



## UPDATE ON DOJ GRANTS UNDER THE BIDEN ADMINISTRATION

*Federal grants no longer have immigration enforcement conditions*

**UPDATE:** Current Office of Justice Programs grants do **NOT** include any immigration enforcement conditions. Additionally, in the first few months of the Biden Administration, immigration enforcement conditions were removed from grants that were previously subject to them.

Deputy Assistant Attorney General Maureen Henneberg, in charge of the Office of Justice Programs, stated in a memo that *“prior grant recipients, including cities, counties and states that were recipients of the department’s popular \$250 million annual grant program for local law enforcement, will no longer be required to cooperate with U.S. Immigration and Customs Enforcement as a condition of their funding.”* For pending grant applications with ICE cooperation restrictions, Henneberg instructed staff to start the process over.<sup>1</sup>

**Bottom line:** sanctuary policies can be enacted without risk of losing federal funding.

### I. Background

In 2017, the Department of Justice (DOJ) announced that it would withhold federal grants from state and local jurisdictions applying to the FY2017 Byrne Justice Assistance Grant (JAG) if jurisdictions failed to cooperate with Immigration and Customs Enforcement (ICE) in deporting members of immigrant communities. Specifically, the DOJ placed the following three conditions on the JAG grant:

- Complete a certification of compliance with 8 U.S.C. § 1373 (“Compliance Condition”);
- Allow ICE access to jails and detention facilities (“Access Condition”);
- Provide ICE with 48-hours notice before a detainee is released (“Notice Condition”).

Jurisdictions across the country challenged these conditions in court. Overwhelmingly, these challenges have been successful, as courts have ruled that DOJ’s actions were illegal and have ordered them to stop. However, as of August 2020, the Seventh Circuit and Second Circuit have issued competing rulings that will likely get appealed to the Supreme Court.

Throughout this litigation, each year these grants enter a new cycle. Each year DOJ issues a new solicitation, which may include requirements about working with or communicating with ICE in order to receive grant funds. This advisory seeks to explain the state of the law as of July 2020, and what localities should do.

## II. What Should Localities Do?

### 1. Stand Up for Good Local Policies

- **Enact and Uphold Sanctuary Policies:** Localities that restrict access to jail facilities or limit information sharing with ICE are doing so because of a strong governmental interest in building healthier relationships with the communities they serve. Greater involvement with abusive and unaccountable federal agencies like ICE and CBP is bad for public safety and undermines local authority.<sup>5</sup>
- **Opt out of these grant programs to begin with:** Federal grants that simply fund more police officers and more militaristic equipment will not help improve relations between law enforcement and Black communities and communities of color. These programs go against the demands of Black communities to defund police. Furthermore, the national uprising sparked by George Floyd's murder has spread much greater awareness about the dangers of more funding for law enforcement. For those reasons, the Movement for Black Lives has [called for](#) the elimination of the JAG grant altogether. Localities serve their communities better by investing in housing, education, and job training rather than boosting law enforcement funding.

### Summary of the Court Rulings:

**District courts:** Every district court that has made a final ruling on the conditions (twelve in total) ruled that the conditions were illegal.<sup>2</sup>

**Appellate courts:** Five courts of appeals have made final rulings on the conditions.<sup>3</sup> Four ruled the conditions were illegal.<sup>4</sup>

**Altogether:** Seventeen federal courts have made final rulings on the legality of the conditions. All but one ruled that the conditions were illegal.

### 2. Keep Updated on the Legal Landscape

- In June, the Seventh Circuit affirmed a nationwide permanent injunction, banning DOJ from imposing the immigration enforcement conditions from all JAG grants nationwide.
- However, the Second Circuit (NY, VT and CT) has allowed DOJ to impose the conditions. This conflict makes it unclear whether the conditions are illegal everywhere, or legal in the Second Circuit (NY, VT and CT) but illegal everywhere else. Localities in these states should determine the status of past years' grant money and whether there are outstanding funds at stake.
- *Keep an eye out:* these cases are likely to go to the Supreme Court, and thus the situation may change again.

### 2. Understand the Current Requirements from DOJ

- Grant cycles renew every year and the DOJ has changed the terms of its grants every year as the courts have struck down their previous efforts.
- In the 2020 JAG cycle (due May 29, 2020 for states and August 19<sup>th</sup> for local entities), no explicit immigration assistance conditions or certifications were included. However, the applicant is required to identify any local or state laws relating to how employees may communicate with ICE, and explain how that law complies with [8 USC § 1373](#).
- Other DOJ grants, such as the COPS and SCAAP programs, have also had immigration enforcement strings attached to them. Like the JAG grants, these funds similarly provide more money to law enforcement, and should be reviewed critically by those seeking to defund or reduce police funding overall.
- Regardless of the nationwide injunction and various lawsuits, DOJ is particularly focused on targeting localities who have local policies that DOJ thinks violate [8 USC § 1373](#), which prohibits any local or state policy that limits communication with DHS about a person's citizenship or immigration status. However, the [constitutionality of this statute](#) is in question.

### III. What Have the Courts Said About the Grant Conditions?

Federal courts across the country have found that the DOJ does not have the legal authority to add these kinds of strings to JAG grants. Until recently, multiple overlapping court orders striking down the conditions covered different regions of the country. But for jurisdictions who were not part of a particular lawsuit, it was unclear what rules applied.

On April 30, 2020, in *City of Chicago v. Barr*,<sup>6</sup> the Court of Appeals for the Seventh Circuit, affirmed a **nationwide permanent** injunction (ban) on placing DOJ's immigration enforcement conditions on the JAG grant. It is important to unpack what exactly this nationwide permanent injunction means. First, the injunction is *nationwide*, meaning it is intended to protect all JAG grant applicants throughout the country.<sup>7</sup> Second, the injunction is *permanent*, meaning that DOJ is banned from placing these conditions on all current *and* future Jag Grants.<sup>8</sup>

However, on February 26, 2020, the 2nd Circuit Court in *State v. Department of Justice*<sup>9</sup> sided with DOJ, deciding that the conditions were **not** illegal. This ruling allowing DOJ to impose the conditions conflicts with the decision in *City of Chicago v. Barr*, which decided that the conditions were illegal and banned DOJ from attaching them to JAG grants nationwide. At this time, it is not completely clear which of these conflicting decisions controls. It seems possible that for now, DOJ can legally place the conditions on JAG grants for jurisdictions in the 2nd Circuit, but in all other circuits, the conditions are illegal.

### IV. It's 2020: Has DOJ Removed the Conditions?

Yes, although they have not let go of the fight entirely. In the past, DOJ simply reconfigured the conditions so that they appeared different—even though they had the same or harsher effects—when earlier iterations of the conditions were struck down by federal courts. But those revisions were struck down as well.

This year, DOJ has eliminated requirements that localities help ICE in order to receive the JAG grant. The 2020 JAG grant application does not require applicants to satisfy the conditions from previous years, and DOJ has not replaced them with specific requirements of local action or policy.

Applicants are, however, required to answer questions related to the way their locality communicates, or doesn't, with ICE and DHS. But the way in which these questions are answered does not appear to affect eligibility for the grant funds. Nonetheless, DOJ likely intends to use this information to target localities with policies that they oppose, potentially by bringing lawsuits or pursuing other threats.

### V. What About Other Federal Grants?

The Trump administration has not tried to attach immigration enforcement conditions to grants from agencies outside the DOJ, such as grants for public health, community development, housing, etc. In *Santa Clara v. Trump*,<sup>10</sup> the Ninth Circuit struck down the executive order that had purported to strip *all* funding from alleged sanctuary cities, and as a result the Trump administration has only pursued defunding through imposing various anti-sanctuary conditions on DOJ law enforcement grants, including, but not limited to, the JAG grant.

However, JAG funds are not the only DOJ grant funds affected. DOJ may still be able to apply new immigration enforcement conditions to other federal law enforcement grants, as they have sought to do with at least the COPS Hiring Program (CHP) and SCAAP programs. Federal courts in the 9th Circuit have considered whether DOJ can apply similar conditions to the CHP grant, which is focused on hiring new officers. In *City of Los Angeles v. Barr*,<sup>11</sup> the 9th Circuit ruled that DOJ could consider participation in immigration enforcement as a factor in awarding funding. The 9th Circuit is the only Circuit so far to address this.

For the FY 2020 CHP grants, which closed in March 2020, “priority consideration may be given” for jurisdictions that “cooperate with federal law enforcement to address illegal immigration” by certifying compliance with section 287(g) of the Immigration and Nationality Act.<sup>12</sup> Section 287(g) authorizes local law enforcement officials to act as federal immigration law enforcement officers. CHP is just one of several grants administered by the COPS office; others also include required certifications about cooperating with ICE in providing information and access to jails.<sup>13</sup>

DOJ has also modified the SCAAP program to increase the information shared from local law enforcement agencies to ICE and DOJ. These requirements likely violate many local and state laws regarding participation in immigration enforcement. Communities should take extra care to audit their participation in the SCAAP program, including whether any local or state laws are being violated. For more about the new DOJ procedures on SCAAP, see:

<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/IAQ-FAQ-June2019.pdf>

## End Notes

<sup>1</sup> Sarah N. Lynch, U.S. Justice Department Ends Trump-Era Limits on Grants to ‘Sanctuary Cities,’ Reuters (Apr. 28, 2021)

<https://www.reuters.com/world/us/exclusive-us-justice-department-ends-trump-era-limits-grants-sanctuary-cities-2021-04-28/>. See also Lawrence Hurley, Biden Seeks Dismissal of “Sanctuary” Funding Dispute at Supreme Court, Reuters (Mar. 4, 2021) (describing the Biden administration’s requests for the Supreme Court to dismiss pending appeals) <https://www.reuters.com/article/us-usa-court-immigration/biden-seeks-dismissal-of-sanctuary-funding-dispute-at-supreme-court-idUSKCN2AW2WN>.

<sup>2</sup> *City of Providece v. Barr*, 385 F. Supp. 3d 160 (D.R.I. 2019); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 271 (E.D. Pa. 2018); *Oregon v. Trump*, 406 F. Supp. 3d 940, 963 (D. Or. 2019); *City & Cty. of San Francisco v. Sessions*, 372 F. Supp. 3d 928, 941 (N.D. Cal. 2019); *States of New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d 213, 245 (S.D.N.Y. 2018); *City and Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 945-48 (N.D. Cal. 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 874 (N.D. Ill. 2018); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 617 (E.D. Pa. 2017); *Colorado v. United States Dep’t of Justice*, No. 19-CV-00736-JLK, 2020 WL 1955474 (D. Colo. Apr. 23, 2020); *City of Evanston v. Barr*, 412 F. Supp. 3d 873, 889 (N.D. Ill. 2019); *City of Chicago v. Barr*, 405 F. Supp. 3d 748, 763 (N.D. Ill. 2019); *City of Los Angeles v. Sessions*, No. CV 18-7347-R, 2019 WL 1957966, at \*4 (C.D. Cal. Feb. 15, 2019).

<sup>3</sup> *City of Philadelphia v. Attorney Gen. of the U.S.*, 916 F. 3d. 276, 291 (3rd Cir. 2019); *City of Providence v. Barr*, 954 F.3d 23, 27 (1st Cir. 2020); *City of Chicago v. Sessions*, 888 F. 3d 272, 287 (7th Cir. 2018); *City & Cty. of San Francisco v. Barr*, No. 18-17308, 2020 WL 3957184 (9th Cir. July 13, 2020); *State v. Dep’t of Justice*, 951 F.3d 84, 123-24 (2d Cir. 2020).

<sup>4</sup> *City of Philadelphia v. Attorney Gen. of the U.S.*, 916 F. 3d. 276, 291 (3rd Cir. 2019); *City of Providence v. Barr*, 954 F.3d 23, 27 (1st Cir. 2020); *City of Chicago v. Sessions*, 888 F. 3d 272, 287 (7th Cir. 2018); *City & Cty. of San Francisco v. Barr*, No. 18-17308, 2020 WL 3957184 (9th Cir. July 13, 2020).

<sup>5</sup> For more about sanctuary policies, see ILRC, *Growing the Resistance: How Sanctuary Laws and Policies Have Flourished During the Trump Administration* (2019), available at <https://www.ilrc.org/growing-resistance-how-sanctuary-laws-and-policies-have-flourished-during-trump-administration>.

<sup>6</sup> *City of Chicago v. Barr*, 961 F.3d 882, (7th Cir. 2020).

<sup>7</sup> Many other courts have previously issued similar injunctions that have been limited to particular applicants or states who brought the legal challenge.

<sup>8</sup> This is important because even as the courts ruled that the conditions for FY2017 were unconstitutional, DOJ manipulated the system because there is a new cycle of grants every year. In 2018, DOJ included revised, but substantially similar, conditions on the grants, and in 2019 revised them again after further court rulings. This forced applicants to bring new claims to their lawsuits and rehash the same fights in court over and over.

<sup>9</sup> *State v. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020).

<sup>10</sup> *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

<sup>11</sup> *City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019).

<sup>12</sup> See top of page 14 on User Guide, Submitting an Application Under the FY 2020 COPS Hiring Program (CHP), available here: <https://cops.usdoj.gov/pdf/2020AwardDocs/chp/UserGuide.pdf>.

<sup>13</sup> See, e.g., [https://cops.usdoj.gov/pdf/2020AwardDocs/cpdmicrogrants/FY20\\_Microgrants\\_App\\_Guide.pdf](https://cops.usdoj.gov/pdf/2020AwardDocs/cpdmicrogrants/FY20_Microgrants_App_Guide.pdf).



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