**No. 19-1802**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

**CITY OF PROVIDENCE and CITY OF CENTRAL FALLS,**

***Plaintiffs-Appellees,***

**v.**

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

***Defendants-Appellants.***

**On Appeal from the United States District Court**
**for the District of Rhode Island**

# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION ET AL. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae the National Immigrant Justice Center states that its parent organization is the Heartland Alliance. The remaining amici curiae do not have parent corporations.

No publicly held corporation owns 10 percent or more of any stake or stock in any of the amici curiae.

/s/ Cody Wofsy
Cody Wofsy
November 13, 2019

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## INTEREST OF AMICI CURIAE

Amici are non-profit civil rights organizations that serve immigrant communities across the country. *See* Addendum (list of amici).[1] Since early 2017, these communities have been the target of a relentless campaign by the Executive Branch to force state and local police to help detain and deport immigrants. Each time an aspect of this campaign has been enjoined by a court—and almost all of them have been enjoined—the Department of Justice has devised a new strategy to achieve the same coercive effect.

Amici write to address the Department's claims of statutory authority in this case. The Department's sweeping arguments in support of that authority, if accepted, would dramatically undermine local communities' ability to supervise their own police forces. Amici urge the Court to enjoin the challenged conditions and secure "[p]erhaps the principal benefit of the federalist system," which is "to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quotation marks omitted).

[1] All of the parties have consented to the filing of this brief. Counsel for amici authored this brief in whole, and that no person other than amici curiae contributed money to preparing or submitting this brief.

## INTRODUCTION

The Department of Justice has claimed a startling new power to control state and local police by attaching new conditions to federal funds through the Byrne Justice Assistance Grant ("JAG") program. It maintains that Congress has delegated near-unlimited power to leverage JAG funds to force police to adopt law enforcement policies of the Department's choosing. But none of the statutes it invokes has ever been understood to authorize new substantive requirements unrelated to the use of JAG funds. Amici agree with the Plaintiffs-Appellees that these statutes do not provide the authority the Department claims.

Amici submit this brief to further explain why these statutes cannot be read to authorize the notice, access, or compliance conditions.

First, the challenged conditions do not qualify as "special conditions" under 34 U.S.C. § 10102(a)(6). That phrase is a narrow term of art, which refers to conditions that ensure grantees comply with existing obligations. And when Congress uses a term of art in a statute, it incorporates the term's established legal meaning. Thus, even if § 10102(a)(6) provided authority to impose special conditions, that provision still would not allow the Department to create the conditions it has imposed here. *City of Los Angeles v. Barr*, No. 18-56292, --- F.3d ----, 2019 WL 5608846, *8 (9th Cir. Oct. 31, 2019).

Second, 8 U.S.C. § 1373 is not an "applicable Federal law" for purposes of the JAG program, because by its own terms it does not apply to federal grants. 34 U.S.C. § 10153(a)(5)(D). The word "applicable," as used in the JAG statute, refers only to laws that are applicable to federal grants, not the entire universe of laws that are applicable to States and localities outside the grant context. *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276, 288-91 (3d Cir. 2019); *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953-55 (N.D. Cal. 2018).

Third, the Department briefly cites three more provisions as possible sources of authority. But each of them pertains only to how JAG funds are spent and accounted for. *See* 34 U.S.C. § 10102(a)(6) (describing "priority purposes" for the use of JAG funds); *id.* § 10153(a)(4) (recordkeeping requirements for JAG-funded programs); *id.* § 10153(a)(5)(C) ("coordination" with state and local agencies affected by the grant before applying for JAG funds). None of them provides authority to impose substantive requirements unrelated to the administration of JAG funds. *Los Angeles*, 2019 WL 5608846, at *8, 10-11; *Philadelphia*, 916 F.3d at 285, 287-88; *City of Chicago v. Barr*, No. 18 C 6859, 2019 WL 4511546, *11-13 (N.D. Ill. Sept. 19, 2019).

The Department's claims of statutory authority in this case are unprecedented. In the decades it has administered JAG and its predecessors, the Department has never claimed any ability to wield those funds to extract policy concessions or to

influence aspects of state and local police operations that are not connected to the expenditure of federal funds provided under the JAG program. When an agency claims to discover "an unheralded power" lying dormant "in a long-extant statute," courts "typically greet its announcement with a measure of skepticism." *Util. Air Reg. Group v. EPA*, 573 U.S. 302, 324 (2014). Like every other court that has considered them, this Court should reject the Department's expansive new statutory claims.

## ARGUMENT

### I. The New Conditions Are Not Valid "Special Conditions."

"Special conditions" is a narrow term that excludes the notice, access, and compliance conditions. *Accord Los Angeles*, 2019 WL 5608846, at *7-8; *see also City of Chicago v. Sessions*, 888 F.3d 272, 285 n.2 (7th Cir. 2018), *partially vacated on other grounds*, 2018 WL 4268817 (7th Cir. June 4, 2018) (en banc); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 617 (E.D. Pa. 2017); *San Francisco*, 349 F. Supp. 3d at 948 n.2.

For completeness and to facilitate whatever further review the Department may seek, amici respectfully urge the Court to address this alternative ground and confirm in this appeal that the notice, access, and compliance conditions are not "special conditions" within the meaning of § 10102(a)(6). That is a pure legal question, and a straightforward one, because the Department has not offered any

meaningful response in multiple rounds of briefing on this issue. *See infra* Part I.C. At the same time, the Department has shown that it will continue enforcing these new conditions, against whoever it can, as long as any uncertainty remains about their legality. *See* Appellees Br. 13 n.9.

### A. The Phrase "Special Conditions" Is a Narrow Term of Art that Excludes the Immigration Conditions.

When Congress uses a term of art, courts must assume that "Congress intended it to have its established meaning." *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991). A term of art is a phrase that has "accumulated [a] settled meaning" in the law, and courts must apply that meaning "unless Congress has unequivocally expressed an intent to the contrary." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981). In determining whether a phrase is a term of art, courts look to a variety of evidence, including treatises, expert opinion, regulations, and statutes. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 467-68 (2002); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575-76 (1995).

The evidence here is overwhelming. For at least three decades, every relevant authority has used "special conditions" to mean conditions that ensure compliance with *existing* grant requirements. The Department has identified no persuasive evidence that the phrase means anything beyond that.

Both of the leading treatises on federal grant law define special conditions as those intended to ensure that a grantee complies with existing rules. One treatise

defines "special conditions" as conditions imposed on a "'high risk' recipient" to ensure that the recipient "will successfully execute [the] grant." Allen, Federal Grant Practice (2017 ed.), § 25:4; *see also id.* §§ 25:1 (defining "'specific' or 'special' conditions"), 25:2, 25:5, 25:10, 47:6. The other treatise contrasts "special conditions"—which address "special risks" of non-compliance—with "general conditions" and "cross-cutting conditions," both of which involve substantive rules applicable to all grantees. *Compare* Dembling & Mason, Essentials of Grant Law Practice (1991), at 125-36 (special conditions), *with id.* at 121-24 (general conditions); *id.* at 107-19 (cross-cutting conditions).

That understanding is shared by the federal agencies that administer grants. Most importantly, the White House's Office of Management and Budget (OMB) has long defined "special conditions" as conditions that are imposed on "'high risk' applicants/grantees." OMB, Circular A-102, § 1(g) (Aug. 29, 1997).[2] This definition dates back to at least the 1980s, long before the "special conditions" language was enacted in 2006. *See* OMB, *Uniform Administrative Requirements for Grants*, 53 Fed. Reg. 8034-01, 8037, 8068, 8090 (1988). As the agency that sets grant policies across the Executive Branch, OMB's usage is especially relevant. *See* 2 C.F.R. Part 200 (OMB's general grant policies); *Mideast Systems v. Hodel*, 792 F.2d 1172, 1175 (D.C. Cir. 1986) (noting OMB's role in administering federal grant

[2] Available at https://bit.ly/2zLVgGc.

law). Its current government-wide grant regulations reflect the same understanding: They use the phrase "special conditions" to mean conditions that "mitigate the effects of a non-Federal entity's risk" of non-compliance with existing grant requirements. 2 C.F.R. §§ 200.205(a)(2), (b). And they restrict the use of "specific conditions" to situations where a grantee poses a "risk" of non-compliance or "has a history of failure." *Id.* § 200.207(a).[3]

Other grant-making agencies use the term the exact same way. *See, e.g.*, 7 C.F.R. § 550.10 (Department of Agriculture); 34 C.F.R § 80.12 (Department of Education); 45 C.F.R. § 74.14 (Department of Health and Human Services). No mention of "special conditions" in the Code of Federal Regulations deviates from this definition.

The Department's own regulations are no exception. When Congress enacted the current version of § 10102(a)(6) in 2006, the Department's regulations governing "[s]pecial grant or subgrant conditions" described them as intended for "'high-risk'

[3] The terms "special conditions" and "specific conditions" are used interchangeably. *See, e.g.*, OMB, *Federal Awarding Agency Regulatory Implementation of OMB's Uniform Administration Requirements*, 79 Fed. Reg. 75871-01, 75874 (Dec. 19, 2014) (explaining that prior "standards for imposing special conditions" are "virtually identical" to current standards for imposing "specific conditions" pursuant to 2 C.F.R. §§ 200.205 and 200.207); Allen, Federal Grant Practice (2017 ed.), § 25:1 (stating that "'specific' or 'special' conditions" are the same); OMB, Uniform Guidance Crosswalk from Existing Guidance to Final Guidance, at 3, 4 (2013) (noting OMB's transition between the two phrases).

grantees" who might have problems adhering to existing grant requirements. 28 C.F.R. § 66.12(a) (in effect from Mar. 11, 1988 until Dec. 25, 2014). And when the Department rescinded that regulation, it adopted OMB's special-conditions regulations, which, as explained above, use the phrase as a term of art. *See* 2 C.F.R. § 2800.101 (adopting, inter alia, 2 C.F.R. §§ 200.205, 200.207).

Congress's own usage reflects the same understanding. For instance, in a statute enacted in 2004, just two years before § 10102(a)(6), Congress used the phrase in the context of a "high-risk grantee." *See* 20 U.S.C. § 1416(e)(1)(C). That makes sense in light of agencies' and experts' consistent usage in the decades prior. Congress has never used the phrase to mean anything beyond its term-of-art meaning.

Against this consistent usage by grant-law experts, commentators, the White House, federal agencies, and Congress, the Department has not identified *any* published or enacted authorities that define special conditions to mean something broader than compliance-ensuring rules. That is striking, because the Department has now had multiple opportunities to brief this issue across numerous different JAG cases. *See* Appellees Br. 13 n.9.

To the extent the Department suggests that *any* condition can be a special condition under the Assistant Attorney General's "general authority," U.S. Br. 19-20, that view not only conflicts with the term-of-art definition, it is also foreclosed

by the rule against superfluity. Reading § 10102(a)(6) to authorize *all* conditions would cut the word "special" out of the statute. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). Indeed, the Department has never explained—in this or any other JAG case—what it thinks "special conditions" actually means. It cannot just mean "conditions."

If any doubt remained, federalism canons would resolve it. The Supreme Court has instructed courts to "assume that Congress does not casually authorize administrative agencies to interpret a statute" in a way that "permit[s] federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001); *see Bond v. United States*, 572 U.S. 844, 858 (2014). The Department would therefore need to identify an "unmistakably clear" statutory statement that "special conditions" in § 10102(a)(6) has the limitless meaning it claims. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The Department plainly cannot meet that high burden.

### B. Congress Added the Special-Conditions Provision to Address Compliance Problems.

The narrow term-of-art definition of "special conditions" dovetails with the purpose and history of the provision. Section 10102 spells out the "[d]uties and functions of [the] Assistant Attorney General" for the Office of Justice Programs (OJP), which administers JAG and other programs. Congress adopted the special-conditions provision to make clear that those duties include ensuring adherence to

the terms of OJP's grants, by placing compliance measures—"special conditions"—on those grants.

The legislative history makes this purpose plain. The special conditions language was added to § 10102(a) in 2006 as part of a major overhaul of OJP. *See* 34 U.S.C. §§ 10101-10111 (OJP provisions). As the House Report explains, the entire purpose of this overhaul was "to instill a culture of accountability at OJP." H.R. Rep. No. 109-233, at 89 (Sept. 22, 2005). Problems had "c[o]me to light" regarding "grantees who do not comply with grant terms," and OJP was failing to take "timely corrective action." *Id.* at 90. Congress therefore enacted an "integrated package of management reforms" to ensure compliance, H.R. Rep. No. 109-233, at 91, creating an audit office, *see* 34 U.S.C. § 10109, a training office, *id.* § 10106, and "several other provisions designed to improve the management of OJP," H.R. Rep. No. 109-233, at 90, including the special-conditions provision. Congress's goal thus perfectly matched the term of art it chose: "special conditions."

While OJP may have already had this authority prior to the 2006 statute, the legislative history makes plain that no one was exercising it. Congress therefore explicitly assigned this duty to the head of OJP, the Assistant Attorney General. 34 U.S.C. §§ 10101, 10102(a)(6), 10101(d). Nor was it previously clear that the OJP head had such authority, because other statutes gave "final authority" over specific OJP grants (including JAG) to *other* officials—the heads of OJP's sub-component

bureaus. *See, e.g.*, 34 U.S.C. § 10141(b); *id.* § 10132(b); *id.* § 10122(b). The 2006 addition thus clarified that the head of OJP could and should be responsible for enforcing the terms of OJP grants.

**C. None of the Department's Responses Are Persuasive.**

The Department has not offered a meaningful response to the term-of-art evidence in this or any other JAG case. Its arguments are all easily rejected.

First, the Department has argued elsewhere that "special conditions" in § 10102(a)(6) should not be read as a term of art limited to high-risk grantees because the statute "does not mention high-risk grantees." U.S. Reply Br., *Dep't of Justice v. State of New York*, No. 19-267 (2d Cir. filed May 16, 2019) ("*New York* U.S. Reply Br."), 6. But that gets the term-of-art canon exactly backwards. The whole point is that, in the absence of an explicit statutory definition, "we must *presume* that Congress intend[s] to incorporate" the established meaning. *Neder v. United States*, 527 U.S. 1, 23 (1999). If an "express reference" to the established meaning was required, the canon would do no interpretive work. *Id.* (rejecting identical argument); *see Field v. Mans*, 516 U.S. 59, 69 (1995) (same). Thus, as the Ninth Circuit recently recognized, while the term "special conditions" is not defined

in the statute, courts must presume that Congress adopted its meaning. *Los Angeles*, 2019 WL 5608846, at *7.[4]

Second, the Department claims that, in the last decade, it has placed conditions on JAG grants that were not connected to existing statutes and regulations but rather the general authority under § 10102(a)(6). U.S. Br. 17. That is wrong. *See infra* Part I.D (addressing each condition the Department has invoked); *Philadelphia*, 916 F.3d at 290 n.12. But even if the Department *had* imposed such conditions, the Supreme Court has been very clear that courts must not stretch statutes to validate every last thing an agency has ever done—otherwise an agency could unilaterally expand its power just by violating its statutory mandate. *See Rapanos v. United States*, 547 U.S. 715, 752 (2006). The Court should reject the Department's "curious appeal to entrenched executive error." *Id.*; *SEC v. Sloan*, 436 U.S. 103, 117-19 (1978); *see also NLRB v. Noel Canning*, 573 U.S. 513, 538 (2014) (a "few scattered . . . anomalies" are not probative of legality).

[4] The Ninth Circuit correctly identified "special conditions" as a term referring only to certain individualized conditions, but did not resolve precisely what individualized conditions would qualify. Nor did it refer to the broad array of definitional materials collected above, instead relying only on the 2006 regulation. *Los Angeles*, 2019 WL 5608846, at *7-8; *cf. FAA v. Cooper*, 566 U.S. 284, 292 (2012) (term of art is based on "the cluster of ideas" drawn from "the body of learning from which it was taken") (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)). As explained above, considering all these materials, "special conditions" encompasses an extremely narrow category of conditions. *See supra*, Part I.A; *cf. Los Angeles*, 2019 WL 5608846, at 16, 16 n.10 (Wardlaw, J., concurring in the judgment) (warning against a nebulous interpretation). In any event, the challenged categorical conditions would be unlawful under any individualized definition of special conditions.

To the extent the Department has recently *described* its general conditions as "special conditions" in unpublished letters to grant recipients, *but see* Dembling & Mason at 121-36 (explaining the difference between general and special conditions), its recent misuse of that phrase does not somehow mean that the phrase is no longer a term of art. Decades of consistent usage in every published and enacted authority prove otherwise. Nor can the Department's later conditions have any bearing on what Congress meant when it enacted the statute in 2006. Indeed, the presumption that Congress incorporates a term-of-art meaning can only be rebutted when "*Congress* has unequivocally expressed an intent to the contrary." *Amax Coal*, 453 U.S. at 330 (emphasis added). In other words, the "rebuttal can only come from the [] statutes themselves," not from some later, informal, administrative deviation. *Neder*, 527 U.S. at 23 n.7. Nothing in the statute remotely suggests—much less unequivocally demonstrates—an intent to diverge from the settled and well-understood meaning of "special conditions."

### D. No Other JAG Conditions Depend on the Unlimited Conditioning Power the Department Claims Here.

The Department claims that "special conditions" must have an unlimited meaning to validate several conditions it has imposed in the past. U.S. Br. 17, 20. That is incorrect.

For each condition the Department has cited, there are specific authorities outside § 10102(a)(6) that either explicitly authorize the condition or could likely

support the condition were it ever challenged. While the Court need not resolve the legality of any prior condition in this case, these specific authorities make clear that the Department has never previously asserted a broad statutory power to create new conditions, and that striking down its new immigration conditions will not mean its prior conditions were illegal.

- The "information technology requirements" (U.S. Br. 17) are explicitly authorized by 34 U.S.C. § 10107(b), which creates an office within OJP to "establish clear minimum standards for [grantees'] computer systems" and ensure that grantees "participate in crime reporting programs administered by the Department." *See also* H.R. Rep. No. 109-233, at 90 (describing authority to impose the exact same conditions).
- The "protections for human research subjects" (U.S. Br. 17) simply incorporate the Department's long-standing regulations on that topic, *see* 28 C.F.R. Part 46, which were adopted pursuant to express statutory direction, 42 U.S.C. § 300v-1(b); Pub. L. No. 95-622, § 301, Nov. 9, 1978.
- The restrictions on "military-style equipment" (U.S. Br. 17) match Executive Order 13688, which restricted federally-funded purchases of military equipment, arguably pursuant to multiple statutes providing authority to control military equipment. *See* 22 U.S.C. § 2778; 10 U.S.C. §§ 272, 280(b)(3), 281(a)(1).

- The "body armor" conditions (U.S. Br. 17) flow directly from 34 U.S.C. § 10202(c), Executive Order 13788, and the Buy American Act, 41 U.S.C. § 8302(a), which directs agencies to ensure federal funds are spent on American-made equipment. Even when the body armor conditions were first adopted in 2012, Congress had already imposed the exact same requirements for body armor purchased through a body-armor-specific grant program. *See* 34 U.S.C. § 10531(c)(2) ("mandatory wear"); *id.* § 10533(1)(A) (performance standards); Pub. L. No. 105-181, § 4 (requiring federally-funded body armor to be "American-made"). The JAG body-armor conditions simply ensured that grantees could not circumvent Congress's body-armor conditions by purchasing body armor using JAG funds.
- The "training requirements" (U.S. Br. 17) are authorized by 34 U.S.C. §§ 10153(b) and 10106(a)(2), (b)(2), which direct the Department to provide "training" and "technical assistance" to grantees, and 34 U.S.C. § 10109(d), which directs the Department to take actions "to ensure compliance with the terms of a grant."

The new immigration conditions thus stand alone in their reliance on a broad and open-ended conditioning authority. And in any event, the prior conditions cannot somehow change the statute's text or expand its meaning. *See supra* Part I.C.

## II. Section 1373 Is Not an "Applicable Federal Law" for JAG Purposes.

In defense of the compliance condition, the Department claims to have discovered a second sweeping power to invent new grant conditions in 34 U.S.C. § 10153(a)(5)(D). It claims it can now condition JAG funds on statutes like 8 U.S.C. § 1373 that have nothing to do with federal grants, and then force applicants to comply with *any* interpretation it announces, no matter how tenuous. U.S. Br. 23-25. There are hundreds (if not thousands) of statutes and regulations that could be deployed for this purpose, and the Department has already invoked at least eight. *See* JAG Solicitation, FY 2018, at 36-37, 44-45 (imposing brand-new interpretations of 8 U.S.C. §§ 1226(a), 1226(c), 1231(a)(4), 1324(a), 1357(a), 1366(1), 1366(3)).[5]

The Department's position is wrong, as multiple courts have now concluded. *See Philadelphia*, 916 F.3d at 288-91; *New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 229-31 (S.D.N.Y. 2018); *San Francisco*, 349 F. Supp. 3d at 953-55. The JAG statute requires applicants to certify compliance with laws that are "applicable," but it is silent about whether that means laws applicable to the *grant*, or the much larger universe of laws applicable to the *applicant*. While the phrase in isolation does not specify the object of "applicable," every facet of the surrounding context requires the narrower meaning. First, every adjacent grant condition pertains narrowly to JAG funds, *see* 34 U.S.C. § 10153(a)(1)-(5); Congress would not bury a sweepingly

[5] *Available at* https://www.bja.gov/funding/JAGLocal18.pdf.

broad set of conditions as the last element in a list of narrow, grant-focused application requirements. Second, the Department's limitless interpretation would render the word "applicable" superfluous, because it would make the provision reach *all* federal laws. Third, the Supreme Court has instructed courts to choose the narrower interpretation of grant conditions and statutes that intrude on state autonomy, especially statutes that interfere with States' criminal justice activities.

### A. The Text and Structure of 34 U.S.C. § 10153(a) Foreclose the Department's Position.

Section 10153(a) appears in the JAG statute's application requirements. It provides that JAG applicants must certify compliance both with "all provisions of this part" and with "all other applicable Federal laws." *Id.* § 10153(a)(5)(D).[6] The phrase "applicable Federal laws" could mean two different things: It could mean laws applicable to the *grant*—i.e. conditions that are already attached to JAG funds specifically or federal funds generally.[7] Or it could mean the hundreds of laws that are applicable to *applicants*—i.e. every statute and regulation that applies to States, localities, and their employees, most of which (like § 1373) have no connection to

[6] "This part" refers to the JAG statute, which is contained in Part A of Title 34, Chapter 101, Subchapter V.

[7] Some such conditions apply specifically to JAG funds. *See, e.g.*, 34 U.S.C. § 20927(a). Others apply to all DOJ funds, *see, e.g.*, 34 U.S.C. § 30307(e), or to federal funds more generally, *see, e.g.*, 42 U.S.C. § 2000d (no discrimination in "any program or activity receiving Federal financial assistance"); 29 U.S.C. § 794(a) (same); 42 U.S.C. § 4604(c) (similar).

federal funds. By itself, the text "all other applicable Federal laws" does not say whether "applicable" refers to grants or applicants.

To be sure, Congress sometimes identifies the object of "applicable" explicitly. *See, e.g.*, 40 U.S.C. § 1314(c) ("laws applicable to the State"); 42 U.S.C. § 16154(g)(1) ("applicable Federal laws . . . governing awards"); 43 U.S.C. § 2631 ("all laws, rules, and regulations applicable to the national forests"). But where it does not, the phrase "applicable laws" alone does not answer the question.[8]

Here, the surrounding statutory context makes it crystal-clear that "applicable" means applicable to the grant, not the applicant. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008) ("[T]he term 'applicable' must be examined in context."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133 (9th Cir. 2009) (rejecting an "expansive definition" of "the term 'applicable'").

First, *all* of the many other surrounding conditions in § 10153(a) apply narrowly to the grant itself.[9] None of them imposes conditions outside the context of grant administration. If "applicable" meant what the Department believes, § 10153(a)(5)(D) would be a major outlier in the JAG statute as the only provision

[8] Tellingly, the only case the Department cites for its textual argument involved a statutory phrase *without* the word "applicable." *See* U.S. Br. 24; *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) ("all other law").

[9] *See, e.g.*, 34 U.S.C. § 10153(a)(1) (JAG funds cannot be used to supplant state or local funds); *id.* § 10153(a)(2), (3) (JAG project must be submitted for appropriate review); *id.* § 10153(a)(4) (requirement to report on administration of JAG grant); *id.* § 10153(a)(6) (plan for how JAG funds will be used).

to import requirements (hundreds, in fact) that do not by their terms apply to federal funds. Courts typically do not interpret serial provisions like § 10153(a) to include such a glaring difference in kind. *See Kucana v. Holder*, 558 U.S. 233, 246 (2010) (interpreting provision in line with its neighbors); Appellees Br. 32; *see also Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("[A] word is known by the company it keeps.").

Second, the phrase "all other" makes the applicable-laws provision a "residual clause," which is limited by "the enumerated categories . . . which are recited just before it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Section 10153(a)(5)(D) first asks applicants to certify that they comply with "all provisions of" the JAG statute. Those requirements are already tied to federal funds, with or without the certification in § 10153(a)(5)(D). Accordingly, the statute's residual clause—"all *other* applicable Federal laws"—necessarily refers to laws that likewise are already tied to federal funds. Otherwise, "there would have been no need for Congress to" enumerate compliance with the JAG statute if it was "subsumed within" an unlimited residual clause. *Id.* at 114-15; *see Falkenberg v. Alere Home Monitoring, Inc.*, No. 13-CV-00341-JST, 2014 WL 5020431, at *3 (N.D. Cal. Oct. 7, 2014).

This context renders the Department's position untenable. Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary

provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Every single one* of § 10153(a)'s nine other conditions is closely tied to grant administration, including the four other certifications in subsection (a)(5). It would be a striking departure for the second half of the final term in that list to suddenly impose a limitless swath of conditions, which, unlike everything else in § 10153(a), are unconnected to JAG funds specifically or federal funds generally. Congress does not "hide elephants in mouseholes." *Id*.

Third, even viewing the phrase in isolation, the rule against superfluity forecloses the Department's attempt to make "applicable Federal laws" mean *all* federal laws. That would render "applicable" meaningless. *See United States v. Hayes*, 555 U.S. 415, 425-26 (2009) (rejecting an interpretation that rendered a single word inoperative). The Department has no coherent answer to this problem. Its only response to the textual limits of § 10153(a) has been to suggest "applicable" establishes a "germaneness" requirement and attempt to recharacterize § 1373 as a law that is "germane" to the JAG grant program. U.S. Br. 23-24. But, as a matter of ordinary language, "applicable" does not mean "germane." This attempt to swap in a Spending Clause concept, *see* Appellees Br. 51, for the term Congress chose thus has no grounding in the text. The Department's strained attempt to avoid superfluity underscores that, of § 10153(a)(5)(D)'s two possible constructions, only the narrow one gives independent meaning to each word.

And indeed, the narrower construction conforms with the government's own certification form. That form uses virtually the same phrase—"all applicable federal statutes and regulations"—interchangeably with the phrase "all federal statutes and regulations *applicable to the award*." *See* Dep't of Justice, Certified Standard Assurances, OMB No. 1121-0140 (emphasis added); *compare id.* § 3(b), *with id.* § 3(a), https://bit.ly/2Cu2WAK; *see San Francisco*, 349 F. Supp. 3d at 954.

Moreover, in the two decades since it enacted § 1373, "Congress has repeatedly, and frequently," *considered* making § 1373 a condition of receiving JAG funds, but has "declined" each time. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017) (collecting bills). These amendments would have been wholly unnecessary if § 10153(a)(5)(D) *already* required compliance with § 1373 as a condition of JAG funds. Appellees Br. 28.

**B. Federalism Canons Compel the Narrower Reading.**

As with the Department's special-conditions theory, federalism principles foreclose its applicable-laws theory. First, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (Congress must "make the existence of the condition . . . explicitly obvious"). Second, as explained above, a statute cannot be read to intrude on core state functions unless the intrusion is

"unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. These presumptions are key to maintaining the federal balance. *Solid Waste*, 531 U.S. at 172-73.

*Gregory* and *Pennhurst* are fatal to the Department's position. In its brief, it avoids identifying the precise mechanism by which it thinks § 10153(a)(5)(D) supports the compliance condition—i.e. whether (a) the statute *delegates* authority for the Department to create new conditions by choosing laws to turn into spending conditions, or (b) the statute *itself* makes spending conditions out of all federal laws that apply to grantees. Neither mechanism is supported by a clear statutory statement.

The delegation possibility is a textual non-starter because § 10153(a)(5)(D) contains no language delegating authority to create new substantive grant conditions, unlike the dozens of statutes that delegate such authority explicitly. *See infra* Part III (listing statutes). At most, § 10153(a)(5) allows the Department to create a "form" for certifying compliance. *See* Black's Law Dictionary (10th ed. 2014) (defining "form" as a "document" to be filled in, as "distinguished" from "substance"). That is a far cry from the "unmistakably clear" language required for Congress to "authorize administrative agencies to . . . encroach[] upon a traditional state power" like criminal justice. *Gregory*, 501 U.S. at 460; *Solid Waste*, 531 U.S. at 172-73.

Unable to claim any delegation of authority to create new conditions, the Department would have to establish that § 10153(a)(5)(D) *itself* creates JAG conditions out of every separate statute and regulation that applies to localities and their employees. Indeed, in other JAG cases, it has argued that "Congress, not the Attorney General, has made [these] laws applicable to plaintiffs." *New York* U.S. Reply Br. 12, 14. But § 10153(a)(5)(D) does not "unambiguously" tell JAG applicants that their grants are conditioned on their compliance with an unlimited swath of unidentified conditions scattered across the U.S. Code and Code of Federal Regulations. *Pennhurst*, 451 U.S. at 17. To the contrary, as explained above, the narrower understanding is far and away the better one. Thus, because § 10153(a)(5)(D) is not "explicitly obvious" in imposing the Department's conditions, it does not authorize them. *Mayweathers*, 314 F.3d at 1067; *see Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003).

In practice, the Department's applicable-laws theory would vastly expand its leverage over state and local police. Far from an innocuous reinforcement of existing obligations, the Department is using § 10153(a)(5)(D) to enforce dubious *new* interpretations of at least eight different immigration statutes. *See* JAG Solicitation, FY 2018, at 36-37, 44-45 (imposing aggressive interpretations of 8 U.S.C. §§ 1226(a), 1226(c), 1231(a)(4), 1324(a), 1357(a), 1366(1), 1366(3), 1373). Every court to consider those interpretations, has rejected them. *See, e.g.*, *United*

*States v. California*, 921 F.3d 865, 886-888, 891-93 (9th Cir. 2019).[10] But by turning them into grant conditions, the Department can coerce compliance en masse, giving recipients mere weeks to either acquiesce to these new requirements or file emergency legal action raising a host of major constitutional and statutory issues—a high-stakes and expensive choice for localities that depend on federal funds. Congress does not "casually" authorize federal agencies to intrude on state prerogatives so blatantly. *Solid Waste*, 531 U.S. at 172-73.

The Department's view would make the JAG statute an extreme outlier in the U.S. Code: Amici are not aware of any federal grant that is conditioned on compliance with every conceivable law that applies to States, localities, and their employees, nor has the Department identified any in multiple rounds of litigation. The Court should reject its claim.

## III. No Other Statutory Provision Confers the Relevant Authority.

The Department's new conditions have been rejected by every single judge to review them, including three unanimous appellate courts and seven district courts. Searching for some new argument, the Department now claims to locate authority in a handful of other provisions. But these provisions pertain only to narrow, ministerial aspects of grant administration, and they look nothing like the clear

[10] *See also, e.g.*, *Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331-33 (E.D. Pa. 2018); *San Francisco*, 349 F. Supp. 3d at 966-68.

language Congress uses when it confers authority to create new substantive conditions. The Department's last-ditch arguments are meritless, as the Third and Ninth Circuits unanimously concluded. *See Los Angeles*, 2019 WL 5608846, at *8, 10-11; *Philadelphia*, 916 F.3d at 285.

First, the Department notes that § 10102(a)(6) allows the Assistant Attorney General to be delegated the power to set "priority purposes for formula grants." U.S. Br. 19-20. Even if that power *had* been delegated to the AAG, *but see* Appellees Br. 40-44, it would simply allow the AAG to determine priorities for how JAG grants are used—not to impose separate requirements unrelated to how the funds are spent. None of the new conditions implicates this authority, because none of them directs how recipients spend their JAG grants. *See also Los Angeles*, 2019 WL 5608846, at *8 ("None of the purposes set forth in § 10152(a)(1) or the predecessor grant statutes corresponds to DOJ's [access or notice] requirement[s.]").

Second, the Department claims authority based on a provision requiring JAG applicants to certify that, prior to applying for funds, "there has been appropriate coordination with affected agencies." 34 U.S.C. § 10153(a)(5)(C); *see* U.S. Br. 22-23. But this provision simply requires applicants to certify that they have coordinated with state and local agencies that will be affected *by the grant*. *See* 34 U.S.C. § 10251(a)(6) (defining "public agency" for JAG purposes as limited to state and local entities). And it uses the past tense—"has been"—foreclosing any

suggestion that the provision requires grantees to provide *ongoing*, daily enforcement assistance to DHS. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) ("verb tense is significant in construing statutes"); *see also Los Angeles*, 2019 WL 5608846, at *11 ("The statutory language does not support DOJ's interpretation that a recipient must coordinate with DHS agents who are not part of a funded program."). Like its neighbors, this provision simply ensures that grantees consult with relevant local stakeholders before they apply for JAG funds. *See* 34 U.S.C. § 10153(a)(2) (coordination with the local "governing body"); *id.* § 10153(a)(3) (public notice and comment).

Third, the Department invokes a provision of the JAG statute requiring applicants to certify that they will "report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." 34 U.S.C. § 10153(a)(4); *see* U.S. Br. 21-22. But that does not allow the Department to force grantees to provide a *different* agency, DHS, with real-time operational assistance. The phrase "financial and programmatic information" refers to general information that allows grantmaking agencies to "evaluate applications and make award decisions, monitor ongoing performance[,] and manage the flow of federal funds." Dep't of Homeland Sec., *Agency Information Collection Activities*, 75 Fed. Reg. 9917-02, 2010 WL 723191 (Mar. 4, 2010). Congress and agencies have used it that way for decades. *See, e.g.*, 42 U.S.C. § 300ff-14(h)(3)(A) (describing

"programmatic and financial reports" as "routine grant administration and monitoring activities"); 38 C.F.R. § 61.80(p) (describing "programmatic data" used for "reporting, monitoring, and evaluation").[11] Like the rest of § 10153(a), this provision pertains to grant administration, and simply allows the Department to monitor the use of JAG funds. *See Los Angeles*, 2019 WL 5608846, at *10.

None of these provisions remotely resembles the statutes that *do* provide agencies with open-ended authority to create new grant conditions. When Congress confers that kind of authority, it does so explicitly. *See e.g.*, 34 U.S.C. § 10446(e)(3) (authorizing the Department to "impose reasonable conditions on grant awards"); 34 U.S.C. § 40701(c)(1) (authorizing Department to "establish appropriate grant conditions"); 15 U.S.C. § 2684(g); 16 U.S.C. § 1225; 20 U.S.C. § 1682; 25 U.S.C. § 1644(b); 25 U.S.C. § 1652(b); 29 U.S.C. § 794(a); 42 U.S.C. § 280e(e); 42 U.S.C. § 2000d-1; 47 U.S.C. § 1204(b)(2). Congress plainly knows how to confer such authority. It has not done so here, and the JAG statute's list of ministerial application requirements would be an exceedingly "odd place" to put such a sweeping power. *Chicago*, 888 F.3d at 285; *Whitman*, 531 U.S. at 468.

[11] *See also*, *e.g.*, 29 U.S.C. § 3245(c)(2); 34 U.S.C. § 20305(a)(2)(B); 20 U.S.C. § 1232f(a); 25 C.F.R. § 23.47(a); 45 C.F.R. § 400.28; 15 C.F.R. § 921.11(b).

* * *

Congress has not authorized the Department to use JAG funds as leverage to coerce local police into helping arrest and deport their own residents. The Department's unprecedented statutory claims should be rejected.

## CONCLUSION

The Court should affirm the decision below.

Dated: November 13, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,405 words, exclusive of the portions of the brief that are exempted by Rule 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Cody Wofsy
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November 13, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, I electronically filed the foregoing Brief of Amici Curiae with the Clerk for the United States Court of Appeals for the First Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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## ADDENDUM: LIST OF AMICI CURIAE

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. In particular, the ACLU has a longstanding interest in enforcing the constitutional and statutory constraints on the federal government's use of state and local police to enforce civil immigration laws. The ACLU has been counsel and amicus in a variety of cases involving these issues, including *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015); *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *United States v. California*, 921 F.3d 865 (9th Cir. 2019); *City of Philadelphia v. Attorney General of the United States*, 916 F.3d 276 (3d Cir. 2019); and *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018).

The **American Civil Liberties Union of Rhode Island (ACLU-RI)** is the state Affiliate of the ACLU. Like its parent organization, ACLU-RI is dedicated to promoting the principles of liberty and equality embodied in the laws and Constitution of the United States which protect the rights of immigrants. In furtherance of those principles, ACLU-RI, through its cooperating counsel, and often in conjunction with the ACLU, has appeared before this Court and the U.S.

District Court of Rhode Island, both as party counsel and as amicus curiae, in a number of cases addressing the rights of immigrants and limits on governmental authority that affect those rights. See, e.g., *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014), 793 F.3d 208 (1st Cir. 2015), 235 F. Supp. 3d 388 (D.R.I. 2017); *Fernandes v. Immigration and Naturalization Service*, 79 F. Supp. 2d 44 (D.R.I. 1999); *Vieira-Garcia v. Immigration and Naturalization Service*, 239 F.3d 409 (2001); and *Qu v. Central Falls Detention Facility Corporation*, 717 F.Supp.2d 233 (D.R.I. 2010).

The **National Immigrant Justice Center (NIJC)** is a program of Heartland Alliance, which provides resettlement services to refugees and mental health services for immigrants and refugees. NIJC, through its staff of attorneys, paralegals, and a network of over 1,500 *pro bono* attorneys, provides free or low-cost legal services to immigrants, including detained non-citizens. NIJC's direct representation, as well as its immigration advisals to criminal defense attorneys, has informed its strategic policy and litigation work around the myriad legal and policy problems of entangling local law enforcement in civil immigration enforcement. NIJC is counsel on a host of immigration detainer-related cases including *Jimenez Moreno v. Napolitano*, 11-5452 (N.D. Ill.) and *Makowski v. United States*, 12-5265 (N.D. Ill.). NIJC also advocated for the amendments to Chicago's Welcoming City

Ordinance (Ch. 2-173) in 2012, the Cook County detainer ordinance (11-O-73) in 2011, and the recently-enacted Illinois TRUST Act (S.B. 31).

The **National Immigration Law Center (NILC)** is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity, and justice. NILC has earned a national leadership reputation for its expertise in the rights of immigrants, including litigating key due process cases to protect the rights of noncitizens.

The **Washington Defender Association (WDA)** is a statewide non-profit organization whose membership includes public defender agencies and those working to improve the quality of indigent defense in Washington State. WDA provides support for high quality legal representation by advocating for change, educating defenders, and collaborating with the community and justice system stakeholders to defend and advance the rights of noncitizens engaged with the criminal justice system. In 2018, WDA lead a coalition that successfully advocated for the King County Council to pass an ordinance prohibiting county agencies, including law enforcement, from collaborating in ICE enforcement.

The **Southern Poverty Law Center (SPLC)** is a non-profit organization founded in 1971 that throughout its history has worked to make the nation's constitutional ideals a reality for everyone. The Immigrant Justice Project of the SPLC provides high-quality legal representation to detained immigrants five immigration detention facilities in the South. It also brings systemic litigation to challenge unjust systems that push people into the deportation system and keep them locked up. Although the Center's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

The **Northwest Immigrant Rights Project (NWIRP)** is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons who are placed in removal proceedings. In addition, NWIRP engages in community education to immigrant communities who interact both with federal immigration enforcement and local law enforcement agencies. Thus, NWIRP has a direct interest in the issues presented in this case.

The **New Orleans Workers' Center for Racial Justice** is membership organization founded by guest workers, immigrant workers, and Black residents of New Orleans in the aftermath of Hurricane Katrina. The Center is dedicated to

defending civil and labor rights through organizing, advocacy, and litigation. The Center's members organized for and won welcoming city policies in New Orleans that make the city safer for all residents, both immigrant and U.S born. In 2011, two reconstruction workers represented by the Center brought suit against the Sheriff of Orleans Parish for unlawfully over-detaining immigrants—for as long as five months, without any probable cause determination. *Cacho v. Gusman*, Civ. No. 11-225 (E.D. La.). In 2013, the Sheriff agreed to stop both the unconstitutional over-detention of immigrants and the use of jail resources for civil immigration investigations, announcing a new policy that was part of the settlement of the *Cacho* case.