AMICUS CORNER

BY: *Amanda Kellar, IMLA Deputy General Counsel and Director of Legal Advocacy*

Byrne Jag Litigation Update

IMLA has been involved as an amicus in the so-called "sanctuary jurisdiction" litigation, which has been going on for over two years. While the policy issues involved in the sanctuary jurisdiction litigation may be politically dicey, the legal principles are among our most fundamental as local government attorneys. They include: the federal government's constitutional authority to commandeer local governments; the ability of the federal government to impose unconstitutional conditions on grants; local autonomy and the ability to determine what is in a local community's best interest, particularly in the police / community relations and public health contexts; separation of powers principles; and the scope of nationwide injunctions against the federal government that seeks to impose unconstitutional laws.

While the litigation is still ongoing, two important victories for local governments are worth highlighting in the context of the Byrne Jag grant litigation: *City of Evanston and the United States Conference of Mayors v. Barr,* No. 18-C-4853 (N.D. Il. Sept. 2019) (the "USCM Decision") and *City of Chicago v. Barr,* No. 18 C 6859, 2019 U.S. Dist. LEXIS 159572 (N.D. Ill. Sep. 19, 2019) (the "Chicago Decision").

Background on the Byrne Jag Grant and Immigration Conditions

The Byrne Jag grant is a formula grant and according to the Office of Justice Programs, it is the leading source of federal justice funding to state and local jurisdictions.[1] The Byrne Jag grant "provides states, and local governments with funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, … crime victim and witness initiatives", etc.[2] The formula to allocate funds under the program is based on population and reported crime. In Fiscal Year 18, the Federal Government awarded over $79 million to more than 880 local governments via the Byrne Jag grant. [3] States were awarded another $176.7 million through the Byrne Jag grant, and some of that money flows to local governments.[4]

Beginning with FY17, DOJ sought to impose three new conditions on the Byrne Jag grant recipients. First, local governments would be required to certify compliance with 8 U.S.C. § 1373 (the "compliance condition"). Second, local governments would need to permit Department of Homeland Security ("DHS") personnel access to any detention facility in order to meet with individuals to inquire about their immigration status (the "access condition"). Third, local governments would be required to provide "as early as practicable" advance notice to DHS regarding the scheduled release of any undocumented immigrants in the jurisdiction's custody (the "notice condition").

Despite the repeated drum beat by courts around the country that the conditions are unlawful, [5] DOJ doubled down on its position by again imposing the same three immigration conditions in FY18 and FY19 (the "repeat conditions"), and also adding a new immigration related condition, known as the "harboring condition." The harboring condition prohibits recipients from making any "public disclosure … of any federal law enforcement information in a direct or indirect attempt to conceal, harbor, or shield from detection any fugitive from justice under 18 U.S.C. ch. 49, or any alien who has come to, entered, or remains in the United States in violation of 8 U.S.C. ch. 12 – without regard to whether such disclosure would constitute (or could form a predicate for) a violation of 18 U.S.C. 1071 or 1072 or 8 U.S.C. 1324(a)."[6] The FY18 grant also contained a new certification requirement, which requires "the would-be grantee to certify that it is not subject to or bound by any "law, rule, policy, or practice" that would "impede the exercise by federal officers of authority" under 8 U.S.C. §§ 1357(a), 1226(a) or (c), 1231(a), or 1366(1) or (3)."[7]

Chicago and USCM FY18 Byrne Jag Decisions

Chicago and the United States Conference of Mayors had both already successfully sued the DOJ regarding the FY17 conditions. [8] In ruling in the FY18 case on the same notice, access, and compliance conditions, the judge noted that the court had already ruled on these exact conditions in the FY17 lawsuit, finding them unlawful then, and concluding that they remain equally unlawful now, and that Chicago and USCM were therefore entitled to summary judgment on these "repeat conditions."[9] As far as the new "certification" requirement, the court again found in favor of Chicago and USCM, explaining:

> It is Congress' job to attach such conditions to the receipt of federal grants, and the Executive cannot unilaterally attach conditions to the receipt of grant funding

> without express authorization from Congress. *City of Chicago*, 888 F.3d at 286. This power has not been delegated, and thus the additional certification requirement is *ultra vires*.[10]

The court similarly rejected the DOJ's claim that a statute requiring the Assistant Attorney General to "maintain liaison" between the executive branch and state and local governments in "matters relating to criminal justice," somehow allowed for the imposition of the "harboring condition" on a formula grant.[11] The court also noted that the fact that the grant at issue is a formula grant, makes it "inconceivable that Congress would have anticipated that the AAG could abrogate that distribution scheme and deny funds to localities based on a new condition related to harboring aliens." [12]

Scope of the Injunctions

After ruling in favor of both Chicago and USCM on the merits, the court next determined the appropriate relief for the parties. Chicago and USCM both requested a program-wide (or nationwide) injunction that would be prospective in nature. In both cases, the court ordered a permanent injunction, preventing the DOJ from imposing the challenged conditions not only in the FY18 grant, but in all future grant cycles. [13] The court explained the necessity of an injunction that reaches into future years as follows:

> Given the extent of the violation established, and DOJ's track record in this litigation, an injunction that covers all future years of the Byrne JAG program is appropriate. The nature of injury here—a violation of the separation of powers doctrine—is highly significant. *See City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) ("The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government. If the Executive Branch can determine policy, and then use the power of the purse to mandate compliance with that policy by the state and local governments, all without the authorization or even acquiescence of elected legislators, that check against tyranny is forsaken."). Unless the Seventh Circuit overturns this Court's summary judgment opinion, it will never be permissible for the Attorney General to impose the challenged conditions on Chicago.[14]

In terms of geographic scope, the court in the Chicago case also ordered a nationwide injunction as to all the challenged conditions, but stayed the nationwide aspect (staying it for all jurisdictions except Chicago) until the Seventh Circuit rules on the issue of the scope of nationwide injunctions in the related FY17 case that Chicago brought against the Attorney General and is currently pending before the Seventh Circuit.[15] If the Seventh Circuit rules that a nationwide injunction is appropriate in the FY17 case that is currently pending before it (and could be decided at any time), then the district court in its FY18 decision indicated that the stay would be lifted and the injunction would apply to all Byrne Jag recipients for FY18 and future program years.

In the USCM case, the court similarly issued a forward-looking injunction, enjoining the DOJ from imposing the immigration related conditions on all future years form the Byrne Jag grant.[16] In terms of geographic scope, the court granted an injunction as to all member of USCM.[17]

Conclusion

These two decisions out of the Northern District of Illinois are important for local governments across the country given the relief ordered by the judge. The key takeaway is that if your local government is a member of USCM, then the DOJ is prohibited from imposing any of the immigration related conditions contained in FY17, FY18 FY19, or any future year DOJ may seek to impose these conditions. If you are not a member of USCM, then all eyes will be on the Seventh Circuit and its ruling regarding the scope of nationwide injunctions in the pending FY17 Byrne Jag case brought by Chicago. [18] If you have questions about these cases or Byrne Jag grant issues, please contact Amanda Kellar at akellar@imla.org. We can also add you to our sanctuary jurisdiction working group. ML

Endnotes

1. *See* https://www.bja.gov/jag/.
2. *Id.*
3. *See* Awards Made for "BJA FY 418 Edward Byrne Memorial Justice Assistance Grant (JAG) Program - Local Solicitation," available at: https://external.ojp.usdoj.gov/selector/title?solicitationTitle=BJA%20FY%2018%20Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20(JAG)%20Program%20-%20Local%20Solicitation&po=BJA
4. *See* Awards Made for "BJA FY 18 Edward Byrne Memorial Justice Assistance Grant (JAG) Program - State Solicitation," available at: https://external.ojp.usdoj.gov/selector/title?solicitationTitle=BJA%20FY%2018%20Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20(JAG)%20Program%20-%20State%20Solicitation&po=BJA
5. *City of Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276, 293 (3d Cir. 2019) (concluding notice, access, and compliance conditions violate the Administrative Procedure Act); *City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018) (affirming preliminary injunction against notice and access conditions); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 879 (N.D. Ill. 2018) (permanently enjoining notice, access, and compliance conditions); *Illinois v. Sessions*, No. 18-4791, ECF No. 25 (N.D. Ill. Sept.

Continued on page 36

Cases cont'd from page 35

Endnotes

1. Grant v. City of Syracuse, No. 5-15 cv 445 (N.D. N.Y. Nov. 17, 2017).
2. Olugbenga Ajilore, "How Civilian Review Boards Can Further Police Accountability and Improve Community Relations," *Scholars Strategy Network*, June 25, 2018 https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations.
3. Syracuse Code of Ordinances 12-184(1), (5); Syracuse CRB Bylaws, section 3 (http://www.syrgov.net/uploadedFiles/City_Hall/CRB/CRB%20by-laws%202012.pdf)
4. *Id.*
5. Syracuse Code of Ordinances, Section 12-187(3)(f)(3).
6. "Substantial evidence" means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971), (admitting report by physician in disability hearing: "despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence . . . ") *Id.*
7. "The actions of the board do not preclude action by the judicial system. *A finding or decision by the board shall not have any collateral effect upon a subsequent administrative or judicial proceeding."* Syracuse NY Code of Ordinances §12-187(3)(f)10 (emphasis added)
8. *Id.* at 1025.
9. Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007).
See e.g., Walker v. City of New York, No. 14-CV-680, 2018 U.S. Dist. LEXIS 58380, at *12-13 (E.D.N.Y. Mar. 30, 2018); Amato v. City of Saratoga Springs, 972 F. Supp. 120, 123-24 (N.D.N.Y. 1997).
11. Mineo v. City of New York, No. 09-CV-2261, 2013 U.S. Dist. LEXIS 46953, at *4-5 (E.D.N.Y. Mar. 29, 2013)"
12. Although bifurcation is discretionary, that "discretion is not unfettered" and the trial court's decision should be reversed if it abused that discretion. *Brown v. Junction Pool Commons, Inc.*, 301 F. App'x 24, 26 (2d Cir. 2008).

Amicus cont'd from page 31

26, 2018) (accord); *City of Los Angeles v. Sessions*, No. 18-7347, 2019 WL 1957966, at *4-5 (C.D. Cal. Feb. 15, 2019) (permanently enjoining notice, access, compliance, harboring, and questionnaire conditions); *City & County of San Francisco v. Sessions*, No. 18-5146, 2019 WL 1024404, at *2 (N.D. Cal. Mar. 4, 2019) (accord); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) (permanently enjoining the notice, access, and compliance conditions); *City of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 246 (S.D.N.Y. 2018) (permanently enjoining notice, access, and compliance conditions); *City of Providence v. Sessions*, No. 18-437, ECF No. 30 at 7-8 (D.R.I. June 10, 2019) (permanently enjoining notice, access, and compliance conditions).
6. *See* Chicago Decision, p. 9.
7. *See* Chicago Decision, p. 27.
8. *City of Chicago*, 888 F.3d at 293; *City of Chicago*, 321 F. Supp. 3d at 879; *City of Evanston & United States Conference of Mayors v. Sessions*, No. 18 C 4853, 2018 U.S. Dist. LEXIS 204500, at *1 (N.D. Ill. Aug. 9, 2018); *United States Conference of Mayors v. Sessions,* No. 18-2734 (7th Cir. Aug. 29, 2018) (lifting stay from injunction as to USCM members).
9. Chicago Decision, p. 26; USCM Decision, p. 13.
10. Chicago Decision, p. 31; *see also* USCM Decision, p. 24.
11. Chicago Decision, p. 32.
12. *Id.* at 35, *citing City of Chicago*, 888 F.3d at 286.
13. Chicago Decision, p. 44-46; USCM Decision, p. 28.
14. Chicago Decision, p. 44.
15. *Id.* at 46.
16. USCM Decision, p. 28.
17. *Id.* at 29.
18. The City of Los Angeles also received a nationwide injunction in its FY18 Byrne Jag litigation, but the nationwide aspect of that injunction is currently stayed pending Ninth Circuit review.

Reptiles cont'd from page 23

tion in limiting plaintiffs' [voir dire] inquiries on specific sums of money" but allowing "inquiring of jurors, in a less particularized fashion, whether they had any prejudice against large verdicts"); Juarez v. Commonwealth Med. Assoc., 742 N.E.2d 386, 388 (Ill. Ct. App. 2000) (trial court properly exercised discretion in limiting plaintiff's counsel to inquiring whether potential jurors "could award 'substantial damages'"); Jones v. Parrott, 143 S.E.2d 393, 395 (Ga. Ct. App. 1965) (voir dire questions to prospective jurors about verdict size "should be phrased in general terms," not in specific dollar amounts).
8. See also Beagle v. Vasold, 417 P.2d at 681 ("the trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering" and "may also, if it deems appropriate, advise the jury it is not bound by any particular method of calculation in assessing damages for pain and suffering"; Johnson v. Brown, 345 P.2d 754, 759 (Nev. 1959) (inasmuch as a per diem argument "may be used only for illustrative purposes, the trial court should insist that it be premised . . . by an admonition that the suggestions of counsel are not to be taken as evidence but are merely the thoughts of counsel as to what would be proper damages to award for this item. It should not hesitate to limit counsel whenever it feels that the rights of the jury to determine for itself what fair and reasonable compensation for such items of damages, are being invaded, or to give such further admonition as it deems necessary.") (emphasis added); Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d 575, 576 (Utah 1960) (if counsel presents a mathematical per diem formula to jury for is consideration in determining damages for pain and suffering, the propriety of such argument is left to the sound discretion of the trial court with a "cautionary instruction that if permitted such presentation is but lawyer talk").