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October 29, 2019

Griselda Aldrete
Executive Director, Fire and Police Commission
200 E. Wells Street, Room 706A
Milwaukee, WI 53202

Re: Proposed Changes to SOP 130: Foreign Nationals - Diplomatic Immunity - Immigration Enforcement

Dear Director Aldrete:

By email dated October 4, 2019, you requested on behalf of the Board of Fire and Police Commissioners ("Board" or "FPC") a legal opinion regarding proposed revisions to Milwaukee Police Department ("MPD") Standard Operating Procedure ("SOP") 130 involving "Foreign Nationals – Diplomatic Immunity – Immigration Enforcement."[1] The Board is conducting a review of SOP 130 pursuant to its authority under Wis. Stat. § 62.50(23).

On October 4, 2019, Police Chief Alfonso Morales submitted proposed modifications to SOP 130.25 "U Nonimmigrant Classification (U-Visa)[2]" and 130.30 "Immigration Enforcement" (collectively, "Chief's Proposal")[3]. Voces de la Frontera, a Milwaukee-based immigrants' rights organization, submitted proposed revisions to SOP 130.10.A. ("Arrested or Detained Foreign Nationals")[4], SOP 130.25, and SOP 130.30 ("Voces' Proposal")[5]. You asked for an opinion as to the legality and enforceability of both proposals, asked us to identify foreseeable impacts, and asked whether any developments in litigation over the Trump Administration's efforts to condition federal grants on cooperation with immigration enforcement efforts provide the City with greater flexibility.

It is our opinion that a permanent injunction issued by a federal district court on September 26, 2019, discussed below, enables our office to assert that the United States Department of Justice ("USDOJ" or "Attorney General") can no longer condition the City's receipt of at least one federal formula grant based on the City's policies on communication and cooperation with federal immigration enforcement

[1] A copy of current SOP 130 is attached as Appendix A.
[2] Chief Morales submitted the proposed modifications to SOP 130.25 on December 11, 2018 but the Commission has not taken any action on those proposed revisions.
[3] A copy of the "Roll Call Version" of the Chief's Proposal is attached as Appendix B.
[4] We are issuing a separate opinion regarding Voces' proposed revisions to SOP 130.10.A.
[5] A copy of Voces' Proposal is attached as Appendix C.

officers. This gives the Board and the Chief greater flexibility in establishing the parameters of permitted Department member communication and cooperation with federal immigration officers. The federal case law in this area is rapidly developing and, it must be noted, subject to change by reviewing courts.

Before we opine on the legality of the Chief's Proposal and Voces' Proposal, we will explain the governing legal context both in terms of the role of local law enforcement in immigration enforcement and the Attorney General's ability to condition federal grants on local cooperation with federal immigration enforcement efforts.

I. LOCAL INVOLVEMENT IN IMMIGRATION ENFORCEMENT

The United States Constitution grants to the federal government "broad, undoubted power over the subject of immigration and the status of aliens[6]." *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). "Congress has specified which aliens may be removed from the United States and the procedures for doing so." *Id.* at 396. Immigrations and Customs Enforcement ("ICE") officers "are responsible 'for the identification, apprehension, and removal'" of removable aliens from the United States. *Id.* (citation omitted).

The United States Supreme Court has made clear that under this federal scheme, "except in specific, limited circumstances," local police do not have authority to unilaterally stop or arrest individuals for suspected violations of civil immigration law. *Id.* at 410. "As a general rule, it is not a crime for a removable alien to remain present in the United States… If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *Id.* at 407; *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 2012) ("[U]nlike illegal entry, mere unauthorized presence in the United States is not a crime."). In *Arizona*, the Court struck an Arizona statute that authorized local police to arrest aliens, without a warrant, on the basis of possible removability, finding that this authority was preempted by federal law. *Id.* at 410.

The Court held that federal law authorizes local officers to perform immigration enforcement only under "specifie[d,] limited circumstances" including, principally, where the Attorney General has entered into a written agreement to allow specific local officers to perform the functions of federal immigration officers. *Id.* at 408-09. When operating under these formal agreements, known as "287(g) agreements" in reference to 8 CFR § 287, the local law enforcement officers are "subject to the direction and supervision of the Attorney General." 8 USC § 1357(g)(3). The City of Milwaukee does not have a § 287(g) agreement.

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[6] Federal law defines "alien" to mean "any person not a citizen or national of the United States." 8 USC § 1101(a)(3).

The *Arizona* court noted that a local law enforcement officer may also "cooperate" with ICE in the "identification, detention, or removal of aliens not lawfully present in the United States." 8 USC § 1357(g)(10)(B).[7] No formal agreement is necessary when local officers cooperate under § 1357(g)(10)(B) but the officers are "subject to the direction and supervision of the Attorney General." § 1357(g)(3).

In *Arizona*, the Court cited a few examples of cooperation with federal immigration officers, including: state or local participation in a joint task force with federal officers; providing operational support in executing a warrant; or allowing ICE to gain access to detainees in state or local facilities. *Arizona*, at 410. ICE typically requests assistance from local police through detainer requests[8] and administrative warrants; both issued by ICE officials and neither issued by a state or federal judge.

"Cooperation" under § 1357(g)(10)(B) does not include "the unilateral decision of state [or local] officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Id.* at 410. At least one federal appeals court has applied *Arizona* to hold that a municipality may be held liable under 42 USC § 1983 if its officers engage in "brief investigatory detentions" based solely on learning of an outstanding civil ICE warrant and with no request or direction from ICE. *Santos v. Frederick County Bd. of Comm'rs*, 725 F.3d 451 (4th Cir. 2013)[9].

In *Santos*, two sheriff deputies seized Santos for Fourth Amendment purposes when one deputy gestured for her to stay seated after dispatch informed him of an outstanding civil ICE deportation warrant but before dispatch confirmed with ICE that the warrant was active. *Santos*, 725 F.3d at 465-66. ICE did not request that the deputies detain Santos until forty-five minutes after she had been arrested. *Id.* at 466. The court held that the deputies violated Santos's Fourth Amendment rights and remanded to the federal district court to determine whether the municipality was liable under § 1983. *Id.* at 468, 470.

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[7] The *Arizona* court also noted the following "limited circumstances" under which local police may engage in immigration enforcement: (a) under 8 USC § 1252c(a), local police may, to the extent permitted by state and local law, arrest and detain any illegally present alien who has been previously convicted of a felony and deported or left the United States after conviction, but only after the police obtain "appropriate confirmation" of the person's status from ICE and only for as long as required for ICE to take the person into custody; (b) under 8 USC § 1324(c), local police may arrest individuals for transporting or harboring certain aliens; (c) under 8 USC § 1103(a)(10), the Attorney General, with the consent of the local law enforcement agency, may authorize local officers to assist in immigration enforcement in the event of an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border."

[8] "The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 CFR § 287.7(a). Federal appellate courts that have considered the issue have held that an ICE detainer request is a request and not mandatory. *Galarza v. Szalczyk*, 745 F.3d 634, 640-41 (3rd Cir. 2014) (summarizing cases).

[9] Regardless of immigration status, undocumented aliens are "persons" protected under the equal protection clause of the Fourteenth Amendment. *Plyler v. Doe*, 457 U.S. 202, 211 (1982).

Santos illustrates the potential for municipal liability when local officers engage in immigration enforcement efforts in the absence of express direction or authorization by federal statute or ICE. Municipalities have also been found liable under § 1983 even when cooperating at the request of ICE. For example, a municipality may be liable under § 1983 if it unlawfully detains an individual in response to an ICE detainer request. *Galarza*, 745 F.3d at 640-41.

While 8 USC § 1357(g)(10)(B) authorizes local cooperation with ICE, under the Tenth Amendment's anti-commandeering doctrine, the federal government cannot *require* local governments to use local resources to cooperate with federal immigration authorities. *Printz v. United States*, 521 U.S. 898, 925-26 (1997) ("'[t]he Federal Government…may not compel the States to enact or administer a federal regulatory program.'") (citation omitted). In *Printz*, the Supreme Court struck down a federal law that required local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court went on to hold that "Congress cannot circumvent that prohibition [against compelling States to enact or enforce a federal regulatory program] by conscripting the State's officers directly." *Id.* at 935.

However, the Tenth Amendment does not prohibit the federal government from imposing grant conditions through Congress's use of the Spending Power. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 867 (N.D. Ill. 2018) ("No Tenth Amendment problem exists when a federal agency imposes grant conditions, because the Spending Clause empowers the federal government to offer funds in exchange for state action it could not otherwise demand.") citing *NFIB v. Sebelius*, 567 U.S. 519, 537 (2012); *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). That said, the Spending Power belongs to Congress and Executive Branch efforts to condition grants without congressional authority violate the Separation of Powers, as explained in Section II of this opinion.

II. CONDITIONS ON FEDERAL GRANTS

A. Update on Executive Order 13,768

You asked for an update on challenges to President Trump's Executive Order, 13,768, "Enhancing Public Safety in the Interior of the United States," which was signed January 25, 2017. The President directed the Attorney General and the DHS Secretary to withhold federal grants from any city or state determined by the Attorney General to be a "sanctuary city." The Order defined "sanctuary city" as a jurisdiction that "willfully refuse[s] to comply" with 8 USC § 1373.[10]

[10] 8 USC § 1373 provides: (a) Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

In *City and County of San Francisco v. Trump*, the Ninth Circuit Court of Appeals held that the Executive Order violated the Separation of Powers because Congress did not authorize the withholding of funds. 897 F.3d 1225, 1234-35 (9th Cir. 2018). But, the Ninth Circuit ruled that the record did not justify a nationwide injunction and therefore vacated the lower court's nationwide injunction, remanding the case back to the federal district court. *Id.* at 1245. As a result, the decision is simply persuasive and not mandatory authority for the City of Milwaukee. Nonetheless, the Attorney General, in an unsuccessful attempt to save the Executive Order, filed with the court a DOJ Memorandum interpreting the Executive Order to apply "solely to federal grants administered by the [DOJ] or the [DHS], and not to other sources of federal funding." *Id.* at 1240.

B. Conditions on Byrne JAG Grants

Based on our research, all but one federal lawsuit have involved conditions placed on the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG grant"), which is the primary source of federal criminal justice funding to states and local governments. *City of Chicago v. Sessions*, 888 F.3d 272, 278 (7th Cir. 2018). Byrne JAG grants are allocated under a statutory formula based on share of violent crime, population, and other factors. 34 USC § 10156.

Each year, the City of Milwaukee is allocated Byrne JAG grant funds and, with Milwaukee County and the City of West Allis, jointly applies for the grant pursuant to a disparate jurisdiction agreement authorized by the Byrne JAG statute. 34 USC § 10156(d)(4). Pursuant to a statutorily-required Memorandum of Understanding, Milwaukee County is the applicant, awardee, and fiscal agent on behalf of the cities. The City of Milwaukee's share of the FY 2019 Byrne JAG grant is approximately $400,000.

Beginning with the FY 2016 Byrne JAG grant, the City Attorney has certified, in writing, that the City is in compliance with 8 USC § 1373 ("§ 1373 Compliance Condition"). SOP 130.30(F) was revised in 2017 to enable the City Attorney to certify that the City complies with § 1373, as required by the FY 2016 Byrne JAG grant that the City had already accepted. (See City Attorney Opinion, dated July 12, 2017). Beginning with the FY 2017 Byrne JAG grants, the Attorney General imposed the following immigration-related conditions on grant applicants:

(b) Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, [ICE].
(2) Maintaining such information.
(3) Exchanging such information with any other Federal, State, or local government entity.

1. "§ 1373 Compliance Condition" – explained above.

2. "Notice Condition" – requiring the local government to provide notice to ICE before releasing certain individuals wanted by ICE;

3. "Access Condition" – requiring the local government to provide, upon ICE's request, access to the local government's detention facilities;

4. "§ 1644 Compliance Condition" – requiring a Chief Legal Officer to certify that the "program or activity" funded under the grant complies with 8 USC § 1644, which is essentially identical to § 1373.[11]

5. "Harboring Condition" – prohibiting the local government 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 [federal law]..."

6. "Additional Certification Requirement" – requiring the Chief Executive to certify that the local government has no "law, rule, policy, or practice" that would "(a) impede the exercise of federal officers of authority under" various immigration enforcement statutes.

7. "Questionnaire Condition" – requiring answers to questions regarding whether the municipality has any laws, policies, or practices related to whether, when, or how employees may communicate with ICE and to explain how the law, policy, or practice complies with § 1373.

The validity of the Notice Condition, Access Condition, and § 1373 Compliance Condition is currently pending before the Seventh Circuit Court of Appeals in *City of Chicago v. Barr*, Docket 18-2885[12]. The outcome of this case will determine whether the Attorney General can impose those three conditions on any local government within the Seventh Circuit's jurisdiction, including the City of Milwaukee. However, it is our opinion that a September 26, 2019 ruling by a federal district judge in a related case applies to the City of Milwaukee such that the Attorney General is prohibited from imposing against the City any of the seven grant conditions summarized above. *City of Evanston and United States Conference of Mayors v. Barr*, 2019 WL 4694734 (N.D. Ill., Sept. 26, 2019) (slip copy) ("*Evanston*").

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[11] 8 USC § 1644 provides: "Notwithstanding any other provisions of Federal, State, or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the [ICE] information regarding the immigration status, lawful or unlawful, of any alien…"

[12] *City of Chicago v. Barr* began as *City of Chicago v. Sessions*.

1. City of Chicago Challenge

The Seventh Circuit Court of Appeals has already held that a federal district court did not err in imposing a preliminary injunction against the Notice and Access Conditions on Separation of Powers grounds, finding that Chicago was likely to succeed on its claim that the Byrne JAG authorizing statute did not authorize the Attorney General to impose the Notice and Access Conditions. *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *en banc reh'g granted in part and opinion vacated in part by* Order, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 4, 2018), Docket No. 128. The Seventh Circuit did not review the § 1373 Compliance Condition because Chicago did not appeal the district court's ruling that § 1373 was both an "applicable law" under the Byrne JAG statute and constitutional.[13] *Id.* at 280.

The federal district court subsequently issued a permanent injunction against the Notice and Access Conditions. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018). The district court also ruled that § 1373 is unconstitutional based on a 2018 Supreme Court decision in which the Court held that a federal statute prohibiting states from authorizing sports gambling violated the anti-commandeering doctrine of the Tenth Amendment. *Id.* at 866-873 (citing *Murphy v. NCAA*, --- U.S. ---, 138 S.Ct. 1461, 1478 (2018)). In *Murphy*, the Supreme Court held that the distinction between a federal statute that *requires* certain state action and a federal statute that *prohibits* state action "is empty…The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either event." *Id.* at 1478.

Applying *Murphy*, the federal district court held that § 1373 violates the Tenth Amendment because it (1) precludes cities from limiting the amount of paid time their employees use to communicate with ICE; (2) "constrains local rulemaking by precluding city lawmakers from institut[ing] preferred policies which run counter to [§] 1373;" (3) transfers local decision-making powers from local policy-makers to line-level employees, "effect[ing] a federally-imposed restructuring of power within state government;" and (4) prohibits city control of its employees' communications with ICE, thereby preventing Chicago from "extricating itself from federal immigration efforts." *Chicago*, at 869-71. The court ruled that because § 1373 is unconstitutional, it cannot be an "applicable Federal law" with which a Byrne JAG grantee must comply. *Id.* at 875-76.

The district court ordered that the permanent injunction against the Notice, Access, and § 1373 Compliance Conditions apply nationwide. *Id.* at 881. However, the court stayed the nationwide scope of the permanent injunction out of deference to

[13]Relying on existing law at the time, as we did in our July 12, 2017 legal opinion, the district court held that "[u]nder current case law, however, only affirmative demands on states constitute a violation of the Tenth Amendment." *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 949 (N.D. Ill. 2017).

the Seventh Circuit. *Id.*[14] Therefore, the permanent injunction is not in effect beyond the City of Chicago, is limited to the FY 2017 Byrne JAG grants, and does not prohibit the Attorney General from requiring that Milwaukee certify compliance with § 1373 when applying for Byrne JAG grants. The City will instead be governed by the Seventh Circuit's decision in *City of Chicago v. Barr*, Docket No. 18-2885 (last accessed October 27, 2019).

While Chicago's challenge to the FY 2017 conditions was making its way through the courts, Chicago challenged the imposition of Conditions 1-6 (outlined above) on the FY 2018 Byrne JAG grants. The same federal district judge who presided over the FY 2017 challenge issued a permanent injunction against all six conditions, finding that the Attorney General lacked statutory authority to impose the conditions under the Byrne JAG statute and finding that § 1373 and § 1644 are unconstitutional and therefore compliance with these unconstitutional laws cannot be imposed as a condition of receiving the Byrne JAG grants. *City of Chicago v. Barr*, --- F.Supp.3d ---, 2019 WL 4511546 (N.D. Ill. Sept. 19, 2019). The court issued a permanent nationwide injunction as to all six challenged conditions for not only FY 2018 but all future years. *Id.* at *16-17. However, in deference to the Seventh Circuit's pending decision, the court again stayed the scope of the nationwide injunction so that it does not apply beyond Chicago. *Id.*

2. City of Evanston and U.S. Conference of Mayors Challenge

While the permanent injunction issued against the Attorney General in the *City of Chicago* cases does not currently protect the City of Milwaukee, it is our opinion that a permanent injunction recently issued by the same federal district court judge in *Evanston, supra* at 6, provides that injunctive relief to the City of Milwaukee.

In *Evanston*, the district court held that Conditions 1 through 6 are *ultra vires,* citing the same court's ruling in *City of Chicago v. Barr*, 2019 WL 4511546 (N.D. Ill. Sept. 19, 2019). *Evanston*, at *5. The court also held that the Attorney General lacks statutory authority to impose the Questionnaire Condition (Condition 7 above) and therefore that condition is *ultra vires* as well. *Id.* at *6-9.

Importantly, the court imposed a "permanent injunction against the imposition of the challenged conditions upon Evanston and any Conference member that has been allocated, applied for, or has been awarded Byrne JAG funds in FY 2017, 2018, and in all future years." *Id.* at *11. In the court's Final Judgment and Order, issued on that same date, the court clarified that "[n]o recipient's acceptance of its FY 2018 award, or of any Byrne JAG award in a future program year, may be construed as

[14] The Seventh Circuit initially upheld the nationwide preliminary injunction against the Notice and Access Conditions. But, subsequently, the Seventh Circuit, in an *en banc* ruling (i.e., by the full court), issued an order staying the nationwide scope of the preliminary injunction until an *en banc* review. Order, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 26, 2018), Docket No. 134.

acceptance of the Conditions." Final Judgment and Order, *City of Evanston, et al. v. Barr*, No. 18-4853 (N.D. Ill. September 26, 2019), Docket No. 94, at 3. The court defined "recipient" to mean the City of Evanston "or any Conference member that has been allocated, applied for, or has been awarded Byrne JAG funds." *Id.* at 4.

It is our opinion that the City of Milwaukee, as a member of the U.S. Conference of Mayors, is protected by the permanent injunction issued in *Evanston*. Technically, the City is neither the "applicant" nor the "awardee;" Milwaukee County is. However, the City is "allocated" Byrne JAG funds. *See* "2017 Wisconsin Local JAG Allocations," available at https://www.bja.gov/Programs/JAG/jag17/17WI.pdf (last accessed October 23, 2019)). Indeed, the City was identified in a list of "Current Conference Members Allocated 2017 Byrne JAG Funds" attached as an exhibit to the affidavit filed by the CEO and Executive Director of the United States Conference of Mayors. *Declaration of Tom Cochran*, No. 18-cv-04853, Docket No. 10-1, Ex. 3.

The rulings in the *Chicago* and *Evanston* cases are consistent with court rulings in other jurisdictions, which have all also stricken the Notice, Access, and § 1373 Compliance Conditions, though not always on the same grounds. *See City of Philadelphia v. Attorney General*, 916 F.3d 276 (3rd Cir. 2019) (Attorney General lacked statutory authority to impose all three of the conditions and not reaching the anti-commandeering analysis because § 1373 is not an applicable law).[15]

C. Conditions on Competitive USDOJ Grants

In contrast with the formula Byrne-JAG grant, the Attorney General may have greater discretion to incorporate immigration-related conditions on discretionary, competitive grants. We cannot say whether further restrictions on cooperation with ICE will impact the City's ability to win discretionary law enforcement-related DOJ grants; there could be many other reasons why any one MPD or Office of Violence Prevention grant application would not be chosen.

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[15] See also *City of Providence v. Barr*, 385 F. Supp. 3d 160 (2019), *appeal filed*, 19-1802 (1st Cir., Aug. 15, 2019) (same as *Philadelphia*); *New York, et al. v. Department of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018), *appeal filed*, 19-275 (2nd Cir., Jan. 28, 2019) (striking all three conditions and holding § 1373 unconstitutional under anti-commandeering doctrine in light of *Murphy*); *City and County of San Francisco v. Sessions*, 372 F. Supp. 3d 928 (N.D. Cal. 2019) (enjoining Conditions 1-5 and 7 on Spending Powers grounds and not reaching the anti-commandeering question); *City of Los Angeles v. Sessions*, 2019 WL 1957966 (enjoining all Conditions and holding that § 1373 is neither an applicable law under the Byrne JAG statute nor constitutional under *Murphy*); *Oregon v. Trump*, 2019 WL 3716932, *18 (D. Or. 2019), *appeal filed*, 19-35843 (9th Cir. Oct. 4, 2019) (enjoining Notice, Access, § 1373 Compliance, §1644 Compliance, and Harboring Conditions and holding §§ 1373 and 1644 are unconstitutional: "the Court agrees with Plaintiffs, as well as every other court to have considered the issue after *Murphy*, that Sections 1373 and 1644 violate the Tenth Amendment.").

In 2017, the Attorney General administered Community Oriented Policing Services program ("COPS") grants in a manner designed to incentivize cooperation with federal immigration efforts. Communities received "bonus points" for selecting one of four focus areas, one of which was control of illegal immigration. The Attorney General also offered "bonus points" to applicants who submitted a "Certification of Illegal Immigration Cooperation," in which the community would agree to adopt policies that mirror the Notice and Access Conditions. The City of Los Angeles, which was not awarded a COPS grant, challenged the bonus points system. *City of Los Angeles v. Barr*, 929 F.3d 1163, 1171-72 (9th Cir. 2019).

The Ninth Circuit Court of Appeals reversed the federal district court's nationwide permanent injunction, holding that the immigration-related scoring factors on this non-formula grant were "well within DOJ's broad authority to carry out" the authorizing statute, were not arbitrary and capricious, and complied with Tenth Amendment and Spending Clause restrictions. *Id.* at 1177, 1183.

Moreover, beginning with FY 2018 grants, the USDOJ's Office of Justice Programs has added immigration enforcement-related conditions to approximately 10 other competitive grant programs. *See* Questions and Answers on Specific Requirements related to Criminal Alien Law Enforcement for Fiscal Year 2017 and 2018 OJP Grant Programs, available at https://ojp.gov/funding/Explore/pdf/FY18_QandA.pdf (last accessed 10/27/2019); *see also* OJJDP FY 2019 Youth Gang Desistance/Diversion Competitive Grant Solicitation, OJJDP-2019-14983.

III. LEGAL REVIEW OF MPD PROPOSAL

A. Proposed Modifications of SOP 130.30

The Chief's Proposal re-writes SOP 130.30(F) and is nearly identical to a provision in the City of Waukesha Police Department "Enforcement of Immigration Laws SOP," which has been provided to the Board by FPC Staff. As proposed, SOP 130.30(F) would read:

> Police members shall not detain or arrest an individual solely for a suspected violation of immigration law. MPD will notify and cooperate with lawful requests of ICE under any of [the] following circumstances:
>
> 1. The individual is engaged in or is suspected of terrorism or espionage;
>
> 2. The individual is reasonably suspected of participating in a transnational criminal street gang;
>
> 3. The individual is arrested for any violent felony;

4. The individual is arrested for a sexual offense involving a minor as a victim;

5. The individual is a previously deported felon;

6. Any other serious felony which demonstrates the subject is a safety threat to the population at large;

7. ICE has presented a judicial warrant.

In light of the *Evanston* injunction, this office is able to assert that the Attorney General cannot condition the City's Byrne JAG grant on certification of compliance with 8 USC § 1373. If the Seventh Circuit were to hold that § 1373 is constitutional, we would have to re-evaluate whether the Chief's proposed revisions of SOP 130.30(F) would preclude the City Attorney from certifying compliance with § 1373.

Accordingly, at this time we view adoption of the Chief's Proposal as mainly a policy matter between the Chief and the Board. Nonetheless, we offer a few comments and recommendations. First, the phrase in proposed paragraph (F), "under any of [the] following circumstances[,]" could cause confusion for department members. Under the canon of construction "*inclusio unius est exclusio alterius*," "the express mention of one matter excludes other similar matters [that are] not mentioned." *FAS, LLC v. Town of Bass Lake*, 2007 WI 73. Therefore, the circumstances expressly listed are the only circumstances under which MPD "will notify and cooperate with lawful requests of ICE." However, to remove any potential lack of clarity for department members, the Chief and Board may wish to consider revising (F) as follows: "only ~~under any~~ if one of the following circumstances is present..."

The SOP should also further clarify the judicial warrant condition. We recommend that the proposed language be modified to read: "7. ICE has presented a criminal warrant issued by a federal or state judge."

In addition, by including the presentation of a judicial warrant as a circumstance under which MPD will cooperate with ICE, it appears that the intent of the proposed modification is to provide that MPD will not cooperate with ICE if presented with an ICE administrative warrant and none of the other circumstances listed in (F) are present. If so, that should be clear and "administrative warrant" should also be defined. We suggest adding the following to paragraph (F):

> For purposes of SOP 130, an administrative warrant refers to administrative removal warrants used by ICE officers to arrest persons who have committed civil immigration violations. An administrative warrant is not a criminal warrant signed by a judge,

> and it shall not be used by department members as the basis to detain or arrest a person. Department members may cooperate with an ICE administrative warrant only if one of the circumstances listed in (F) applies.

Further, the Chief and the Board should ensure that the modified paragraph (F) does not create inconsistencies with other parts of existing SOP 130.30 (see Appendix A). For example, we recommend revising current SOP 130.30 as follows:

- SOP 130.30(B): Replace "when requested, or from notifying those officials in serious situations where a potential threat is perceived" with "under one of the circumstances listed in (F)." The current language could cause confusion as to when MPD will cooperate with ICE under (F).

- SOP 130.30(C): Consider separating the two sentences by moving the second sentence to paragraph (D). The first sentence of (C)[16] should stand alone because it seems to be watered-down by the second sentence. The current (C) is confusing in that the second sentence does not necessarily follow from the first sentence.

- SOP 130.30(C): Replace "unless that person is reasonably believed to be involved in one or more of the activities identified in (F) below" with "except under one of the circumstances listed in (F)."

- Delete SOP 130.30(E) as unnecessary and duplicative of the proposed (F).

B. Proposed Modifications of SOP 130.25

The Chief's Proposal's deletion of "violent" in SOP 130.25(A) is consistent with the governing regulation, 8 CFR § 214.14(a)(9), which does not limit the definition of "qualifying crime or qualifying criminal activity" to "violent" crimes but includes obstruction of justice, blackmail, extortion, and perjury. The remaining proposed changes to SOP 130.25 appear to involve strictly policy matters.

IV. LEGAL REVIEW OF VOCES' PROPOSAL

A. Proposed Modifications of SOP 130.30

Most of the proposed revisions contained in Voces' Proposal affect MPD policy rather than legal issues such as the City Attorney's ability to certify compliance with 8 USC § 1373, if required. Therefore, it will be most important for the Board to consider advice from the Police Chief as to the effect of Voces' Proposal on

[16] "A person's right to file a police report, participate in police-community activities, or otherwise benefit from police services is not contingent upon their immigration status."

department operations. Wis. Stat. § 62.50(23) ("A chief shall act as an adviser to the board when the board reviews his or her department.").

One exception is found in SOP 130.30(B) of Voces' Proposal (see Appendix C), which provides, in pertinent part:

> Enforcement of the nation's immigration laws is the responsibility of the federal government, particularly United States Immigrations and Customs Enforcement (ICE). Accordingly, the Milwaukee Police Department shall not use any resources for immigration enforcement. Detaining, investigating, holding people for ICE, **or sharing information with ICE should not be done at the expense of local taxpayers.** Therefore, no Department officer, employee or agent shall use Department funds, resources, facilities, property, equipment, or personnel to assist in the enforcement of federal immigration law. Nothing in this section shall prevent the Department from lawfully discharging its duties in compliance with and in response to a lawfully issued judicial warrant or subpoena… (emphasis added).

If a reviewing court determines that § 1373 is constitutional, we would have to re-evaluate whether the restriction on "sharing information with ICE," would affect our ability to certify compliance with § 1373. Also, the second sentence in paragraph (B) is duplicative.

A second legal concern involves proposed paragraph (L), which provides:

> L. To ensure transparency and accountability, the Department shall report and share with the public on a regular basis requests and communications from ICE or any other federal immigration enforcement agency to the Department.

To the extent that this provision requires disclosure of ICE detainer requests, it likely conflicts with 8 CFR § 236.6, as interpreted by the Wisconsin Supreme Court in *Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16 ("federal regulation 8 C.F.R. § 236.6 precludes the release of any information pertaining to individuals detained by a state or local facility…"). The court declared that 8 CFR § 236.6 "is meant to protect sensitive information pertaining to government criminal or immigration-related investigations." *Id.* at ¶ 36. At a minimum, any required disclosure should be qualified, e.g. "To the extent permitted by state or federal law…" or "except as prohibited by state or federal law…" In any case, this provision should be further reviewed if the Board wishes to give it consideration.

In addition, in multiple places, Voces' Proposal restricts Department member action "when the *purpose or direct effect* is the enforcement of civil immigration law." *See* par. (I) and (J), e.g. (emphasis added). Several jurisdictions that limit local law

enforcement involvement with immigration enforcement do so by restricting officers from acting where the "sole purpose" is enforcement of civil immigration law. *See e.g.*, MPD SOP 130.30(E); St. Paul Ordinance § 44.03 ("Public safety officials may not undertake any law enforcement action for the sole purpose of detecting the presence of undocumented persons…"); Pittsburgh Bureau of Police, "Unbiased Policing," Order 11-3 ("Officers are prohibited from arresting or detaining persons for the sole purpose of investigating their immigration status.").[17]

Restricting officers from taking action where the "sole purpose" is enforcement of civil immigration law appears to be more consistent with a policy that allows for public-safety related exceptions and the constitutional concerns identified by the United States Supreme Court in *Arizona*, *supra* at 2 ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."). In such situations the purpose of police action is public safety, not solely immigration enforcement. Moreover, the inclusion of "direct effect" appears to inject vagueness into this core directive to Department members. There is significant doubt that a responding officer could predict the "direct effect" of any one encounter in the field and we recommend against its use.

In addition, paragraph (K) contains a couple errors. First, there is an inadvertent reference to "MCSO officers." Second, the reference to 287(g) agreements should read "agreements authorized under 8 CFR § 287 and 8 USC § 1357(g)."

Finally, though purely a policy issue, one of the key differences between Voces' Proposal and the Chief's Proposal is that Voces' Proposal would permit MPD cooperation with ICE only when ICE provides a judicial warrant. Unlike the Chief's Proposal, Voces' Proposal does not appear to allow officers to cooperate with ICE based on any of the public safety-related circumstances identified in paragraph (F) of the Chief's Proposal. As with all of the proposed revisions offered by Voces, the Board needs to hear from the Police Chief as to how Voces' Proposal would impact police department operations. Wis. Stat. § 62.50(23).

B. Proposed Modifications of SOP 130.25

Voces' proposed changes to SOP 130.25 appear to present policy issues only and we have no comment.

[17] FPC staff's "Immigration Enforcement in Milwaukee's Peer-City Police Department Policies."

Very truly yours,

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TDM/mal

c: Mayor Tom Barrett
James Owczarski, City Clerk
Police Chief Alfonso Morales

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