THE END OF "SANCTUARY CITIES" OR THE END OF SEPARATION OF POWERS?: AN ANALYSIS OF THE EXECUTIVE BRANCH'S MISUSE OF THE SPENDING POWER TO CRACK DOWN ON SANCTUARY CITIES

Comment

Daisy Contreras[*]

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* Articles Editor, *Texas Tech Law Review*, Volume 53; J.D. Candidate, Texas Tech University School of Law, 2021; B.A. University of Texas at San Antonio, 2018. A special thanks to Dean Jack Wade Nowlin and Associate Dean Jamie Baker for guidance in the Academic Legal Writing seminar. Also, thank you to Professor Richard Rosen for his advice throughout the writing process.

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I. INTRODUCTION

Imagine that an illegal immigrant has just been a victim of armed robbery while walking down the streets of an "anti-sanctuary" jurisdiction.[1] Because that person knows she lives in an anti-sanctuary jurisdiction,[2] where local officers enforce federal immigration laws, she does not report the crime and risk detainment by officials.[3] Thus, the criminal who committed the armed robbery gets to remain in the community, making the city less safe.[4]

Now imagine that the same scenario occurs in a "sanctuary city" such as Los Angeles, California.[5] In this scenario, the illegal immigrant who was assaulted trusts the police officers in her community and knows she will not be detained simply for reaching out to the police to report a crime.[6] Thus, the criminal who committed the armed robbery is more likely to be caught and arrested, making the city safer. However, this scenario does not have a happy ending because the City of Los Angeles and its police officers are then denied a federal grant as punishment for failing to question the immigrant about her status; therefore, failing to enforce federal immigration laws.[7] This hypothetical is very similar to what has happened in this country.

In 2017, the federal government denied the City of Los Angeles vital grants meant for hiring more police officers and building trust within the

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1. *See generally* Tanvi Misra, *The Rapid Rise of the 'Anti-Sanctuary' City*, CITYLAB (Sept. 27, 2018), https://www.citylab.com/equity/2018/09/the-rapid-rise-of-the-anti-sanctuary-city/571309/ ("[S]o-called 'anti-sanctuary' cities in the United States . . . are local jurisdictions that agree to have their local law enforcement act like immigration officers in jails and in the field.").

2. *See id.*

3. *See* Pauline Portillo, Comment, *Undocumented Crime Victims: Unheard, Unnumbered, and Unprotected*, 20 SCHOLAR 345, 355 (2018) (stating that immigrants are vulnerable to crimes because criminals know that immigrants fear deportation and are reluctant to report crimes); Symposium, *Sanctuary Cities*, 81 ALB. L. REV. 679–87 (2018) ("Citizenship status is one of the most significant barriers that prevent crime victims and witnesses from reporting crimes.").

4. *See* City of Los Angeles v. Barr (*City of Los Angeles II*), 929 F.3d 1163, 1194–95 (9th Cir. 2019) (Wardlaw, J., dissenting) (noting that unreported crimes lead to more criminals at large and make the community less safe).

5. *See infra* Part III.A (explaining the concept of sanctuary cities like Los Angeles).

6. *See* Portillo, *supra* note 3, at 20.

7. *See* City of Los Angeles v. Sessions (*City of Los Angeles I*), 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018).

community.[8] When the City of Los Angeles initially sued the Attorney General and the Department of Justice (DOJ), the District Court for the Central District of California held that the Attorney General and the DOJ acted without congressional authorization when they implemented immigration-based preferences on the Community Oriented Policing Services (COPS) grant.[9] However, the Court of Appeals for the Ninth Circuit reversed, holding that the Attorney General and the DOJ had not exceeded their delegated authority to specify grant conditions.[10]

Under Article I of the Constitution, Congress has exclusive spending power, and the Executive Branch cannot act on that power beyond congressional authorization.[11] The Trump Administration, however, has sought to defund sanctuary cities through the use of Congress's exclusive spending power by implementing immigration-based preferences on federal grants, such as the COPS grant.[12] The immigration-based preferences are beyond congressional authorization because Congress did not give the Attorney General authority to use the COPS grant as a tool to enforce federal immigration laws on the states.[13] The sanctity of a deeply rooted principle—the separation of powers—is at stake through the Executive Branch's misuse of the spending power and the Ninth Circuit's approval of such action.[14] As the remaining branch with the responsibility to protect Congress's exclusive spending power and uphold the separation of powers, the Supreme Court should reverse the Ninth Circuit's decision. [15]

Although many scholars have addressed the sanctuary cities' litigation over grant conditions and the many implicated constitutional issues, scholarship on the issue has become partially outdated due to the decision of the Ninth Circuit in *City of Los Angeles v. Sessions*.[16] The decision has created a rift in the circuit courts' general stance on the Trump Administration's conditioning of federal grants.[17] This is the first academic

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8. *See id.*

9. *Id.* at 1098–99.

10. *City of Los Angeles II*, 929 F.3d 1163, 1169 (9th Cir. 2019).

11. *See* U.S. CONST. art. I, § 8, cl. 1; *id.*, § 9, cl. 7.

12. *See generally Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614 [hereinafter *Donald Trump Speech in Arizona*] (stating that Trump will block funding to sanctuary cities).

13. *See infra* Part VI (arguing that the executive branch conflicts with Congress's spending power).

14. *See infra* Part V (addressing the implication of the Ninth Circuit's decision on separation of powers).

15. *See infra* notes 27–28 and accompanying text (explaining that the Ninth Circuit's ruling approving conditioning for federal grants is the first and only decision that supports this stance).

16. *See City of Los Angeles I*, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018).

17. *See* City of Philadelphia v. Att'y Gen. of U.S. (*City of Philadelphia II*), 916 F.3d 276, 293 (3d Cir. 2019); City of Chicago v. Sessions (*City of Chicago II*), 888 F.3d 272, 293 (7th Cir. 2018). Before the Ninth Circuit's ruling, the general concession among the courts of appeals was that the Executive Branch did not have congressional authority to implement immigration-based conditions on federal grants. *See City of Philadelphia II*, 916 F.3d 276; *City of Chicago II*, 888 F.3d 272.

comment to address the recent Ninth Circuit decision and assess how the court's ruling puts the future of Congress's spending power at stake. This Comment does not consider the other issues raised by litigation concerning federal grants and sanctuary cities.[18] Instead, it solely focuses on the issue of separation of powers and the Executive Branch's encroachment of Congress's exclusive spending power.

Part II of this Comment begins by laying out the history behind the deeply rooted principle of separation of powers and Congress's exclusive spending power.[19] Part III breaks down the "sanctuary city" label and analyzes the Trump Administration's efforts to crack down on sanctuary cities.[20] Part IV addresses the circuit court decisions that have addressed whether the Executive Branch can use Congress's spending power to implement immigration-based preferences and conditions on federal grants.[21] Part V analyzes how the Ninth Circuit's decision threatens the sanctity of Congress's spending power and the overall deeply rooted principle of separation of powers.[22] Part VI argues that the Executive Branch's implementation of the immigration-based preferences on the COPS grant violated Congress's exclusive spending power.[23] Lastly, Part VII concludes that the Supreme Court must reverse the Ninth Circuit's decision.[24]

II. OVERVIEW OF THE SEPARATION OF POWERS AND SPENDING POWER

A. The Principle of Separation of Powers

The separation of powers is the "division of the legislative, executive, and judicial functions of government among separate and independent bodies."[25] The text of the United States Constitution enshrines this principle in its structure.[26] The drafters of the Constitution divided powers among three branches of government: the Legislative Branch, Executive Branch, and

18. *See* Ilya Somin, *Reclaiming and Restoring Constitutional Norms: Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247 (2019) (providing a comprehensive study on sanctuary city litigation).

19. *See infra* Part III (providing a general overview of the separation of powers and examining Congress's spending power).

20. *See infra* Part III (explaining how sanctuary cities function and addressing the Trump Administration's opposition to them).

21. *See infra* Part IV (analyzing a number of cases addressing the denial of federal grants to sanctuary cities).

22. *See infra* Part V (criticizing the Ninth Circuit's decision and its threat to separation of powers).

23. *See infra* Part VI (explaining how the Executive Branch has overstepped its bounds and violated Congress's spending power).

24. *See infra* Part VII (proposing a solution the Supreme Court must adopt to remedy the violation of Congress's spending power).

25. *Separation of Powers*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/separation-of-powers (last visited May 30, 2020).

26. *E.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 80 (3d ed. 2006).

Judicial Branch.[27] Additionally, within the separation of powers is the principle of checks and balances, in which each branch checks and balances one another's power, ensuring that no one branch becomes too powerful.[28] Further, the doctrine of checks and balances ensures that each branch maintains its exclusive power and does not exercise the power of the other branches.[29]

The principle of separation of powers can be traced back to Montesquieu, a philosopher of the 1700s, who stressed that separation of powers in a government is essential to liberty.[30] The Founding Fathers were greatly influenced by Montesquieu's beliefs, which led to the clear division of powers in the United States Constitution.[31] Like Montesquieu, the Founding Fathers "believed that combining [all] powers in one man or body necessarily jeopardized political liberty."[32] When writing the Constitution, the Founding Fathers separated the government's power by granting executive power to the President,[33] legislative power to Congress (including the spending power),[34] and judicial power to the Supreme Court and inferior federal courts established by Congress.[35] Since the drafting of the Constitution, the principle of separation of powers has been fundamental to the United States government.[36]

B. Congress's Exclusive Spending Power

Pursuant to Article I, § 8, Clause 1 of the United States Constitution, the power to spend belongs to Congress.[37] This spending power includes the following Appropriations Clause found in Article I, § 9, Clause 7 of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[38] Some regard the clause as the cornerstone of Congress's exclusive spending power.[39] The Appropriations Clause's

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27. Legal Info. Inst., *Separation of Powers*, CORNELL L. SCH., https://www.law.cornell.edu.wex/separation_of_powers (last visited May 30, 2020).

28. *See* Thomas O. Sargentich, *The Contemporary Debate About Legislative Executive Separation of Powers*, 72 CORNELL L. REV. 430, 432–33 (1987).

29. Legal Info. Inst., *supra* note 27.

30. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 58 (1998).

31. *Id.*

32. *Id.*

33. *See* U.S. CONST. art. II, § 1, cl. 1.

34. *See id.* art. I, § 1.

35. *See id.* art. III, § 1.

36. *See* Morrison v. Olson, 487 U.S. 654, 693–94 (1988).

37. U.S. CONST. art. I, § 8, cl. 1.

38. *Id.* art. I, § 9, cl. 7.

39. *See* Rosen, *supra* note 30, at 111.

restricting language has been interpreted as a restriction on the Executive Branch, meaning "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[40] Therefore, when Congress makes an appropriation, the Executive Branch will be "subject to any conditions or restrictions Congress imposes in connection with its appropriation of funds."[41]

Moreover, when Congress wants an agency to carry out a grant, Congress authorizes it "in the form of enabling legislation," usually in the form of a statute.[42] The agency's discretion to carry out the grant, however, is limited to the purpose and discretion that Congress sets out in the statute.[43] The discretion granted is determined by the statutory text of the statute under which a grant is promulgated, but "regardless of the amount of authority delegated by Congress to the awarding agency, all grant terms must be consistent with the authorizing statute."[44]

III. "SANCTUARY CITIES" AMIDST THE TRUMP ADMINISTRATION

A. What Is a "Sanctuary City?"

There is not one agreed-upon definition for sanctuary cities among opponents and supporters of sanctuary cities.[45] Opponents of sanctuary cities have generally defined them as jurisdictions that obstruct federal immigration enforcement,[46] while supporters of sanctuary cities define them as jurisdictions that have "chosen to distance themselves from federal immigration enforcement in furtherance of important [local] interests involving their communities."[47] As Katy Sheehan, the mayor of a sanctuary city, attempted to differentiate: sanctuary cities are not about taking immigrants and housing them in city hall so they cannot be deported; sanctuary cities are about refusing to take on the role of federal immigration officers and inquiring into one's status.[48] More objectively, sanctuary cities have been defined as "relating to or being a locality that provides limited cooperation to federal officials in the enforcement of immigration laws or policies."[49]

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40. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

41. *See* Rosen, *supra* note 30, at 112–13.

42. City of Philadelphia v. Sessions (*City of Philadelphia I*), 280 F. Supp. 3d 579, 593 (E.D. Pa. 2017).

43. *Id.*

44. *Id.*

45. Christopher N. Lasch, *Understanding "Sanctuary Cities*,*"* 59 B.C. L. REV. 1703, 1709 (2018).

46. *Id.* at 1705 n.4.

47. Barbara E. Armacost, "*Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1199 (2016).

48. Symposium, *supra* note 3, at 693–94.

49. *Sanctuary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sanctuary (last visited May 30, 2020).

Sometimes the term sanctuary cities is given a negative connotation; however, sanctuary cities have embraced the term and proclaimed themselves as sanctuary cities.[50] Today there are roughly 200 sanctuary cities and jurisdictions in the United States, and about nine "sanctuary states."[51] Sanctuary cities can be traced back to faith-based sanctuary movements beginning in the 1980s.[52] However, sanctuary cities gained much attention and controversy following President Trump's candidacy and presidency.[53] In response to President Trump's election and his efforts to deter illegal immigration, a growing number of jurisdictions have adopted sanctuary policies to disentangle their communities from the federal government.[54] Policy initiatives adopted by jurisdictions include: "(1) barring investigations into immigration violations; (2) limiting compliance with ICE detainers and administrative warrants; (3) limiting ICE's access to local jails; (4) limiting disclosure of sensitive information; and (5) declining to participate in joint operations."[55] Recently, the Executive Branch's efforts to crack down on sanctuary cities have exposed these jurisdictions to extensive litigation.[56]

B. The Trump Administration's Efforts to Crack Down on Sanctuary Cities

Throughout his candidacy and presidency, President Trump has made it very clear that tackling illegal immigration is a main priority for his Administration.[57] As promised, President Trump has made several efforts to tackle illegal immigration;[58] however, enforcing federal immigration laws throughout the country has proven to be a difficult task for federal officials alone without state cooperation.[59] In an effort to enforce federal immigration laws on the states and punish sanctuary jurisdictions that refuse to cooperate,

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50. Lasch, *supra* note 45, at 1709.

51. Bryan Griffith & Jessica M. Vaughan, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIG. STUD., https://cis.org/Map-Sanctuary-Cities-Counties-and-States (last updated Feb. 5, 2020).

52. *See* Lasch, *supra* note 45, at 1711.

53. *See* Priscilla Alvarez, *Trump Cracks Down on Sanctuary Cities*, ATLANTIC (Jan. 25, 2017), https://www.theatlantic.com/politics/archive/2017/01/trump-crack-down-sanctuary-city/514427/; *What Is a Sanctuary City? And What Happens Now?*, CBS NEWS (Jan. 26, 2017, 11:23 PM), https://www.cbsnews.com/news/what-is-a-sanctuary-city-and-what-happens-now/.

54. Lasch, *supra* note 45, at 1703.

55. *Id.* at 1707.

56. *See infra* Part III.B (detailing the Trump Administration's efforts to clamp down on sanctuary cities and notable cases surrounding these actions).

57. *See Donald Trump Speech in Arizona*, *supra* note 12 ("We will end the Sanctuary Cities that have resulted in so many needless deaths. Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars, and we will work with Congress to pass legislation to protect those jurisdictions that do assist federal authorities.").

58. *See id.*; *President Trump Ranted For 77 Minutes in Phoenix. Here's What He Said*, TIME (Aug. 23, 2017), https://time.com/4912055/donald-trump-phoenix-arizona-transcript/.

59. Lasch, *supra* note 45, at 1723 n.34.

the Trump Administration turned to the spending power.[60] President Trump signed Executive Order 13768 into effect,[61] but was quickly enjoined.[62] Following the injunction, then-Attorney General Jeff Sessions made modifications to certain federal grants to gain state cooperation with federal immigration enforcement.[63]

1. President Trump's Executive Order 13768

Just days after taking office, President Trump signed into effect Executive Order 13768: "Enhancing Public Safety in the Interior of the United States."[64] The Order called for an expansion of interior immigration enforcement, directing the "executive departments and agencies to employ all lawful means to enforce the immigration laws of the United States."[65] More specifically, it directed the Attorney General to ensure that "jurisdictions that willfully refuse[d] to comply with 8 U.S.C. § 1373 [were] not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary."[66] 8 U.S.C. § 1373 is a federal immigration law that mandates that a state or local government "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[67] Sanctuary cities, by definition, are not in compliance with § 1373 because they do not cooperate with federal immigration officials.[68]

Executive Order 13768 was short lived; less than three months after the Order was signed, the District Court for the Northern District of California issued a preliminary injunction against it.[69] In total, two federal district courts and one court of appeals held that Executive Order 13768 was

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60. *See Attorney General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions*, U.S. DEP'T OF JUST. (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions [hereinafter *Attorney General Jeff Sessions's Remarks*] (stating that the DOJ will require grant applicants to comply with 8 U.S.C. § 1373); *Transcript: Donald Trump's Full Immigration Speech Annotated*, L.A. TIMES (Aug. 31, 2016, 9:35 PM), https://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html (stating that Trump will block funding for sanctuary cities).

61. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

62. *See* County of Santa Clara v. Trump (*Santa Clara I*), 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (enjoining Executive Order 13768).

63. *See infra* Part III.B.2 (describing changes implemented by then-Attorney General Jeff Sessions).

64. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

65. *Id.*

66. *Id.* at 8801.

67. 8 U.S.C. § 1373 (2018).

68. *See* Lasch, *supra* note 45, at 1706. However, sanctuary cities are not per se illegal for refusing to comply with federal law because the federal government cannot commandeer state or local officials into administering laws passed by Congress. Printz v. United States, 521 U.S. 898, 935 (1997).

69. *See Santa Clara I*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

unconstitutional.[70] The common finding among the courts that considered the issue was that Executive Order 13768 undermined principles of separation of powers and federalism.[71]

2. The Attorney General Modified Federal Grant Requirements

On March 23, 2017, then-Attorney General Jeff Sessions announced that the Department of Justice (DOJ) would begin denying federal funding to sanctuary cities.[72] This was accomplished by "requir[ing] jurisdictions seeking or applying for Department grants to certify compliance with Section 1373 as a condition for receiving [federal grants]."[73] Among the grants modified to ensure that jurisdictions enforced federal immigration laws were the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) and the COPS grant.[74] The Edward Byrne JAG Grant Program was created in 2005.[75] The Byrne JAG grant is a primary provider of criminal justice funding for states and localities, as it provides funds necessary to support a range of law enforcement and correction programs.[76] Congress passed the Public Safety Partnership and Community Policing Act and established the COPS grant in 1994.[77] The COPS statute lays out the grant authorization to make public safety and community policing grants.[78] Congress established the COPS grant to provide funding to states and localities for community-oriented policing, such as hiring officers and developing programs geared towards community-oriented policing.[79] Community policing is the development of "partnerships between law enforcement agencies and the communities they serve so they can work collaboratively to resolve problems and build community trust."[80]

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70. *See id.*; County of Santa Clara v. Trump (*Santa Clara II*), 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2018).

71. *See Santa Clara I*, 250 F. Supp. 3d at 539; *Santa Clara II*, 275 F. Supp. 3d at 1219.

72. *See Attorney General Jeff Sessions's Remarks*, *supra* note 60.

73. *Id.*

74. *See Backgrounder on Grant Requirements*, U.S. DEP'T JUST., https://www.justice.gov/opa/press-release/file/984346/download (last visited on May 30, 2020) [hereinafter *Grant Requirements*]; *2017 COPS Hiring Program (CHP) Application Guide*, U.S. DEP'T JUST., https://cops.usdoj.gov/pdf/2017AwardDocs/chp/app_guide.pdf (last visited May 30, 2020) [hereinafter *Application Guide*] (stating that jurisdictions that choose illegal immigration as a focus area and submit certification of compliance with 8 U.S.C. § 1373 will receive bonus points).

75. 34 U.S.C. §§ 10151–10158 (2018).

76. *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, BUREAU JUST. ASSISTANCE., https://www.bja.ojp.gov/program/jag/overview (last visited May 30, 2020).

77. *See* 34 U.S.C. §§ 10381–10389.

78. *Id.* § 10381.

79. *Id.*

80. U.S. DEP'T OF JUST., FY 2018 CONGRESSIONAL JUSTIFICATION OFFICE OF COMMUNITY ORIENTED POLICING SERVICES 1, 4 (2017), https://www.justice.gov/file/969011/download [hereinafter CONGRESSIONAL JUSTIFICATION].

On July 25, 2017, the Attorney General announced new conditions on the 2017 recipients of the Byrne JAG grant to ensure "that federal immigration authorities have the information they need to enforce immigration laws and keep [the] communities safe."[81] Shortly thereafter, the recipients were notified that they would have to certify compliance with 8 U.S.C. § 1373, which barred any restrictions on communications between local officials and federal immigration officials.[82] Additionally, notice and access conditions were added—compelling recipients to comply with the conditions or forfeit the grant funds.[83] Under the notice condition, local officials had to "provide at least 48 hours advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien."[84] The access condition required that local officials give DHS officials "access [to] any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States."[85]

Subsequently, on September 7, 2017, the DOJ, under the direction of the Attorney General, announced new "priority consideration criteria" for the COPS grant.[86] This announcement notified jurisdictions that "their applications would receive additional points in the application scoring process if their agencies cooperate with federal law enforcement to address illegal immigration, ensuring that federal immigration authorities have the full ability to enforce immigration laws and keep our communities safe."[87] More specifically, to receive priority consideration, applicants had to certify that "[i]f the applicant operates a detention facility, the applicant [will] provide Department of Homeland Security (DHS) access to their detention facility; . . . [a]nd, the applicant [will] provide advance notice as early as practicable (at least 48 hours, where possible) to DHS of an illegal alien's release date and time."[88] If an applicant submitted the certification, the jurisdiction received bonus points in the scoring process.[89]

Litigation over the new immigration grant requirements quickly ensued, as sanctuary cities argued that the Attorney General and the DOJ did not have

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81. *See* Press Release, Office of Pub. Affairs, Attorney Gen. Sessions Announces Immigration Compliance Requirements for Edward Byrne Mem'l Justice Assistance Grant Programs, U.S. DEP'T OF JUST. (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

82. *See Grant Requirements*, *supra* note 74.

83. *See id.*

84. *Id.*

85. *Id.*

86. Press Release, Office of Pub. Affairs, Dep't of Justice Announces Priority Consideration Criteria for COPS Office Grants, U.S. DEP'T OF JUST. (Sept. 7, 2017), https://www.justice.gov/opa/pr/department-justice-announces-priority-consideration-criteria-cops-office-grants.

87. *Id.*

88. *COPS Office: Immigration Cooperation Certification Process Background*, U.S. DEP'T OF JUST., https://www.justice.gov/opa/press-release/file/995376/download (last visited May 30, 2020).

89. *Id.*

congressional authority to impose such conditions on grants.[90] The first lawsuits were brought against the conditions placed on the Byrne JAG grant.[91] The Attorney General claimed to have authority to implement such conditions on federal grants;[92] but almost every district court and appellate court that has considered the issue has held that the Attorney General acted without congressional authorization when he placed immigration-based conditions on Byrne JAG funds.[93]

Litigation addressing the COPS grant modifications began in 2018, but there was not a circuit court decision until 2019.[94] As of 2019, the City of Los Angeles is the only sanctuary city that has brought suit against the Attorney General and DOJ for the immigration-based preferences placed on the COPS grant.[95] The District Court for the Central District of California found that Congress did not authorize the Attorney General to place immigration-based preferences on the grant and that the Attorney General acted arbitrarily and capriciously when he did so.[96] The Ninth Circuit Court of Appeals reversed, however, holding that the Attorney General did not exceed his delegated authority granted by Congress.[97]

IV. THE COURTS OF APPEALS ADDRESS THE EXECUTIVE BRANCH'S AUTHORITY TO IMPLEMENT IMMIGRATION-BASED CONDITIONS AND PREFERENCES ON FEDERAL GRANTS

The Seventh, Third, and Ninth Circuit Courts of Appeals were all similarly faced with the issue of whether the Executive Branch acted beyond congressional authorization when it introduced new requirements for federal

90. *See* Oregon v. Trump, 406 F. Supp. 3d 940, 967–68 (D. Or. 2019); New York v. Dep't of Justice, 343 F. Supp. 3d 213, 227 (S.D.N.Y. 2018); City of San Francisco v. Sessions, 349 F. Supp. 3d 924, 947 (N.D. Cal. 2018); City of Evanston v. Sessions, No. 18-C-4853, 2018 WL 10228461 (N.D. Ill. Aug. 9, 2018); *City of Philadelphia I*, 309 F. Supp. 3d 289, 321 (E.D. Pa. 2018); *City of Los Angeles I*, 293 F. Supp. 3d 1087, 1098 (C.D. Cal. 2018); State *ex rel.* Becerra v. Sessions, 284 F. Supp. 3d 1015, 1034 (N.D. Cal. 2018); *City of Chicago I*, 264 F. Supp. 3d 933, 943 (N.D. Ill. 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018).

91. *See City of Chicago I*, 264 F. Supp. 3d at 936 (deciding the first case on this issue).

92. *See City of Philadelphia II*, 916 F.3d 276, 284 (3d Cir. 2019) ("[The Court] consider[ed] three sources of authority offered by the Attorney General: *first*, the Byrne JAG statute, 34 U.S.C. §§ 10151–10158; *second*, the provision defining the duties of the AAG for OJP, 34 U.S.C. § 10102(a); and *third*, for the Certification Condition only, Section 10153(a)(5)(D) of the Byrne JAG statute.").

93. *See* cases cited *supra* note 90 (noting litigation over the new immigration grant requirements); *see also* New York v. U.S. Dep't of Justice, 951 F.3d 84, 110–11 (2d Cir. 2020) (holding that the Attorney General had authority to implement the Byrne JAG conditions).

94. *See City of Los Angeles I*, 293 F. Supp. 3d at 1093.

95. *See City of Los Angeles II*, 929 F.3d 1163, 1169 (4th Cir. 2019).

96. *City of Los Angeles I*, 293 F. Supp. 3d at 1087, 1097, 1099.

97. *City of Los Angeles II*, 929 F.3d at 1181.

grants to create state and local cooperation with federal immigration officials.[98]

A. City of Chicago v. Sessions

The Seventh Circuit Court of Appeals was the first circuit court to consider whether the Trump Administration had authority to condition federal grants on cooperation with federal immigration law.[99] In *City of Chicago v. Sessions*, specifically at issue were the notice and access conditions that the Attorney General placed on recipients of the Byrne JAG grant.[100] The City of Chicago, a sanctuary city with a "Welcoming Ordinance" in place for the protection of immigrants,[101] sued the Attorney General alleging that the conditions were unconstitutional.[102]

The Seventh Circuit analyzed the issue with a "bedrock principle[ ]" in mind—the separation of powers.[103] The court found that the Attorney General unlawfully "used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement."[104] The court gave three main reasons why the Attorney General lacked the authority to impose the conditions on the Byrne JAG grant.[105] First and foremost, the court acknowledged that the power of the purse rests exclusively in Congress.[106] Second, it found that Congress had not imposed, nor had intended to impose, notice and access conditions on the Byrne JAG grant.[107] Furthermore, the court noted that Congress previously refused to approve measures that would tie funding to state and local immigration policies.[108] Lastly, the court refused the Attorney General's claim of authority under the Byrne JAG statute, which sets out the grant's authorized purpose and formulas for fund allocation.[109] The court reasoned that "[n]one of those provisions grant the Attorney General the authority to impose conditions that require states or local governments to assist in immigration enforcement."[110]

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98. *See City of Philadelphia II*, 916 F.3d 276 (3d Cir. 2019); *City of Los Angeles II*, 929 F.3d 1163; *City of Chicago II*, 888 F.3d 272 (7th Cir. 2018).

99. *See City of Chicago II*, 888 F.3d at 276–77.

100. *Id.* at 276.

101. Chi. Ill. Mun. Code § 2-173-005 (2019), https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2448728 (stating that the purpose of the Welcoming Ordinance is to create cooperation between undocumented persons and the community).

102. *City of Chicago II*, 888 F.3d at 280.

103. *Id.* at 277.

104. *Id.*

105. *Id.* at 293.

106. *Id.* at 277.

107. *Id.*

108. *Id.* Since 2006, Congress has rejected legislation attempting to condition federal funding on compliance with 8 U.S.C. § 1373. *Id.*

109. 34 U.S.C. §§ 10152–10158 (2018).

110. *City of Chicago II*, 888 F.3d at 284.

Furthermore, when the Court of Appeals for the Third Circuit considered the issue, it applied the same analysis and came to a similar conclusion.[111]

B. City of Philadelphia v. Attorney General of the United States

The Third Circuit, in *City of Philadelphia v. Attorney General of the United States*, similarly considered whether the Attorney General had the authority to place the notice and access conditions on the Byrne JAG grant.[112] In that case, the City of Philadelphia sued the Attorney General because Philadelphia was denied the grant for its failure to comply with the newly implemented conditions.[113] The court's analysis was straightforward: It focused on whether Congress had actually granted authority to the Attorney General and the DOJ to impose notice and access conditions on the grant.[114]

The court noted that the Executive Branch was claiming authority that neither Congress nor the Constitution had granted to it.[115] The court rejected the Attorney General's claims of authority under the Byrne JAG statute and the provisions found under the "Duties and functions of Assistant Attorney General" in 34 U.S.C. § 10102(a).[116] In response to the Attorney General's claim of authority under the Byrne JAG statute, the court stated that his interpretation of the statute stretches the provisions too far and that the Attorney General's authority is actually exceptionally limited.[117] Of the limited authority granted to the Attorney General by the statute, "the power to withhold *all* of a grantee's funds for *any* reason the Attorney General chooses" is not authorized.[118]

Furthermore, the court held that the language found in the section establishing the "Duties and functions of Assistant Attorney General"[119] does not authorize the Attorney General to implement notice and access conditions.[120] The court explained that the word "including" signifies that the provision is limited to the extent that such power has been vested to it by Congress—and such power has not been vested anywhere in the statute.[121] Because there is no valid source of authority empowering the Attorney

111. *City of Philadelphia II*, 916 F.3d 276 (3d Cir. 2019).
112. *Id.* at 279.
113. *Id.*
114. *Id.* at 284.
115. *Id.* at 279.
116. *Id.* at 287–89.
117. *Id.* at 285.
118. *Id.* at 286.
119. 34 U.S.C. § 10102(a)(6) (2018) ("The Assistant Attorney General shall: . . . exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants.").
120. *City of Philadelphia II*, 916 F.3d at 287.
121. *Id.*

General to implement the challenged conditions, the conditions were unlawfully imposed by the Attorney General.[122]

For the Seventh and Third Circuits, the answer was clear—the Executive Branch cannot use the spending power for federal immigration purposes.[123] However, when the Ninth Circuit addressed a similar issue, it reached an entirely different conclusion.[124]

C. City of Los Angeles v. Barr

In *City of Los Angeles v. Barr*, the Ninth Circuit considered whether the DOJ had authority to implement "bonus points" to favor jurisdictions that promised to cooperate with federal officers to enforce federal immigration laws.[125] Specifically at issue were the bonus points allocated to applicants of the COPS grant who chose the newly added focus area of illegal immigration and submitted a "Certification of Illegal Immigration Cooperation."[126] The bonus points are additional points allotted to complying jurisdictions during the application scoring process.[127] Los Angeles, a sanctuary city, "chose 'building trust and respect' as its focus area" instead of a focus on illegal immigration.[128] When it was denied funding, the City of Los Angeles sued the Attorney General seeking to enjoin the DOJ from awarding bonus points to jurisdictions that agreed to cooperate with federal immigration authorities.[129]

The Ninth Circuit took a different approach than the Seventh and Third Circuits when reviewing the constitutionality of the DOJ's actions.[130] The Ninth Circuit applied *Chevron* deference to the DOJ's interpretation of the statute and agreed that Congress granted the DOJ broad authority to carry out the grant program, and thus, including immigration-based preferences was well within its broad authority.[131] Applying *Chevron* deference, the court reasoned that an agency, which has been given authority to promulgate a grant, gets wide discretion unless its actions are clearly inconsistent with the statute and Congress's expressed intent.[132] Thus, the court explained that the new focus on illegal immigration and certification of cooperation with federal

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122. *Id.* at 291.

123. *Id.* at 293; *City of Chicago II*, 888 F.3d 272, 293 (7th Cir. 2018).

124. *See City of Los Angeles II*, 929 F.3d 1163, 1183 (9th Cir. 2019).

125. *Id.* at 1169–72. This Comment does not discuss the argument of whether the City of Los Angeles had standing in the matter because the Ninth Circuit itself found that there was standing. *Id.* at 1172–73.

126. *Id.* at 1171–72.

127. *See Application Guide*, *supra* note 74.

128. *City of Los Angeles II*, 929 F.3d at 1172.

129. *Id.*

130. *See supra* Parts IV.A–B (noting that the Seventh and Third Circuit Courts of Appeals dealt with a similar grant statute, 34 U.S.C. §§ 10152–10158).

131. *City of Los Angeles II*, 929 F.3d at 1177–80 (applying *Chevron* deference and finding that Congress afforded the DOJ such discretion by enacting a statute with substantial gaps).

132. *Id.* at 1177.

immigration officers is germane to the purpose of the COPS grant; the purpose of the COPS grant is "to enhance the crime prevention functions of state and local law enforcement and to enhance public safety through interacting with and working with the community."[133] The court reasoned that the DOJ's determination—that cooperation with immigration officials can enhance public safety—is consistent with the broad scope of authority granted through the COPS grant statute.[134]

V. THE NINTH CIRCUIT'S APPROVAL OF THE EXECUTIVE BRANCH'S USE OF THE SPENDING POWER THREATENS THE SEPARATION OF POWERS

In a ruling that created a rift between the courts of appeals, the Ninth Circuit found that the Trump Administration had the authority to favor anti-sanctuary jurisdictions.[135] The Ninth Circuit failed to realize that the immigration-based preferences were "part of a broader effort to divert federal funds from congressionally authorized purposes to the Trump Administration's efforts to press state and local police into federal immigration enforcement."[136] Before the Ninth Circuit's ruling, every district court and circuit court that considered the Trump Administration's use of the spending power to enforce federal immigration laws on the states enjoined the Administration from doing so based on separation of powers principles.[137] The Ninth Circuit's ruling creates a dangerous precedent, one that future presidential administrations may use to usurp the spending power for their own political priorities.[138]

As the Seventh Circuit put into perspective, the issue of whether the Executive Branch can implement immigration-based preferences on federal grants is not about immigration.[139] The issue is about a "bedrock principle[]" of the United States: The separation of powers.[140] The Founding Fathers instilled this bedrock principle in the Constitution to protect the United States from tyranny.[141] As evident from the text of the Constitution and history, the

133. *Id.* at 1180.

134. *Id.* at 1178.

135. *Id.* at 1183.

136. *Id.* at 1184 (Wardlaw, J., dissenting).

137. *See infra* Part VI (explaining that the DOJ's actions are a violation of Congress's spending power, and therefore a breach of the separation of powers). Although the Ninth Circuit now has some support from the Second Circuit, which similarly upheld the Attorney General's authority to condition grants on immigration enforcement, their decisions find no support from their sister circuits. *See* New York v. U.S. Dep't of Justice, 951 F.3d 84, 110–11, 123 (2d Cir. 2020) (holding that the Byrne JAG conditions are constitutional).

138. *See infra* note 155 and accompanying text (explaining how the Executive Branch's broad use of the spending power can have severe repercussions on the separation of powers).

139. *City of Chicago II*, 888 F.3d 272, 277 (7th Cir. 2018).

140. *Id.*

141. *See* Rosen, *supra* note 30, at 56 ("[E]xperience under early state constitutions inspired a system of separate legislative, executive, and judicial powers that included sufficient checks and balances to ensure one department did not dominate the other two.").

Founding Fathers clearly intended to exclusively grant Congress the spending power.[142]

An independent presidential spending power is completely "inconsistent with the text of the Constitution, the intent of the Constitution's Framers, and the country's experience under the Constitution."[143] The Constitution contains specific language dividing the power and responsibilities among the three separate branches; furthermore, "[t]his division and enumeration of powers establishes the fundamental terms by which one branch's claim to authority may be deemed valid or invalid."[144] Congress's exclusive spending power is clearly enumerated,[145] and the language of the statute does not suggest that Congress shares the spending power with the Executive Branch.[146] Thus, any claim of spending power by the Executive Branch cannot be valid.[147]

Allowing the Executive Branch to encroach on Congress's exclusive spending power opens the door to the dangers that the separation of powers guards against.[148] The Founding Fathers' attempt to protect the country from an oppressive Executive Branch would be in vain "[i]f the Executive Branch can determine policy, and then use the power of the purse to mandate compliance with that policy . . . all without the authorization or even acquiescence of elected legislators, that check against tyranny is forsaken."[149] The Executive Branch's use of the spending power to enforce its own political agenda wrongfully aggrandizes its power at the expense of the Legislative Branch and the overall sanctity of separation of powers.[150]

Many defend the Trump Administration's use of the spending power because they believe that illegal immigration is a dangerous threat to the United States.[151] Their argument is that President Trump and his Administration are simply protecting the country and faithfully executing federal immigration laws.[152] Though the President is bestowed with broad power to faithfully execute the laws, the Constitution does not grant him

142. *See id.* at 70–74.

143. *Id.* at 18.

144. Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 575 (1987).

145. U.S. CONST. art. I, § 8, cl. 1.

146. Rosen, *supra* note 30, at 18.

147. *Id.* at 131.

148. *See infra* notes 155 and accompanying text (discussing the potential dangers associated with illegal immigration policy and the President's spending power).

149. *City of Chicago II*, 888 F.3d 272, 277 (7th Cir. 2018).

150. Freytag v. Comm'r, 501 U.S. 868, 878 (1991) ("Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch.").

151. *See* HANS VON SPAKOVSKY & CHARLES STIMSON, ENFORCING IMMIGRATION LAW: WHAT STATES CAN DO TO ASSIST THE FEDERAL GOVERNMENT AND FIGHT THE ILLEGAL IMMIGRATION PROBLEM 7 (2019), https://www.heritage.org/sites/default/files/2019-10/LM254_0.pdf.

152. *See id*. at 1–2.

spending powers to do so.[153] Additionally, it may be that the Executive must address illegal immigration, but addressing it through the encroachment of the spending power creates a greater danger than the one it allegedly seeks to resolve.[154]

Regardless of one's views on sanctuary cities and illegal immigration, the threat to the separation of powers—the encroachment on Congress's spending power—is one that should alarm all.[155] The Ninth Circuit's decision in favor of the Trump Administration enables this administration—and future administrations—to use the spending power for their political priorities.[156] For example, future administrations can now use grant funds to favor jurisdictions that agree to enforce stricter gun laws or more lenient abortion laws while defunding jurisdictions that stand in the way of their agenda.[157] This possibility is antithetical to what the Founding Fathers envisioned when they delegated the spending power to Congress.[158]

VI. THE EXECUTIVE BRANCH'S ACTIONS VIOLATED CONGRESS'S SPENDING POWER

A. The Executive Branch Cannot Use the Spending Power Beyond What Congress Authorizes

Congress's spending power is exclusive, and the Executive Branch cannot use the spending power for immigration purposes if Congress has not granted that authority or discretion.[159] Moreover, the President himself does not have discretion to authorize his own administration to usurp the power of the purse for immigration enforcement purposes.[160] The President's power is limited when he acts contrary to the expressed or implied will of Congress.[161]

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153. Rosen, *supra* note 30, at 25.

154. *City of Chicago II,* 888 F.3d at 277; *see supra* note 136 and accompanying text (discussing the Founding Fathers' intention to grant the spending power exclusively to Congress).

155. *City of Chicago II*, 888 F.3d at 277; *Freytag*, 501 U.S. at 878; *see supra* notes 139–41 and accompanying text (discussing the separation of powers).

156. *See generally* W.J. Hennigan & Brian Bennett, *With $3.6 Billion in New Defense Department Funding, President Trump Continues His Plan to Build the Border Wall With Military Money*, TIME (Sept. 3, 2019), https://time.com/5667858/trump-military-funds-border-wall/ (stating that President Trump declared a national emergency to allocate billions to build the border wall without congressional approval).

157. *See generally id.*

158. *See* U.S. CONST. art. I, § 8, cl. 1.

159. *See supra* Part II (discussing the separation of powers and Congress' spending power).

160. *See, e.g.*, City of San Francisco v. Trump, 897 F.3d 1225, 1234–35 (9th Cir. 2018) (holding that President Trump violated the separation of powers through his execution of an executive order purporting to prevent sanctuary jurisdictions from receiving federal funds); County of Santa Clara v. Trump (*Santa Clara I*), 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017) (holding that President Trump did not have the power to place conditions on federal grants for the purpose of preventing sanctuary jurisdictions from receiving funding).

161. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

Courts have widely held that a president's authority "must stem either from an act of Congress or from the Constitution itself."[162] In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court held that it must stop, and that it will stop, a president's actions when those actions violate the separation of powers principle.[163] Courts have applied this principle against President Trump's efforts to use Congress's spending power to address immigration issues.[164] The courts have resisted President Trump's use of the spending power in the permanent injunction of Executive Order 13768 and President Trump's appropriation of money for the border wall.[165]

Additionally, using grant funds to enforce federal immigration laws on the states violates principles of federalism.[166] Allowing the Executive Branch to use the spending power beyond the bounds of congressional authorization permits the federal government to coerce states into compliance with federal laws.[167] Encroaching upon the states' Tenth Amendment rights is definitely something that Congress did not authorize.[168] Even Congress's exclusive spending power, which the Constitution clearly grants, is limited when it uses funding to coerce the states to act.[169] For years the Supreme Court has upheld the anticommandeering principle by holding that Congress has no authority to coerce states to enforce federal law.[170] Thus, the Executive Branch is barred from coercing the states to enforce federal laws.[171]

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162. *Id.* at 585 (majority opinion).

163. *Id.* at 587–89.

164. *See, e.g.*, El Paso County v. Trump, 407 F. Supp. 3d 655, 668 (W.D. Tex. 2019) (declaring Proclamation 9844 unlawful because it authorized funding beyond the 2019 Consolidated Appropriations Act for the border wall); California v. Trump, No. 19-CV-00872-H562019, 2019 WL 2715421, at *1, *6 (N.D. Cal. June 28, 2019); *Santa Clara II*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2018) (holding § 9(a) of the Executive Order unconstitutional), *aff'd in part, vacated in part sub nom. City of San Francisco*, 897 F.3d 1225; City of Seattle v. Trump, No. 17-497-RAJ, 2017 WL 4700144 at *1, *10 (W.D. Wash. Oct. 19, 2017) (denying summary judgment and requesting briefing from parties concerning a potential stay); *Santa Clara I*, 250 F. Supp. 3d at 497.

165. *See, e.g.*, *El Paso County*, 407 F. Supp. 3d at 668; *California*, 2019 WL 2715421, at *6; *Santa Clara II*, 275 F. Supp. 3d at 1219; *City of Seattle*, 2017 WL 4700144, at * 9; *Santa Clara I*, 250 F. Supp. 3d at 540.

166. *See generally* Legal Info. Inst., *Federalism*, CORNELL L. SCH., https://www.law.cornell.edu/wex/federalism (last visited May 30, 2020) (explaining that federalism is the split of power between state and national governments).

167. Somin, *supra* note 18, at 1286.

168. U.S. CONST. amend. X (concerning the concept of federalism and the anticommandeering principle).

169. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012) (holding that Congress cannot coerce states into participation).

170. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (explaining the anticommandeering doctrine); *Sebelius*, 567 U.S. at 577–78 (arguing that Congress does not have the power to regulate states through its spending power); Printz v. United States, 521 U.S. 898, 920 (1997) (explaining the separation of powers between federal and state government); New York v. United States, 505 U.S. 144, 165 (1992) (explaining the power the Constitution grants Congress).

171. *Cf. Printz*, 521 U.S. at 920; *New York*, 505 U.S. at 165 (explaining that the Founders gave Congress authority over individuals, not states).

B. Congress Did Not Grant the DOJ Limitless Discretion to Place Immigration-Based Preferences on the COPS Grant

Congress drafted detailed instructions for how to carry out the COPS grant, and therefore did not grant the Attorney General or the DOJ broad discretion to implement immigration-based preferences.[172] The Attorney General and the DOJ claimed, however, that Congress conferred broad authority under the COPS statute—meaning that the DOJ had authority to implement preferential consideration as it saw fit.[173] The Ninth Circuit agreed that the statute conferred broad authority to the DOJ to carry out the grant program and thus applied *Chevron* deference.[174] Applying *Chevron* deference, the court reasoned that the DOJ's determination that federal immigration enforcement met public safety purposes must be upheld because, as long as there is a reasonable basis for the determination, it is presumed valid.[175]

However, the language and structure of the COPS statute is clear and unambiguous, and Congress did not leave gaps for the DOJ to fill.[176] Because the statute clearly sets out the DOJ's discretion and limits, Congress's expressed intent governs, and a contrary construction by the DOJ and Attorney General must be void.[177] Although the statute does not explicitly say that immigration-based preferences cannot be applied to the COPS grant, Congress's clear intent can be determined through the canons of statutory construction and legislative history.[178] Using the traditional tools of statutory construction is a historically accepted method to determine Congress's intent in a statute.[179] The Ninth Circuit should have used the canons of statutory construction in its analysis of whether the DOJ exceeded its authority when it applied immigration-based preferences to the grant.[180]

The structure and language of the statute show that the statute is clear and unambiguous and did not confer broad discretion.[181] The statute grants authority to the Attorney General to carry out the COPS grant program, but

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172. *See* 34 U.S.C. § 10381 (2018).

173. *City of Los Angeles II*, 929 F.3d 1163, 1177–78 (9th Cir. 2019).

174. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). Under *Chevron* deference, an agency's interpretation of an ambiguous statute will be permissible if it is reasonable and rational. *Id.* at 866.

175. *City of Los Angeles II*, 929 F.3d at 1177–80.

176. *See id.*

177. *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

178. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 449–50 (1987) (using canons of statutory construction and legislative history to determine Congress's intent concerning the Immigration and Nationality Act).

179. *See id.*

180. *See id.* at 446 (stating that courts should use "traditional tools of statutory construction" including canons of statutory interpretation, the structure of the statute, and legislative history to discern Congress's intent in the application of *Chevron*).

181. 34 U.S.C. § 10381(b)–(c) (2018).

it specifically sets out twenty-three purposes for which the Attorney General has the discretion to issue grants—none of which include immigration.[182] If Congress intended to give the Attorney General broad discretion, Congress would not have laid out such specific directions.[183] Furthermore, as Judge Wardlaw points out in his dissent to the Ninth Circuit's decision, since the creation of the grant, Congress has only appropriated funds for two purposes: Hiring and rehiring law enforcement officers for community-oriented policing.[184] This means that "Congress has yet to authorize funding for the remaining twenty-one purposes for which the COPS Office may make grants."[185]

Although Congress gave the DOJ authority to "promulgate regulations and guidelines to carry out th[e] subchapter" on Public Safety and Community Oriented Policing,[186] such regulations and guidelines must be in line with the congressional purpose of the grant.[187] Because Congress created the grant for specific purposes, "it can be presumed that it intends that the dispersing agency make its allocations based on factors solely related to the goal of implementing the stated statutory purposes in a reasonable fashion, rather than taking irrelevant or impermissible factors into account."[188] Instead of taking into consideration the jurisdiction's immigration policies when reviewing the applications, the DOJ should have solely factored in the applicants' initiatives to foster public safety and relationships between the community and police officers.[189]

Additionally, the inclusion of a separate section specifying three sole instances in which the DOJ may give preferential consideration shows that Congress spoke clearly as to the discretion it was granting.[190] When Congress decides to authorize preferential consideration for a grant program, it explicitly does so or it gives a broad statement of discretion.[191] The only congressionally authorized preferential considerations under the COPS statute are found in subsection (c), which is clearly titled "Preferential consideration of applications for certain grants."[192] The preferential considerations listed are for jurisdictions that are committed to hiring or rehiring officers, or have implemented safe harbor laws for victims of human

182. *Id.* § 10381(b).

183. *See id.*

184. *City of Los Angeles II*, 929 F.3d 1163, 1187–88 (9th Cir. 2019) (Wardlaw, J., dissenting).

185. *Id*. at 1188.

186. 34 U.S.C. § 10388.

187. *See supra* notes 43–44 and accompanying text (describing how the statutory text of a statute determines the discretion that an agency receives).

188. *City of Los Angeles II*, 929 F.3d at 1192 (Wardlaw, J., dissenting) (quoting Robbins v. Reagan, 780 F.2d 37, 48 (D.C. Cir. 1985) (per curiam)).

189. *Id.*

190. *See* 34 U.S.C. § 10381(c).

191. *See City of Los Angeles II*, 929 F.3d at 1188 (Wardlaw, J., dissenting).

192. 34 U.S.C. § 10381(c).

trafficking.[193] To authorize these preferential categories, Congress amended the statute to grant the DOJ authority to give such applicants preferential treatment.[194] If the COPS statute actually granted the DOJ broad discretion in and of itself, Congress would not have needed to amend the statute to include the preferential considerations section and would have instead left it up to the DOJ to implement such preferential consideration.[195] The list of congressionally authorized preferential considerations evidently does not include an authorized preference based on cooperation or compliance with federal immigration laws.[196]

Although the DOJ successfully argued that the enforcement of federal immigration laws is in pursuit of public safety—one of the grant's main purposes—the DOJ's reasoning is troubling.[197] The DOJ's reasoning would suggest that virtually any condition or preference placed on the grant could be justified by claiming that it has some relationship to public safety, even if entirely counterproductive to the purposes of community policing.[198] To say that Congress granted the DOJ broad power to use the grant to enforce any law remotely related to public safety sets a dangerous precedent.[199] For example, the DOJ could implement bonus points to incentivize jurisdictions to make their police officers regularly carry AR-15s to deter criminals just because it remotely relates to public safety.[200] That example may meet the public safety purpose of the grant; however, it conflicts with the central goal of community-oriented policing because forcing police to walk around carrying AR-15s would not create trust between police and the community.[201]

Furthermore, congressional history does not support a finding that Congress granted the DOJ discretion to implement immigration-based preferences on the COPS grant. The Supreme Court has notably used legislative history when deciding against applying *Chevron* deference to an agency's action.[202] It is unreasonable to believe that tying federal

193. *Id.* § 10381(c)(1)–(3).

194. *See* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, §§ 601, 1002, 129 Stat. 227, 259–60, 266–67 (amending the statute to allow preferential consideration to applicants with laws in place to combat human trafficking).

195. 34 U.S.C. § 10381(c).

196. *Id.*

197. *See City of Los Angeles II*, 929 F.3d 1163, 1176 (9th Cir. 2019) ("DOJ has reasonably determined that cooperation on illegal immigration matters furthers the purposes of the Act.").

198. *See id.*

199. *See supra* note 181 and accompanying text (explaining that Congress could not have intended to give the Attorney General and DOJ broad discretion).

200. *See supra* note 127 and accompanying text (explaining the bonus points system).

201. *See supra* notes 79–80 and accompanying text (describing how the COPS grant was established to promote community oriented policing, which means developing relationships between law enforcement agencies and communities).

202. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26 (2000) (denying *Chevron* deference because the history of congressional regulation of regarding tobacco products, including other statutes, showed that the FDA acted without authority to regulate the sale and promotion of tobacco products).

immigration preferences to grants is something that Congress authorized or intended when Congress has historically rejected legislation that conditioned federal funding on compliance with federal immigration laws.[203] These rejected efforts include the Mobilizing Against Sanctuary Cities Act and the Enforce the Law for Sanctuary Cities Act, amongst several others proposed and rejected in 2015 and 2016.[204] Each of these acts proposed that sanctuary cities should be denied federal funds for failing to cooperate with federal immigration officials to enforce immigration laws.[205] In opposition to the Enforce the Law for Sanctuary Cities Act, Congressman Polis stated that the "bill would punish local law enforcement for prioritizing public safety and community policing over" immigration priorities.[206] Ultimately, Congress opposed the bill because it would deny funding to local officials simply for not prioritizing federal immigration laws.[207] It is clear that Congress has never intended to place immigration-based preferences on grants, which would have the effect of denying local officials of sanctuary cities an opportunity to receive funding.[208]

The DOJ's reasoning should not be accepted because the underlying effect of the immigration-based preferences is not one that Congress would have approved.[209] Because "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent," the Ninth Circuit should have held that the changes made to the COPS grant, as an effort to defund sanctuary cities, are beyond congressional authorization.[210]

Additionally, because President Trump and then-Attorney General Jeff Sessions have openly stated their intent to defund sanctuary cities, it would not be untenable to find that the imposed immigration-based preferences were arbitrary and capricious.[211] In fact, the district court that first considered

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203. *See City of Chicago II*, 888 F.3d 272, 277 (7th Cir. 2018).

204. *See* Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. § 4 (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 4 (2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3(a) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2 (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3 (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. § 2 (2015).

205. Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. § 4 (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 4 (2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3(a) (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3 (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. § 2 (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2 (2015).

206. 161 CONG. REC. H.R. 5409 (daily ed. July 23, 2015) (statement of Rep. Polis).

207. H.R. 3009 (LEXIS) (tracking the bill and showing that the proposed Act failed).

208. *Id.*

209. *See* United States v. Shimer, 367 U.S. 374, 383 (1961) ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

210. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

211. *See supra* notes 57, 60 and accompanying text (discussing President Trump and then-Attorney General Sessions' statements).

the issue arrived at that exact conclusion.[212] The court reasoned that when the DOJ placed the immigration-based preferences purporting to stop "violent crime stemming from illegal immigration," the DOJ did not argue at trial or present any evidence that it had based its conclusion on concrete data.[213] Under the Administrative Procedure Act (APA) § 706(2)(D), an agency action should be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[214] The DOJ's actions were arbitrary and capricious because the overall reason for giving priority consideration to jurisdictions that certified compliance with federal immigration laws was to defund sanctuary cities, while creating public safety was a disingenuous justification.[215] But because the Ninth Circuit applied *Chevron* deference, it upheld the DOJ's determination without further questioning whether the immigration-based preferences actually met the public safety purpose.[216]

C. Immigration-Based Preferences Are Not Germane to the Authorized Purpose of the Grant

The Ninth Circuit's analysis and conclusion—that immigration-based preferences meet the purpose of the grant—is flawed.[217] Specifically, the application of *South Dakota v. Dole* in the Ninth Circuit's decision is incorrect for two reasons.[218] First, in *Dole*, it was Congress who conditioned the receipt of federal grants—not the DOJ.[219] There, the Supreme Court upheld Congress's decision to withhold federal funds from states whose drinking age laws did not conform to federal law.[220] Because Congress's spending power is broad, it easily passed the test set out in *Dole*.[221] However, the DOJ has no independent spending power, meaning that if the Attorney General exceeded his discretion an analysis under *Dole* is completely irrelevant.[222] Second, even if *Dole* was the correct analysis to apply, the

212. *City of Los Angeles I*, 293 F. Supp. 3d 1087, 1099 (C.D. Cal. 2018), *rev'd sub nom*., *City of Los Angeles II*, 929 F.3d 1163 (9th Cir. 2019).

213. *Id*. at 1099.

214. Administrative Procedure Act, 5 U.S.C. § 706(2)(D) (2018). *See also Chevron*, 467 U.S. at 844 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

215. *See supra* notes 211, 213 and accompanying text (discussing that prior courts had found the acts arbitrary and capricious).

216. *See City of Los Angeles II*, 929 F.3d at 1177–80.

217. *See id.* at 1176.

218. *See id.* at 1172; South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that Congress could condition receipt of highway funds on adoption of a minimum drinking age).

219. *See Dole*, 483 U.S. at 211–12.

220. *See id.*

221. *See* United States v. Butler, 297 U.S. 1, 66 (1936) (finding that Congress's spending power is broad and not limited to what is only enumerated in the Constitution).

222. *See City of Philadelphia I*, 280 F. Supp. 3d 579, 593 (E.D. Pa. 2017) (stating that the degree of discretion afforded to agencies is dependent on what Congress grants).

DOJ's actions would fail the relatedness requirement set out in *Dole* because enforcing federal immigration laws is not germane to the community-oriented purpose of the COPS grant.[223]

The immigration-based preferences are not germane to the purpose of the COPS grant.[224] Since its establishment, the COPS grant had been awarded according to congressional purpose—that is until 2017, when then-Attorney General Jeff Sessions placed immigration-based preferences on the grant program.[225] The COPS grant was established for the purpose of increasing the number of police officers in communities and to improve interaction and cooperation within communities and its officers.[226] Congress authorized the Attorney General and the DOJ to "make grants . . . to increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety," none of which indicate cooperation with *federal* officials for *federal* priorities.[227]

The purpose of the grant is in the name of the grant program itself: "Community Oriented Policing Services."[228] The Office of Community Oriented Policing Services defines "community policing" as the development of "partnerships between law enforcement agencies and the communities they serve so they can work collaboratively to resolve problems and build community trust."[229] However, the immigration-based preferences substituted federal immigration enforcement for community policing.[230] As Judge Wardlaw emphasized in his dissenting opinion, "the 'illegal immigration' focus area and Cooperation Certification (together, the 'federal immigration preferences') are [not] in any way related to community-oriented policing."[231]

Demanding that local police cooperate with federal immigration officials does not create trust between the community and police, contrary to the central purpose of the COPS grant.[232] As immigrants become aware that their local police are coordinating with federal immigration officers, they start to fear any kind of interaction with the police[233] to the point that even during an emergency—like being a victim of a crime—they will avoid the

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223. *See Dole*, 483 U.S. at 207–08 (stating that conditions placed must be germane to the federal interest in particular grant programs).

224. *See City of Los Angeles II*, 929 F.3d 1163, 1191 (9th Cir. 2019) (Wardlaw, J., dissenting).

225. *Id.*

226. *See* Violent Crime Control and Law Enforcement Act of 1994 § 10003, 34 U.S.C. § 10381.

227. *Id.*

228. *Id.*

229. CONGRESSIONAL JUSTIFICATION, *supra* note 80.

230. *See id.*

231. *City of Los Angeles II*, 929 F.3d 1163, 1191 (9th Cir. 2019) (Wardlaw, J., dissenting).

232. *Id.* at 1194.

233. *Latinos and the New Trump Administration*, PEW RES. CTR. (Feb. 23, 2017), https://www.pewresearch.org/hispanic/2017/02/23/latinos-and-the-new-trump-administration/.

police at all costs.[234] Police officials in cities with large Latino populations have noted a decrease in the amount of crime reports filed by Latinos overall.[235] For example, Houston police officers noted a 43% decrease in rapes reported by Latinos in 2017 compared to 2016.[236] These findings suggest that cooperation with federal immigration officials leads to a decrease in crime reporting and overall trust of the police, therefore, clearly undermining the community policing purpose of the grant.[237] Furthermore, a decrease in reports is clearly a threat to community safety because "[u]nreported and therefore unpunished crimes lead to 'greater number of perpetrators at large,' posing a clear threat to community safety."[238] Thus, cooperation with federal immigration officials also undermines the public safety purpose of the grant.[239]

D. The Immigration-Based Preferences Skewed the Grant to Effectively Deny Funding to Sanctuary Cities

Sanctuary cities were not given a fair chance as applicants of the COPS grant program because the new preferences skewed the scoring process. The Ninth Circuit erred in concluding that the City of Los Angeles was not disadvantaged simply for being a sanctuary city.[240] The court failed to consider the disparaging effect that the immigration-based preferences has on sanctuary city applicants.[241] The City of Los Angeles was disadvantaged by having to compete for an already competitive grant against applicants who were favored simply for choosing to cooperate with federal officials.[242] Although it may be true that the City of Los Angeles (notwithstanding the immigration-based preferences) may have still been denied the grant, the preferences placed by the DOJ in effect ensured that Los Angeles would not have a fair chance at receiving the grant.[243] Moreover, the last two times that the City of Los Angeles applied for the grant (in 2012 and 2016) it received the grant.[244]

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234. Portillo, *supra* note 3, at 365.

235. *Id.* at 367.

236. Brooke A. Lewis, *HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year*, HOUS. CHRON. (Apr. 6, 2017, 10:01 AM), https://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php (noting that the decrease in crime reports correlates with the rising negative rhetoric surrounding immigrants).

237. *See* Portillo, *supra* note 3, at 366.

238. *City of Los Angeles II*, 929 F.3d 1163, 1194–95 (Wardlaw, J., dissenting).

239. *See id.*

240. *Id.* at 1169 (majority opinion).

241. *See infra* notes 248–249 and accompanying text (discussing how grantees who agreed to cooperate with immigration-based preferences were more likely to get the grant).

242. *See City of Los Angeles II*, 929 F.3d at 1191 (Wardlaw, J., dissenting).

243. *See id.*

244. *City of Los Angeles I*, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018), *rev'd sub. nom.*, *City of Los Angeles II*, 929 F.3d 1163.

The added bonus points for illegal immigration enforcement skewed the scoring process to effectively deny funding to sanctuary jurisdictions.[245] The fact that the majority of the grantees submitted certification of compliance with federal immigration laws shows the disparaging effect of the preferences.[246] The immigration-based preferences have similar effects as grants with blanket requirements—jurisdictions failing to address illegal immigration or certify compliance with immigration officials are likely to be denied funding.[247] As then-Attorney General Jeff Sessions proudly announced in a speech, 80% of the grantees submitted certification of compliance with federal immigration policies.[248] Those grantees were put at a great advantage, while sanctuary cities were widely denied funding for community-oriented policing.[249] Because the grant is designed to create trust between the police and its community, it is unreasonable to think that Congress intended that a jurisdiction that elects to focus on federal immigration would be worthier of the grant than a jurisdiction that elects to build trust and respect between the community and police. [250] On the other hand, the focus area that the City of Los Angeles chose—"building trust and respect" within the community—was clearly germane to the purpose of the grant.[251]

VII. THE EXECUTIVE BRANCH'S ENCROACHMENT MUST BE STOPPED

The immigration-based preferences on the COPS grant should face the same fate as the enjoined Executive Order 13768 and Byrne JAG conditions.[252] The courts enjoined Executive Order 13768 and the Byrne JAG conditions because they lacked congressional authorization to refuse funding to sanctuary jurisdictions.[253] The immigration-based preferences on the COPS grant in effect deny grant funds to sanctuary jurisdictions, while anti-sanctuary jurisdictions are put at a great advantage for promising to

245. *See City of Los Angeles II*, 929 F.3d at 1191 (Wardlaw, J., dissenting).

246. *See* Press Release, U.S. Dep't of Justice, Att'y Gen. Sessions Announces $98 Million to Hire Community Policing Officers (Nov. 10, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-98-million-hire-community-policing-officers.

247. *See City of Los Angeles II*, 929 F.3d at 1191 (Wardlaw, J., dissenting).

248. Press Release, U.S. Dep't of Justice, *supra* note 246.

249. *See id.*

250. *Community Policing (COPS): FY 2017 Budget Request at a Glance*, U.S. DEP'T OF JUST., https://www.justice.gov/jmd/file/822291/download (last visited May 30, 2020) (stating community trust as its mission).

251. *See City of Los Angeles II*, 929 F.3d at 1183 (Wardlaw, J., dissenting).

252. *See City of Philadelphia II*, 916 F.3d 276, 293 (3d Cir. 2019); *City of Chicago II*, 888 F.3d 272, 293 (7th Cir. 2018); City & County of San Francisco v. Trump, 897 F.3d 1225, 1231–35 (9th Cir. 2018). *But see* New York v. U.S. Dep't of Justice, 951 F.3d 84, 123–24 (2d Cir. 2020) (vacating the partial injunction on the Byrne JAG conditions that was previously granted in favor of the appellees).

253. *See City of Philadelphia II*, 916 F.3d at 293; *City & County of San Francisco*, 897 F.3d at 1235.

comply with federal immigration laws.[254] The immigration-based preferences have the same effect that Executive Order 13768 and the Byrne JAG conditions sought to have on sanctuary jurisdictions: defunding sanctuary cities.[255] The only difference is that Executive Order 13768 and the Byrne JAG conditions were more obvious in their goals because they clearly stated that jurisdictions that failed to comply with 8 U.S.C. § 1373 would be denied federal grants.[256]

The claim that the Ninth Circuit made in *City & County of San Francisco v. Trump* when it enjoined Executive Order 13768 is the same claim that this Comment makes—the Executive Branch must be stopped from usurping the power of the purse.[257] There, the Ninth Circuit held that under the separation of powers the Executive Branch could not refuse to disperse grants to sanctuary jurisdictions without congressional authorization.[258] The court correctly called out the Administration's attempt to claim for itself Congress's exclusive spending power.[259] However, in *City of Los Angeles v. Barr*, the Ninth Circuit failed to see that the preferences placed on the COPS grant were an extension of the Trump Administration's attempt to usurp Congress's spending power for its immigration priorities.[260]

Because the Ninth Circuit failed to do so, the Supreme Court must stop the Executive Branch from encroaching on Congress's exclusive spending power. As the remaining branch of government, the responsibility to check the Executive Branch's encroachment on the spending power falls on the judiciary.[261] Because the Ninth Circuit created a dangerous precedent, when the Supreme Court considers this case it should reverse the Ninth Circuit's decision and hold that the Executive Branch cannot usurp grant funds for federal immigration enforcement.[262] Reversal of the decision will ensure that future administrations will not have the opportunity to divert grant funds for their own political priorities.

This solution is reasonable because amending the COPS statute to directly state that the grant cannot be used to enforce immigration laws on the states could take years, because a statute can only be modified by going

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254. *See Application Guide*, *supra* note 74 (stating that jurisdictions that choose illegal immigration as a focus area and submit certification of compliance will receive preferential consideration).

255. *See* cases cited *supra* note 252 (describing the community policing purpose of the grant).

256. *See* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). *See also* Oregon v. Trump, 406 F. Supp. 3d 940, 962 n.7 (D. Or. 2019) (drawing a distinction between the conditions placed on the Byrne JAG grant and the immigration-based preferences on the COPS grant).

257. *See City & County of San Francisco*, 897 F.3d at 1231–35 (holding that Executive Order 13768 violated separation of powers because Congress had not tied funding to compliance with 8 U.S.C. § 1373).

258. *See id.* at 1231.

259. *See id.* at 1234.

260. *See City of Los Angeles II*, 929 F.3d 1163, 1181 (9th Cir. 2019).

261. *See supra* notes 27–28 and accompanying text (explaining the separation of powers).

262. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

through a complicated and difficult bicameral legislative process.[263] Additionally, amending the statute would only solve the issue for the COPS statute, meaning that the Executive Branch would have the opportunity to apply immigration-based preferences and conditions on other grants.[264] However, the weight of a Supreme Court ruling will greatly restrict the Executive Branch from applying immigrations-based preferences on federal grants, because when district and appellate courts consider similar issues, they will be bound to follow the Supreme Court ruling.[265] As decisions over the Executive Branch's authority to condition grants continue to emerge and create splits among the circuit courts, a decision by the Supreme Court becomes all the more important.[266] Without the Supreme Court's guidance, the lower courts will continue to disagree on the scope of the Executive Branch's authority.[267]

VIII. CONCLUSION

Congress's spending power is exclusive and the Executive Branch must be stopped from encroaching on that power. The DOJ acted beyond what was authorized by the text and purpose of the COPS statute when it implemented immigration-based preferences on the COPS grant.[268] The preferences were arbitrarily implemented to meet the Executive Branch's goal to defund sanctuary cities—a purpose that is beyond congressional authorization.[269] This is the first academic comment to address the Ninth Circuit's decision upholding the Executive Branch's encroachment on Congress's exclusive spending power. The Ninth Circuit's decision opens the door for future administrations to usurp grant funds to accomplish their political objectives while wholly disregarding the purpose of Congress's appropriation.[270] While trying to crack down on sanctuary cities, the Executive Branch has simultaneously eroded the sanctity of the separation of powers.[271] Because the Ninth Circuit created a dangerous precedent, it is up to the Supreme Court to reverse the Ninth Circuit's decision and uphold the principle of separation

263. *See generally* CONG. RESEARCH SERV., THE AMENDING PROCESS IN THE SENATE (2015), https://crsreports.congress.gov/product/pdf/RL/98-853 (describing the amendment process for a statute).

264. *Id.*

265. *See* United States v. Katzin, 769 F.3d 163, 173 (3d Cir. 2014) (citing United States v. Aguiar, 737 F.3d 251, 260–61 (2d Cir. 2013) ("Supreme Court decisions are binding precedent in every circuit.").

266. The most recent decision addressing the Trump Administration's authority to condition the Byrne JAG grant on immigration enforcement created a circuit split on the issue. *See* New York v. U.S. Dep't of Justice, 951 F.3d 84 (2d Cir. 2020).

267. *Compare id.*, *with City of Philadelphia II*, 916 F.3d 276 (3d Cir. 2019)*, and City of Chicago II*, 888 F.3d 272, 293 (7th Cir. 2018).

268. *See City of Los Angeles II*, 929 F.3d 1163 (9th Cir. 2019).

269. *Id.*

270. *Id.*

271. *See* Sargentich, *supra* note 22.

of powers. The immigration-based preferences imposed on the COPS grant must face the same fate of Executive Order 13768.