire to wait upon a ruling from a higher court can override the district court's obligation to exercise its equitable

powers to prevent irreparable harm. Regardless, even if such a consideration were proper, it would not counsel in favor of staying the entire injunction, but only of limiting it to the notice and access conditions which this Court already has ruled are likely unlawful. *Chicago v. Sessions*, 888 F.3d at 287.

B. The Attorney General will suffer no irreparable harm in the absence of a stay, whereas a stay will cause the Conference to suffer irreparable harm.

The Attorney General also has not met his burden to demonstrate the irreparable harm necessary to support a stay. Indeed, the Attorney General did not argue in the district court that he would be harmed by the preliminary injunction. Nor did the district court find that the Attorney General would be harmed absent a stay. This alone requires that the stay be lifted. *See Adams*, 488 F.2d at 1065-66 (denying stay where applicant "does not purport to claim that he will suffer irreparable injury unless a stay is granted").

Significantly, however, the stay will cause the Conference tremendous and irreparable harm. As the district court held, the choice that Conference member cities are forced to make by August 10, is an "affront to their sovereignty," is therefore "no choice at all" and "is itself sufficient to establish irreparable harm." (Ex. A, at pp. 8, 9.) If anything, this understates the stakes. The Conference's member cities undisputedly await receipt of nearly $50 million in federal law enforcement grant funds, and they undisputedly use those funds for critical, life-saving programs to combat violent crime. Additionally, many cities have adopted policies that would be overridden by the conditions, and which those cities believe are essential to maintaining cooperation

between immigrant communities and law enforcement, and thus to fighting serious, violent crimes in their cities. Such harm has been acknowledged by this Court already. *Chicago v. Sessions*, 888 F.3d at 291. Accordingly, the district court's willingness to grant a stay even though the Attorney General demonstrated no harm, and the district court found none, was an abuse of discretion. This Court should lift the stay to prevent the severe harm faced by the Conference's members from materializing.

II. The district court improperly balanced the equities when it based its decision not on any harm to the Attorney General, but upon notions of judicial economy.

The district court's decision that a stay was warranted hinged upon its conclusion that a "balancing of the equities" requires such a result. (Ex. A, at p. 9.) As an initial matter, that ruling is error because it overlooks that the district court in evaluating a stay does not properly reach a balancing of the equities unless it finds that the stay applicant is likely to succeed on the merits and will be irreparably harmed absent a stay. *In re Forty-Eight Insulations, Inc.*, 115 F.3d at 1300-01. As set forth above, neither showing was made here.

Moreover, in balancing the equities, the district court relied not on any comparison of the harm faced by the parties, but on concerns regarding "judicial economy" and the possible impact of later rulings on its decision. (Ex. A, at pp. 10, 12 (citing *California ex rel. Lockyear v. U.S. Dept' of Agric.*, 710 F. Supp. 2d 916, 924 (N.D. Cal. 2008, *aff'd* 575 F.3d 999 (9th Cir. 2009).) But the district court's only cited case is inapposite and does not stand for the proposition that in balancing the equities, the court can take account of such concerns absent irreparable harm. To the contrary, in

California ex rel. Lockyear, the court partially stayed an injunction where the defendant would be irreparably harmed because the injunction was contrary to a competing ruling of another court. *Id.* Here, by contrast, no such ruling exists. Nor does the district court's speculation about possible future rulings rise to the level of irreparable harm that could entitle the Attorney General to a stay.

III. The district court's reliance upon this Court's pending review in *Chicago v. Sessions* is misplaced.

The district court's concerns regarding this Court's pending review in *Chicago v. Sessions* are misplaced under the very distinct circumstances presented here. As the district court recognized, "unlike in *Chicago v. Sessions*, the party requesting relief is not a single city—but an association comprised of many—and the injunction Plaintiffs seek is designed to protect their interests—rather than the interests of non-parties nationwide." (Ex. A, at p. 10.) In this regard at least, the facts of this case therefore stand in stark contrast to the facts presented in the *Chicago* litigation. *See City of Chicago v. Sessions*, 888 F.3d 272, 299-300 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) ("[o]ther jurisdictions that do not want to comply with the Notice and Access conditions were not parties to this suit, and there is no need to protect them in order to protect Chicago"). In the *Chicago* litigation, one city sought an injunction that would affect the rights of numerous other municipalities who were strangers to the litigation. In this case, by contrast, the Conference is a party and represents the interests of its members, including over 250 municipalities across the nation that are in immediate need of injunctive relief. The district court correctly found

that the Conference has standing to vindicate the interests of its members (*see* Ex. A, at pp. 4-7), and the Conference seeks injunctive relief that would protect its members' right to be free from the Attorney General's illegal conditions. The propriety of injunctive relief in this case therefore can be determined independently from the propriety of the nationwide injunction in the *Chicago* litigation; the two cases are not identical simply because they share common legal issues. The district court's concerns about the *Chicago* litigation were therefore misplaced. They do not justify the issuance of a stay on the district court's preliminary injunction in this case.

CONCLUSION

For the reasons stated above, the Conference respectfully requests that this Court enter an order immediately lifting the stay on the district court's preliminary injunction order with respect to the Conference.

Dated: August 10, 2018

Respectfully Submitted,

THE UNITED STATES CONFERENCE OF MAYORS

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CERTIFICATE OF COMPLIANCE

I certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 4,185 words. This motion was prepared in a proportionally spaced typeface using Microsoft Word in a 12-point roman-style font.

By: /s Brian C. Haussmann
Brian C. Haussmann

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I served a copy of the foregoing document by e-mail upon all counsel of record in the district court case *City of Evanston and The United States Conference of Mayors v. Jefferson Beauregard Sessions, III*, Case No. 18-cv-4853.

By: /s Brian C. Haussmann
Brian C. Haussmann

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF EVANSTON and THE UNITED STATES CONFERENCE OF MAYORS,

Plaintiffs,

v.

JEFFERSON BEAUREGARD SESSIONS III, in his Official Capacity as Attorney General of the United States,

Defendant.

Case No. 18 C 4853

Judge Harry D. Leinenweber

ORDER

The City of Evanston and the U.S. Conference of Mayors seek a preliminary injunction enjoining the Attorney General from attaching three Conditions to funds under the Edward Byrne Memorial Justice Assistance Grant Program. As set forth herein, the Court finds that both Plaintiffs have standing to pursue their claims and, further, are entitled to preliminary injunctive relief. The Court accordingly enters an injunction enjoining the Attorney General from attaching the three challenged Conditions to grants awarded to Evanston and to any Conference member who faces the Attorney General's fast-approaching "accept or decline" deadlines. However, out of deference to the court of appeals and its pending *en banc* rehearing concerning the nationwide scope of the preliminary injunction in this Court's related case, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017), the Court stays its injunction as to the Conference.

STATEMENT

This case presents the same issues this Court has twice ruled upon in a related case. *See generally City of Chicago v. Sessions*, No. 17 C 5720, 2018 WL 3608564 (N.D. Ill. July 27, 2018); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933. For the sake of brevity, this Order incorporates the facts laid out in those opinions.

Before the Court now is a Motion for a Temporary Restraining Order and a Preliminary Injunction brought by the City of Evanston and the U.S. Conference of Mayors. Those Plaintiffs ask the Court to enjoin the Attorney General's attachment of three Conditions to the funds provided by the Byrne JAG grant which lies at the heart of both this dispute and the related case. This Court and others have referred to these three as the Notice, Access, and Compliance Conditions, respectively. In the *Chicago v. Sessions* case, as the litigants well know, the Seventh Circuit affirmed this Court's preliminary, nationwide injunction against the first two Conditions. Thereafter, the court of appeals voted *en banc* to vacate and rehear only the nationwide aspect of the injunction. In so doing, the *en banc* court also stayed this Court's preliminary injunction as to all areas of the country beyond Chicago. While that rehearing was pending, this Court entered a permanent injunction enjoining the imposition of not only the first two Conditions contemplated by the preliminary ruling, but also the third and final Condition given the Supreme Court's intervening ruling in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). Out of deference to the Seventh Circuit's pending rehearing and respect for judicial economy, this Court stayed its permanent injunction, as the higher court had preliminarily, to all areas beyond Chicago.

When the Seventh Circuit stayed the nationwide scope of the injunction, the Attorney General demanded that Evanston and many members of the Conference agree to the Conditions or else forgo the Financial Year 2017 award. The Attorney General imposed August decision deadlines on those members, meaning the Plaintiffs here require injunctive relief, if at all, within the next few days. (Cochran Decl. ¶¶ 42-46, Dkt. 10-1 (explaining that some Conference members face an August 10th deadline, while others face a deadline of August 27th).) For simplicity's sake, the Court will refer to these below simply as to the "accept or decline" deadlines.

With the above in mind, the Court considers Plaintiffs' Motion. Writ large, the Attorney General has two objections to the sought-after injunction: First, he contends Plaintiffs lack standing; second, he contends that even if Plaintiffs have standing, they fail to pass the bar for injunctive relief.

To have standing, "a plaintiff must show he is under threat of suffering an 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted). The Attorney General argues Evanston lacks standing because it is merely a "subrecipient," and the City of Chicago (which is presently protected from the Conditions by injunction) is the "recipient" that applies for Byrne JAG awards on Evanston's behalf. The Attorney General explains that he determined not to enforce any award conditions in any FY 2017 Byrne JAG award made to Chicago while the injunction is in force, and that "this non-

enforcement would also apply to any subaward under Chicago's award." (*See* Trautman Decl. ¶ 5, Dkt. 15-1.) This explanation does not clear up matters nor indicate that Evanston is free from the hazards imposed by the Attorney General's August deadlines. In court on August 8th, the Acting Assistant Attorney General represented that when a subrecipient receives funds, it is the *recipient only* who signs the contract with the DOJ promising to adhere to the Conditions. And yet, the Attorney General does not dispute that said subrecipient must still comply with those Conditions regardless, as Evanston declares it has had to do in years past. (*See* Gergits Decl. ¶¶ 4-5, Dkt. 10-3.) Thus, to receive funds, Evanston must accept the Conditions just like the other would-be grantees, and the injunction presently in place as to Chicago does not insulate Evanston from that requirement. Evanston faces an imminent and concrete injury fairly traceable to Defendant's actions; the City has standing to pursue injunctive relief.

That brings us to the Conference of Mayors. The Court considered the Conference's standing once before, when the Conference sought to intervene in the *Chicago v. Sessions* case. 2017 WL 5499167, at *5. The Court agreed the Conference had standing, though it considered standing on a less exacting standard than the one it must now apply. Earlier, the Court accepted the Conference's factual allegations as true; now, the Conference must present at least "competent proof," meaning a "showing by a preponderance of the evidence," that standing exists. *Retired Chi. Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996). The Attorney General marshals several arguments against standing. First, he argues the Conference represents *mayors*—not cities—upon whom the Conditions impose no burden. But the

Conference's constitution indicates the contrary is true: Said document precludes membership for municipalities of less than 30,000 people. (Conference Constitution, art. II, § 1, Dkt. 10-2.)

The balance of the Attorney General's arguments is best considered within the framework for associational standing, which is what the Conference purports to have here. Such standing demands: (1) its members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to its organizational purposes; and (3) neither the claim asserted, nor the relief requested requires the participation of individual association members in the suit. *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977)) (citations omitted).

To the first requirement: It is not necessary that every one of the association's members has standing to sue in its own right. Rather, it suffices when any one member shows that it would have standing to bring suit on its own behalf. *Hunt*, 432 U.S. at 342-43; *accord Builders Ass'n of Greater Chi. v. City of Chicago*, 170 F.R.D. 435, 438 (N.D. Ill. 1996). The Conference recounts that over 250 of its members were allocated FY 2017 awards and face the August "accept or decline" deadlines. (Cochran Decl. ¶¶ 42-47, Dkt. 10-1.) As this Court ruled once before, those cities all have standing, just as Chicago did in its case. *See City of Chicago*, 2017 WL 5499167, at *5. The first requirement is met.

As for the second requirement, which turns upon the association's "organizational purposes": The Conference's CEO declares that the Conference was founded to coordinate cities' interactions with the federal government. To that end, the

Conference adopted three resolutions "supporting immigrant rights," signaling the Conference's intent to protect and preserve local decision making and opposing so-called "punitive sanctuary jurisdiction policies that limit local control and discretion." (Cochran Decl. ¶¶ 4-23, Dkt. 10-1.) The Conference's actions and its chief executive's words demonstrate that its interests in seeking injunctive relief—which would preserve the power and discretion of local decision making against federal overreach—accord with the Conference's organizational purposes. (*See id.*)

The Attorney General has one other argument on this front worth mentioning. He contends that the Conference is not authorized to litigate on behalf of its members, which is required where said members have "profound conflicts of interest." *See Retired Chi. Police Ass'n*, 76 F.3d at 864. Such profound conflicts occur where, for example, associations seek to sue their own members, *see Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380-81 (7th Cir. 1987), or where the association's suit, if successful, would increase some of its members' insurance premiums, *see Retired Chi. Police Ass'n*, 76 F.3d at 865-66. As Plaintiffs point out, there are no such "profound conflicts" at play here. The Attorney General explains that some of the Conference's members support the grant Conditions, and that other members, like the Texas municipalities, are bound to follow state-law requirements that mirror the federal Conditions anyway. These differences in policy preference or state law, however, do not amount to a profound conflict: Those Conference members that agree with the Attorney General's Conditions may continue to accede to and support them, and the Texas municipalities are under no obligation to flout their state-law requirements if this suit succeeds. Simply put, these lesser

conflicts between members do not rise to the level preclusive of standing. *See Builders Ass'n of Greater Chi.*, 170 F.R.D. at 438-39 (citing *United Automobile Workers v. Brock*, 477 U.S. 274, 290 (1986)).

Finally, associational standing exists only when the suit does not require the participation of the individual members. The Court ruled once before that the injunctive and declaratory relief the Conference now seeks raises purely legal questions, is not contingent on evidence from a specific city, and thus is "amenable to associational standing." *City of Chicago v. Sessions*, 2017 WL 5499167, at *5 (N.D. Ill. Nov. 16, 2017); *cf. Brock*, 477 U.S. at 287-88 (finding associational standing when suit presented only pure questions of law); *Org. of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R.*, 579 F. Supp. 574, 590 (N.D. Ill. 1983) (finding associational standing for group's injunctive relief claims). This is so because every Conference member, regardless of its particular local policies, stands to benefit by being inoculated against federal overreach. The Court stands by that earlier ruling now. Accordingly, the Conference has met all three requirements to pass the associational standing threshold.

Having determined that Plaintiffs have standing, the question remains whether the Court should order the injunctive relief they seek. To win a preliminary injunction, Plaintiffs must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). When, as here, the Government is the opposing party, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Of course, the Court does not make this determination in a vacuum. Instead, the Court is guided by its earlier rulings in the *Chicago v. Sessions* case as well as the Seventh Circuit's affirmance and subsequent *vacatur* of the nationwide scope of the injunction. In its earlier decisions, this Court found that the same argument presented by Plaintiffs here—namely that the Attorney General lacks the statutory authority to impose the Conditions—had merit. Though the plaintiffs at bar have changed, the legislation proscribing which conditions the Attorney General may attach has not. The Attorney General once more argues that hidden away within 34 U.S.C. § 10102 is a sweeping grant of authority that entitles him to impose these, and nearly any other condition, he chooses. Though he flavors that argument differently than he did last time around, it is substantially the same. The court of appeals labeled the earlier iteration "untenable," and this Court agrees. *City of Chicago v. Sessions*, 888 F.3d 272, 285 (7th Cir. 2018). Said argument does no work for the Attorney General here. The Court believes Plaintiffs are likely to prevail on the merits of their claims.

Beyond that, Plaintiffs must show they face irreparable harm absent injunctive relief. This hurdle too has been cleared. First, the Attorney General has imposed August deadlines by which Plaintiffs must either accept the grant and its Conditions or else decline the funds outright. Because this Court has already found that the Attorney General lacks the authority to impose *any* of these Conditions, however, the choice Plaintiffs face—to decline funds or accept them upon pain of sacrificing their sovereign powers—is no choice at all and is itself sufficient to establish irreparable harm. *Cf. Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537-38 (N.D. Cal. 2017) (citing *Morales v. Trans World*

Airlines, Inc., 504 U.S. 374, 380-81 (1992)). That some Conference members may like and even endorse the policies embodied by the Conditions does not change things. These localities still suffer an affront to their sovereignty when the Attorney General is permitted to direct their behavior in an unauthorized way. Indeed, by seeking to implement their own, pro-federal-immigration, preferred policies, those Conference members exercise the same local sovereignty the Attorney General now threatens to impinge.

Finally, Plaintiffs must show the balance of equities tips in favor of granting the requested injunction. This is where Plaintiffs' prayer for relief runs into trouble. The Seventh Circuit recently vacated its affirmance of the Court's nationwide injunction, signaling that a majority of that court has agreed to revisit the issue. After that, this Court published another ruling in which it found, based on an application of a recently-issued Supreme Court opinion, that 8 U.S.C. § 1373 is unconstitutional and thus the Compliance Condition, which subsumes that statute, is also unlawfully imposed. *City of Chicago*, 2018 WL 3608564, at *11. That Section 1373 determination was admittedly a closer question than the earlier-issued decision invalidating the Notice and Access Conditions, and the complexity of that latter decision gives the Court some pause in awarding the injunctive relief in this case.

The difficulty here arises from the scope of relief necessary to protect the Conference's members from the imposition of the Conditions. The Conference has over 1,400 members across the country, though only about 250 ask for relief here. (Cochran Decl. ¶¶ 5, 42-47, Dkt. 10-1.) Even in its most limited form, any injunction issued in their favor will have effects throughout the country and certainly far beyond the borders of the Seventh

Circuit. The Court recognizes that unlike in *Chicago v. Sessions*, the party requesting relief is not a single city—but an association comprised of many—and the injunction Plaintiffs seek is designed to protect their interests—rather than the interests of non-parties nationwide. Even so, a Conference-favoring injunction engenders many of the same concerns that agitated against entering a nationwide injunction in the *Chicago* case. Prime among these is denying difficult statutory questions—like the ones here concerning Section 1373—the chance to percolate through the courts in other jurisdictions. *City of Chicago v. Sessions*, 888 F.3d 272, 297 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part). Though this Court found such a broad injunction nevertheless appropriate in *City of Chicago*, the court of appeals has signaled it may have a different perspective. Thus, given the pending rehearing, this Court is disinclined to issue another, similarly-broad injunction absent further guidance from the court of appeals.

As evidenced by this Court's recent ruling entering and staying the permanent injunction in the *Chicago v. Sessions* case, the Court believes judicial economy and the public interest will be best served if the court of appeals is permitted the opportunity to consider the rehearing now pending on these issues and express its opinion as to the nationwide injunction. This will avoid possibly subjecting the Attorney General and grant applicants across the nation to the judicial whiplash brought on by an *en banc* reversal. But the Attorney General's fast-approaching "accept or decline" deadlines pose a problem. The Plaintiffs no doubt have a keen interest in jealously guarding their autonomy against federal outreach; yet this Court has a keen interest in deferring to the guidance of higher courts and, in accordance with

that guidance, not binding up the litigation before other judges across the country without an acknowledgement of the propriety of doing so. (*Cf.* Order, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 14, 2018), Dkt. No. 131 (refusing Attorney General's motion for immediate ruling on his motions for a stay and stating the court of appeals intended to rule only after the Supreme Court's resolution of similar issues in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).)

Fundamentally, this Court has considerable discretion in issuing a preliminary injunction. *Computer Care v. Serv. Sys. Enters.*, 982 F.2d 1063, 1067 (7th Cir. 1992). Faced with competing and difficult-to-balance equities, the Court uses that discretion to rule as follows: The Court issues the sought-after injunction as to both Evanston and those members of the Conference who face the Attorney General's August deadlines, though, in line with its recent ruling in the *Chicago* case, the Court also stays the injunction as to the Conference, which, by virtue of its membership, demands an injunction of near-nationwide effect. *See City of Chicago*, 2018 WL 3608564, at *18 (staying in large part this Court's permanent nationwide injunction). As the Court laid out in *City of Chicago*, "[s]tays, like preliminary injunctions, are necessary to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits. The goal is to minimize the costs of error." 2018 WL 3608564, at *18 (quoting *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014)). Further, "the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.* Especially given the close question posed by the Section 1373 analysis, the Court believes, as before, that the public interest

will be best served by deferring to the court of appeals rather than mooting those many parallel suits now pending in different jurisdictions. *Cf. California ex rel. Lockyer v. U.S. Dep't of Agric.*, 710 F. Supp. 2d 916, 924 (N.D. Cal. 2008) (staying in part an injunction to minimize conflict with jurisdictions entertaining similar litigation), *aff'd*, 575 F.3d 999 (9th Cir. 2009). This interest in streamlining judicial economy weighs heavily enough even to overcome the injury those Conference members face in having to decide whether to accept the offered FY 2017 funds by the Attorney General's deadlines.

Should the Conference believe this stay is improvidently imposed, it may raise the issue with the Seventh Circuit in short order. Until then, this Court believes it must hew closely to the deference required of it for higher authority. The requested injunction is now ordered, though immediately stayed as to the Conference.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: 8/9/2018