No. 17-2991

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, No. 17-cv-5720 (Leinenweber, J.)

DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rule:

Other Authority:

INTRODUCTION AND SUMMARY

Pursuant to Federal Rule of Appellate Procedure 35, defendant-appellant, the Attorney General, respectfully asks this Court to rehear the panel decision of April 19 insofar as it affirmed a preliminary injunction that extends beyond the City of Chicago—the only plaintiff in the case—to encompass jurisdictions nationwide. The affirmance of a nationwide injunction directly conflicts with this Court's decision in *McKenzie v. City of Chicago*, 118 F.3d 552 (7th Cir. 1997), and contravenes settled principles of equity for the reasons set out in Judge Manion's partial dissent in this case. Review by the full Court is warranted to correct the panel's error with regard to a recurring issue of exceptional importance. As contemplated by this Court's order of April 24, 2018, we are simultaneously filing a motion to stay the injunction insofar as it extends beyond the City of Chicago.

The district court enjoined two conditions on grants made by the Department of Justice to states and localities under the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG Program")—grants that provide additional funding for law enforcement purposes. Both conditions concern cooperation with the federal government regarding aliens who have committed crimes or are suspected of committing crimes, and are being held in custody by the grantee jurisdiction. We do not ask the en banc Court to address the merits of the district court's decision or the applicability of the injunction to the City of Chicago, issues that will continue to be litigated in the court below.

This petition concerns the scope of the injunction. Although Chicago is the only plaintiff in this action, the court did not limit its injunction to the City, but instead made its order applicable to all grant applicants across the country. The district court did not suggest that extending its order to non-parties nationwide was in any respect necessary to avoid injury to Chicago. Instead, the court justified the scope of its order on the ground that, in its view, "judicial economy counsels against" requiring other jurisdictions who wished to challenge the rulings "to file their own lawsuits." Stay Op. 11 [App. 110]. The panel majority affirmed, holding that the court could extend its injunction to non-parties across the country as long as Chicago had standing to bring suit with regard to its own alleged injury.

That ruling is foreclosed by *McKenzie,* which the panel majority failed even to cite. In *McKenzie,* the plaintiff sought to enjoin application of a program to non-parties "despite the lack of class certification, in order to prevent the City from violating the Constitution." *McKenzie*, 118 F.3d at 555. Rejecting that contention, the Court explained that when "a class has not been certified, the only interests at stake are those of the named plaintiffs," and that, in the absence of certification, "a court may [not] grant relief to non-parties." *Id.* at 555. *See also Laskowski v. Spellings*, 546 F.3d 822, 825 (7th Cir. 2008) ("The general rule is that a plaintiff has standing to sue only for injuries to his *own* interests that can be remedied by a court order.").

As Judge Manion's partial dissent explained, the nationwide injunction is also irreconcilable with the principle established in *United States v. Mendoza*, 464 U.S. 154

(1984), that "nonmutual offensive collateral estoppel . . . does not apply against the Government in such a way as to preclude relitigation of issues." Partial Dissent 42 (quoting *Mendoza*, 464 U.S. at 162) (omission in original). Judge Manion noted that the majority did not cite *Mendoza*, but that it apparently believed that the principles articulated in *Mendoza* are inapplicable in a case presents a purely legal question. As Judge Manion observed, "if a lack of factual differentiation is all that is needed to distinguish *Mendoza*, then a nationwide injunction is appropriate in every statutory-interpretation case. That cannot be the law." *Id.* at 43.

STATEMENT

A. Grants Under the Byrne JAG Program

Congress created the Byrne JAG Program in 2006 to provide additional funding to state and local law enforcement agencies. *See* Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006). The statute provides that "[f]rom amounts made available to carry out" the program, "the Attorney General may," in accordance with a statutory formula, "make grants to States and units of local government" for certain criminal justice purposes. 34 U.S.C. § 10152(a)(1).

When the Office of Justice Programs (OJP)—the Department of Justice entity that administers the program—approves a Byrne JAG application, it sends a grant award document to the applicant, which enumerates, among other things, the conditions applicable to the award. *See* Hanson Decl., Dkt. 32-1, Exs. A-C [App. 44-

99]; OJP Grant Process Overview.[1] Applicants then typically have 45 calendar days to review the special conditions and accept the award documents. *See* OJP Grant Process Overview.

OJP has received nearly 1,000 applications from state and local jurisdictions seeking fiscal year 2017 Byrne JAG Program funds. Hanson Second Decl., Dkt. 82, ¶ 4. Prior to the entry of the nationwide preliminary injunction, OJP had aimed to issue fiscal year 2017 Byrne JAG Program awards by September 30, 2017, which is the end of the relevant fiscal year. *Id.* ¶¶ 7-8. But because of the nationwide injunction, OJP has not distributed the grants to any jurisdictions since the injunction was issued, as it cannot do so without dropping the challenged conditions.

B. Prior Proceedings

1. The City of Chicago filed this lawsuit to challenge three conditions that OJP intended to place in Chicago's Byrne JAG Program award documents for fiscal year 2017. *See* Compl., Dkt. 1. The district court concluded that two of the conditions are not authorized by the governing statute. The first condition, which the district court referred to as the "notice" condition, requires that, with respect to any "program or activity" funded by the grant, the grantee must have a policy designed to ensure that, when the Department of Homeland Security (DHS) provides a formal written request for advance notice of the scheduled release date and time for a particular alien at a

[1] https://ojp.gov/funding/Apply/GrantProcess.htm

particular facility, the facility will "as early as practicable" provide the notice to DHS. Hanson Decl., Ex. A, ¶ 56.1.B [App. 63]. The second condition, which the district court referred to as the "access" condition, requires that, with respect to any "program or activity" funded by the grant, the grantee must have a policy designed to ensure that federal agents are "given access" to correctional facilities for the purpose of meeting with aliens and to "inquire as to such individuals' right to be or remain in the United States." Hansen Decl., Ex. A, ¶ 56.1.A [App. 63]. The two conditions were imposed to further the law enforcement purposes of the Byrne JAG Program and are based on the Assistant Attorney General's authority to "plac[e] special conditions on all grants" and to "determin[e] priority purposes for formula grants." 34 U.S.C. § 10102(a)(6).[2]

The district court issued a preliminary injunction with respect to the "notice" and "access" conditions, but did not limit its injunction to Chicago, the only plaintiff in the case. Chicago did not claim that a broader injunction was required to avoid irreparable harm to itself. Nevertheless, the district court declared that "[t]his injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are

[2] The district court rejected Chicago's challenge to an additional condition (a version of which the City accepted in FY 2016) that requires grant recipients to certify compliance with 8 U.S.C. § 1373. *See* Merits Op. 20-35 [Short Appendix 20-35]; Hanson Decl., Ex. C, ¶ 52 [App. 99].

restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction." Merits Op. 41 [Short Appendix 41].

2. On October 13, 2017, the district court denied the government's motion for a partial stay regarding the application of the injunction to non-parties. The court expressed the view that "judicial economy counsels against" requiring other jurisdictions who wished to challenge the rulings "to file their own lawsuits," particularly because some of them had filed amicus briefs. Stay Op. 11 [App. 110]. A panel of this Court denied a partial stay on November 21, 2017. But because this Court promptly set a briefing schedule and scheduled oral argument for January 19, 2018, the government did not seek a stay from the en banc Court or the Supreme Court.

3. On April 19, 2018, the same panel affirmed the district court's injunction, holding that Chicago "established a likelihood of success on the merits of its contention that the Attorney General lacked the authority to impose the notice and access conditions on receipt of the Byrne JAG grants." Maj. Op. 24.

The panel divided on the issue presented by this petition—whether the district court exceeded its authority in extending the injunction to non-parties across the country. The panel majority held that Chicago had standing to seek equitable relief as to its own grant, and that it was unnecessary for Chicago to demonstrate an injury resulting from issuance of grants to all the other jurisdictions in the country. Maj. Op. 28. The panel majority likewise concluded that the injunction did not constitute an

abuse of the district court's equitable authority for three reasons. First, the panel majority expressed its view that nationwide relief was appropriate because "the challenge here presents purely a narrow issue of law" that "will not vary from one locality to another," *id.* at 30, and that, in its view, the case therefore "does not present the situation in which the courts will benefit from allowing the issue to percolate through additional courts," *id.* at 31. Second, the panel majority concluded that "[t]he public interest would be ill-served here by requiring simultaneous litigation of this narrow question of law in countless jurisdictions," *id.* at 32-33, declaring that amicus briefs indicated that "a significant number of award recipients oppose the conditions," *id.* at 33. Third, the majority held that "the structure of the Byrne JAG program itself supports . . . a nationwide injunction," based on the panel's assumption that "the recipients of the grant are interconnected" because available funds might be redistributed among applicants in the event that some jurisdictions are unwilling to accept the conditions. *Id.* at 34.

Judge Manion dissented from the majority's ruling regarding the scope of relief, stating that the majority mistakenly endorsed "a gratuitous application of an extreme remedy" by "bypass[ing] Supreme Court precedent, disregard[ing] what the district court actually concluded concerning the equities in this case, and misread[ing] the effect of providing relief to Chicago only." Partial Dissent 42. Judge Manion noted that the nationwide injunction circumvents the Supreme Court's unequivocal holding that "nonmutual offensive collateral estoppel . . . does not apply against the

Government in such a way as to preclude relitigation of issues." *Id.* (quoting *United States v. Mendoza*, 464 U.S. 154, 162 (1984)) (omission in original). The partial dissent noted that the majority did not cite *Mendoza,* but that it apparently believed that the principles articulated in *Mendoza* do not apply when a case presents a purely legal question. Judge Manion declared that "if a lack of factual differentiation is all that is needed to distinguish *Mendoza*, then a nationwide injunction is appropriate in every statutory-interpretation case. That cannot be the law." *Id.* at 43.

Turning to the balance of the equities, Judge Manion noted that the district court had found the equities in equipoise, and saw "no basis to second-guess the reasoning of the district court." *Id.* at 45. He further observed that the majority's concern that litigation in multiple fora would not be in the public interest was misplaced, as it ignored the availability of class action relief. *Id.* at 46. Such relief "has the benefit of dealing with the one-way-ratchet nature of the nationwide injunction," as it would bind both the government and the class members, rather than permitting plaintiffs multiple "bites at the apple" in suits against the government. *Id.* Finally, Judge Manion stated that "[t]he structure of the Byrne JAG program does not require granting relief to non-parties," as "there are no provisions for redistribution of funds withheld for failing to abide by the Attorney General's 'special conditions,'" and even if such redistribution took place, "Chicago would *benefit* by getting more money." *Id.* at 48-49.

4. On April 23, the federal government moved for a partial stay of the injunction insofar as it provided relief to parties other than Chicago. On April 24, the panel denied the motion "without prejudice to renewal," stating that if the Attorney General "files a petition for rehearing en banc, he may ask this court for a partial stay with his petition or after any decision by this court to rehear this case en banc." The Attorney General hereby seeks rehearing en banc, and is simultaneously filing a renewed motion for a stay, as contemplated by this Court's order.

ARGUMENT

THE PANEL MAJORITY'S DECISION DIRECTLY CONTRAVENES THIS COURT'S PRECEDENT, ESTABLISHED PRINCIPLES OF ARTICLE III STANDING, AND LIMITATIONS ON A COURT'S EQUITABLE AUTHORITY

A. To establish standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quotation marks omitted). "[S]tanding is not dispensed in gross," and the plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted).

Accordingly, this Court has made clear that "plaintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties." *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's

judgment may benefit others collaterally."). Applying this principle, this Court in *McKenzie* reversed an injunction that precluded the City of Chicago from operating a demolition program with respect to entities other than the plaintiffs. This Court noted the district court's conclusion "that it was appropriate to enjoin the entire program, despite the lack of class certification, in order to prevent the City from violating the Constitution." *McKenzie*, 118 F.3d at 555. Reversing that holding, this Court declared that the district court's statement "assume[d] an affirmative answer to the question at issue: whether a court may grant relief to non-parties. The right answer is no." *Id.*

Likewise, in *Scherr v. Marriott International, Inc.*, 703 F.3d 1069 (7th Cir. 2013), this Court held that the plaintiff did not have standing to seek an injunction that went beyond remedying her personal injury, even though the defendant allegedly committed the same legal violation more broadly. The Court noted that the plaintiff had established that she was suffering an imminent injury from the defendant's use of spring-hinged door closers at one particular hotel, and affirmed the injunction as to that hotel. *Id.* at 1074-75. The plaintiff had not, however, established that she would be imminently injured by the defendant's use of the same door closers at the defendant's other hotels, and thus she did not have standing to pursue injunctive relief relating to other hotels. *Id.* at 1075.

These decisions, to which the panel majority made no reference, make clear that where "a class has not been certified, the only interests at stake are those of the

named plaintiffs." *McKenzie*, 118 F.3d at 555 (citing *Baxter v. Palmigiano,* 425 U.S. 308, 310 n.1 (1976)). Thus, in *Alvarez v. Smith*, 558 U.S. 87 (2009), the plaintiffs lacked standing to seek declaratory and injunctive relief against a state's practice of keeping property in custody without a prompt post-seizure hearing because the plaintiffs had already received the seized property or forfeited their claims to it. The Supreme Court explained that since class certification had been denied, the "only disputes relevant here are those between these six plaintiffs and the State's Attorney . . . and those disputes are now over." *Id.* at 93; *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (the plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency order] on the ground that it might cause harm to other parties").

Basic principles of equity also require that the injunction be limited to the plaintiff in this case. Equitable principles require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, there is no dispute that Chicago's injury would be completely remedied by an injunction limited to the City's own grant.

B. As Judge Manion's partial dissent explains, the injunction also contravenes principles established in *United States v. Mendoza*, 464 U.S. 154 (1984), in which the Supreme Court held that "nonmutual offensive collateral estoppel . . . does not apply against the Government in such a way as to preclude relitigation of issues." Partial Dissent 42 (quoting *Mendoza*, 464 U.S. at 162) (omission in original). The Supreme

Court held that "allowing nonmutual collateral estoppel against the Government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," and "would deprive [the] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari." Partial Dissent 42-43 (quoting *Mendoza*, 464 U.S. at 160) (alterations in original).

As Judge Manion observed, "the Fourth and Ninth Circuits have both recognized [that] these concerns are just as present in the context of nationwide injunctions." Partial Dissent 43 (citing *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001)). Thus, in addition to departing from this Court's precedent, the panel decision diverges from the precedent of two other circuits.

As Judge Manion noted, the panel majority did not cite *Mendoza*, but "it implicitly attempts to distinguish that decision" on the ground that "this case 'does not present the situation in which courts will benefit from allowing the issue to percolate through additional courts and wind its way through the system in multiple independent court actions.'" Partial Dissent 43 (quoting Maj. Op. 31). Judge Manion observed that the panel majority "claims this case is different from ones involving issues 'for which the context of different factual scenarios will better inform the legal principle.'" *Id.* (quoting Maj. Op. 31). He explained, however, that "if a lack of

factual differentiation is all that is needed to distinguish *Mendoza,* then a nationwide injunction is appropriate in every statutory-interpretation case. That cannot be the law." *Id.* The partial dissent admonished that "[w]e are not the Supreme Court, and we should not presume to decide legal issues for the whole country, even if they are purely facial challenges involving statutory interpretation." Partial Dissent 44. Indeed, there are parallel challenges to the pending grant conditions in several other courts, and the nationwide injunction here renders the work of those courts meaningless. *See City of Los Angeles v. Sessions*, No. 17-7215 (C.D. Cal.) (filed Sept. 29, 2017); *City of Philadelphia v. Sessions*, No. 17-3894 (E.D. Pa.) (filed Aug. 30, 2017); *City & County of San Francisco v. Sessions*, No. 17-4642 (N.D. Cal.) (filed Aug. 11, 2017).

Judge Manion also took issue with the panel majority's belief "that avoiding 'widespread, duplicative litigation in the absence of' a nationwide injunction is in the public interest." Partial Dissent 45-46 (quoting Maj. Op. 33). As Judge Manion explained, the way to avoid duplicative litigation is to file a class action suit. He noted that a "class action has the benefit of dealing with the one-way-ratchet nature of the nationwide injunction. A nationwide injunction ties the Attorney General's hands when he loses, but if Chicago had lost here, then . . . other municipalit[ies] could have filed suit [or continued to litigate their existing suits] against the Attorney General in . . . other jurisdiction[s], and that process could in theory continue until a plaintiff finally prevailed. With a class action, a decision would bind those other municipalities just as it would bind the Attorney General, and they could not run off to the 93 other

districts for more bites at the apple." Partial Dissent 46. The "one-way-ratchet" effect is particularly marked here, as some other jurisdictions attempted to take advantage of Chicago's injunction by filing amicus briefs—a fact the panel majority treated as favoring a nationwide injunction. Maj. Op. 33. In any event, there is no basis for presuming that all of the nearly 1,000 applicants for Byrne JAG funds share Chicago's opposition to the conditions as a matter of either law or policy.

The partial dissent also explained that no basis exists for the panel majority's assumption that "the structure of the Byrne JAG program itself supports the district court's determination to impose a nationwide injunction because the recipients of the grant are interconnected." Maj. Op. 34. Indeed, even assuming that grants withheld from other jurisdictions would be redistributed in a way that would affect Chicago, "Chicago would *benefit* by getting more money." Partial Dissent 49.

Thus, the alleged rationale for permitting a nationwide injunction in *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), has no applicability here. Partial Dissent 48. Judge Manion noted that "the Fourth Circuit upheld a nationwide injunction on the President's 'travel ban' because the plaintiffs were 'dispersed throughout the United States,' there was an interest in ensuring uniform application of immigration laws, and the court concluded the ban 'likely violates the Establishment Clause.'" Partial Dissent 48 (quoting *International Refugee Assistance Project*, 857 F.3d at 605). The partial dissent also noted that while "the Supreme Court declined to completely stay the injunction," it did not "directly address[] the merits of

why the injunction should be nationwide." *Id.* (citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017)). "The same [purported] need to protect third parties to provide complete relief is not present here." *Id.*

C. In sum, the settled Article III and equitable limits on the scope of injunctions apply with full force here. The panel's contrary ruling conflicts with this Court's precedent and decisions of the Fourth and Ninth Circuit and presents a question of exceptional importance. Review by the full Court is warranted.

CONCLUSION

For the foregoing reasons, the full Court should rehear this case to address the scope of the district court's injunction.

Respectfully submitted,

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APRIL 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition satisfies the type-volume limitation in Rule 35(b)(2)(A) because it contains 3,791 words. This petition was prepared using Microsoft Word 2013 in Garamond, 14-point font, a proportionally-spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Brad Hinshelwood
Brad Hinshelwood