No. 20-666

In the Supreme Court of the United States

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The Edward Byrne Memorial Justice Assistance Grant (JAG) program provides federal grant funding for States and local governments to spend on criminal justice initiatives. Congress established it as a formula grant, entitling recipients in each State to a share of the total funding allocated by Congress according to the State's population and crime rates. As relevant here, petitioners attached three conditions on grant funds distributed for the 2017 fiscal year. The "notice condition" required grantees to respond to any request made by the Department of Homeland Security for information about when non-citizens would be released from state or local custody. The "access condition" required grantees to allow federal officials to access their correctional or detention facilities to meet with non-citizens. The "certification condition" required grantees to certify that they comply with 8 U.S.C. § 1373, which generally bars States and local governments from prohibiting "any government entity or official from sending to, or receiving from," federal immigration authorities "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." The questions presented are:

1. Whether petitioners have the statutory authority to impose the notice and access conditions.

2. Whether the court of appeals correctly held that, because respondents' laws comply with 8 U.S.C. § 1373, petitioners may not withhold JAG funds from respondents based on the certification condition.

PARTIES TO THE PROCEEDING

As the petition notes (at II), at the time the petition was filed, William P. Barr was a petitioner in his official capacity as Attorney General of the United States. Since that time, Jeffrey A. Rosen has assumed the role of Acting Attorney General; Rule 35.3 directs that Acting Attorney General Rosen is automatically substituted for his predecessor. As far as respondents are aware, the remaining parties are correctly identified in the petition as of the date on which this brief is filed.

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STATEMENT

1. Congress created the Edward Byrne Memorial Justice Assistance Grant (JAG) program in 2006 by merging two pre-existing programs that provided funding to State and local governments for criminal justice initiatives. *See* Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006) (codified at 34 U.S.C. §§ 10151 *et seq*.). Congress intended to give grant recipients "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" for policing. H.R. Rep. No. 109-233, at 89 (2005). The JAG program is the "'primary provider' of federal grant dollars to support state and local criminal justice programs." Pet. App. 4a-5a. Grants are made according to a statutorily-defined formula based on each State's population and violent crime statistics. *See* 34 U.S.C. § 10156(a). Any "State or unit of local government" may submit an application for JAG funding. *Id.* § 10153(a). Funds must be spent for one of eight enumerated purposes, none of which pertains to immigration enforcement. *See id.* § 10152(a)(1). California has applied for and received JAG funds every year since 2006. D. Ct. Dkt. No. 20 at 3 (N.D. Cal. No. 3:17-cv-4701). It has used those funds to "support education and crime prevention programs, court programs, and law enforcement programs like task forces on criminal drug enforcement, violent crime, and gang activities." Pet. App. 30a.

Congress has vested the Attorney General with limited authority in administering the JAG program. For example, the Attorney General may specify the "form" of the application, collect and "review" applications, and ensure that applicants have certified that "all the information contained in the application is correct." 34 U.S.C. §§ 10153(a), 10154. Within the

Department of Justice, the JAG program is administered by the Office of Justice Programs (OJP), which is headed by an Assistant Attorney General. *See id.* §§ 10101, 10102, 10110(1).

This suit concerns three conditions that petitioners attached to JAG funds distributed for the 2017 fiscal year. The "notice condition" requires grantees to "provide at least 48 hours' advance notice to" the Department of Homeland Security (DHS) "regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice." C.A. E.R. 300. The "access condition" requires grantees to allow DHS personnel to "access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to remain in the United States." *Id.* The "certification condition" requires a grant recipient's "chief legal officer" to certify that the grantee complies with 8 U.S.C. § 1373. *Id.* at 305-312. Section 1373, in turn, directs that States and local governments "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from" federal immigration officials "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); *see also id.* § 1373(b)(3) (States and local governments may not prohibit "[e]xchanging such information with any other Federal, State, or local government entity").

2. Shortly after the federal government announced the JAG grant conditions for the 2017 fiscal year, California filed this lawsuit. *See* C.A. E.R. 571-572; C.A. Dkt. 22 at 1-39. California's complaint alleged that petitioners lacked statutory authority to impose the challenged conditions; that petitioners

imposed the conditions in violation of the Administrative Procedure Act; that the conditions exceeded Congress's Spending Clause powers and violated separation of powers principles; and that if Section 1373 were applied to certain California statutes, it would violate the Tenth Amendment. C.A. Dkt. 22 at 34-36. The complaint also sought a declaration that certain California statutes did not violate Section 1373 (or, in the alternative, a declaration that Section 1373 could not constitutionally be applied to those statutes). *Id.* at 36-39. The City and County of San Francisco (which is also a respondent here) filed its own complaint challenging the three conditions. *See* C.A. E.R. 541, 571. It asserted similar claims and sought similar relief. *Id.*

The district court decided the two cases together and granted respondents' motions for summary judgment. *See* Pet. App. 24a-121a. As relevant here, the court concluded that petitioners did not have the authority to impose any of the challenged conditions. *Id.* at 49a-56a, 68a-70a. It rejected petitioners' argument that the three conditions were authorized by 34 U.S.C. § 10102(a)(6), which sets forth the duties and responsibilities of the Assistant Attorney General for OJP. Pet. App. 53a-56a. It also rejected the argument that the certification condition was authorized by 34 U.S.C. § 10153(a)(5)(D), which requires JAG grantees to certify that they will "comply with . . . all other applicable Federal laws." *See* Pet. App. 68a-70a. In the context of respondents' challenge to the certification condition, the district court separately held that Section 1373 does not prohibit States and localities from barring communication with immigration officials about "contact information and release status information for any detained immigrants," *id.* at 95a-

98a; and that, in light of that holding, respondents' laws do not violate Section 1373, *id.* at 98a-102a.[1]

The district court ordered the defendants to disburse the 2017 JAG funds to respondents and issued a declaration that various California statutes and San Francisco ordinances complied with Section 1373. Pet. App. 114a-121a.[2] The court also prohibited the federal government from attaching the challenged conditions on JAG funds allocated to "any jurisdiction in the United States," but stayed that portion of its order pending appellate review. *Id.* at 118a-120a; *see also id.* at 102a-110a.

3. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-23a. On the merits, the court concluded that petitioners' arguments were foreclosed by its own "[r]ecent precedential decisions." *Id.* at 3a.

With respect to the first two grant conditions, the court of appeals noted that its decision in *City of Los*

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[1] The district court also held that all three grant conditions exceeded Congress's Spending Clause powers, Pet. App. 71a-84a, and that the decision to impose them violated the Administrative Procedure Act, *id.* at 86a-94a. With respect to the certification condition, the district court also concluded that, if petitioners' reading of Section 1373 were correct, the statute would violate the Tenth Amendment and therefore could not be considered an "applicable" law for purposes of Section 10153(a)(5)(D). *Id.* at 57a-67a.

[2] In the district court, petitioners "'effectively conceded'" that no provision of California law other than a single statute, S.B. 54, violated Section 1373. Pet. App. 16a. On appeal, they argued for the first time that other California statutes violated Section 1373; but the court of appeals rejected that argument. *See id.* at 16a-17a. In this Court, petitioners have not argued that any California law other than S.B. 54 violates Section 1373. *See* Pet. 9, 32.

Angeles v. Barr, 941 F.3d 931 (9th Cir. 2019) (Ikuta, J.) "held that DOJ lacked statutory authority to impose the Access and Notice Conditions on Byrne funds." Pet. App. 3a. In particular, the *City of Los Angeles* decision rejected the federal government's argument that those conditions could be imposed under 34 U.S.C. § 10102 or 34 U.S.C. § 10153. *See* Pet. App 11a. As to the former provision, the court had reasoned that although "the Assistant AG's powers and functions could include 'placing special conditions on all grants, and determining priority purposes for formula grants,'" the access and notice conditions did not constitute "'special conditions'" or "'priority purposes.'" *City of Los Angeles*, 941 F.3d at 939 (quoting 34 U.S.C. § 10102(a)(6)); *see id.* at 939-944; Pet. App. 11a. As to the latter provision, the court had reasoned that the access and notice conditions "far exceed" the certifications and assurances authorized by the statute. Pet. App. 11a; *see City of Los Angeles*, 941 F.3d at 944-945; *see also* 34 U.S.C. § 10153(a)(4) (requiring applicants to assure that they will "maintain and report such . . . information (programmatic and financial) as the Attorney General may reasonably require"); *id.* § 10153(a)(5)(C) (requiring a "certification, made in a form acceptable to the Attorney General" that there "has been appropriate coordination with affected agencies").[3]

Turning to the certification condition, the court of appeals in this case noted that its decision in *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 590 U.S. ___ (U.S. Jun. 15, 2020) (No. 19-532), had "narrowly construed the statutory language of 8

[3] Petitioners did not file any petition for rehearing *en banc* or petition for a writ of certiorari with respect to the *City of Los Angeles* decision.

U.S.C. § 1373." Pet. App. 4a. In that case, the federal government had challenged several California laws, asserting (among other things) that S.B. 54 was preempted by the information-sharing requirements of Section 1373. *See id.* at 13a; *California*, 921 F.3d at 872-873, 886, 891-893. The court of appeals had rejected "DOJ's broad construction of § 1373, holding that § 1373, by its terms, only concerned "'information strictly pertaining to immigration status (i.e. what one's immigration status is).'"" Pet. App. 14a. Here, the court of appeals applied the same "construction of § 1373 to the state and local laws at issue," *id.* at 16a, and held that the laws "do not violate" Section 1373 and that petitioners therefore "cannot withhold [JAG] funds pursuant to the Certification Condition," *id.* at 12a.[4]

The court of appeals did, however, "vacate the nationwide reach of the permanent injunction and limit its reach to California's geographical boundaries." Pet. App. 22a; *see id.* at 18a-23a.

ARGUMENT

The court of appeals correctly resolved each of the questions presented by this petition and its decision accords with the great weight of federal authority on the subject. As petitioners note, *see* Pet. 33-34, this case implicates a conflict of authority as a result of the Second Circuit's recent decision in *New York v. United States Department of Justice*, 951 F.3d 84, 102-122 (2d Cir. 2020), *reh'g en banc denied*, 964 F.3d 150 (2020), *petitions for cert. filed*, Nos. 20-795 (Dec. 10, 2020) &

[4] Because it affirmed on that basis, it was "unnecessary for [the court of appeals] to consider the district court's alternative grounds for enjoining the Certification Condition, including constitutional grounds," and it did "not address them." Pet. App. 12a.

20-796 (Dec. 10, 2020). But the impending transition in federal administrations may eliminate or reduce any need for the Court to resolve that conflict if the incoming administration changes its policy with respect to the conditions imposed on JAG grantees. Under these circumstances, it would be appropriate for the Court to defer action on this petition (and the pending petitions in the Second Circuit case) until it can ascertain the position of the incoming administration on these issues. If there appears to be a need for further review at that time, the Court can grant the most suitable vehicle for plenary review.

I. THE DECISION BELOW IS CORRECT

Petitioners devote most of their petition to a lengthy recitation of their underlying merits arguments, *see* Pet. 16-32, which have been rejected by almost every federal court to consider them.[5] This response is not the place to address those arguments at length. But even a brief review of petitioners' theories demonstrates that they are unsound.

1. Neither the statute establishing the JAG program nor any other provision authorizes petitioners to impose the challenged grant conditions. By design, the program creates a dedicated stream of funding to state and local governments for criminal justice initiatives. *See* 34 U.S.C. §§ 10152(a)(1), 10156. The statute dictates that the "Attorney General *shall*" allocate

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[5] *See*, *e.g.*, Pet. App. 10a-18a; *City of Chicago v. Barr*, 961 F.3d 882, 891-909 (7th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23, 30-45 (1st Cir. 2020); *City of Philadelphia v. Att'y Gen. of the United States*, 916 F.3d 276, 284-291 (3d Cir. 2019); *cf. Colorado v. U.S. Dep't of Justice*, 455 F. Supp. 3d 1034, 1047-1054 (D. Colo. 2020), *appeal docketed*, No. 20-1256 (10th Cir. July 13, 2020).

funds according to a formula based on population and violent crime statistics. *Id.* § 10156(a) (emphasis added).[6] Petitioners' administrative function in carrying Congress's plan to fruition is almost entirely ministerial. Petitioners decide the "form" of the application and "review" the applications once submitted. *Id.* §§ 10153(a), 10154. They also ensure that applicants have provided a congressionally specified set of "certification[s]" and "assurance[s]." *Id.* § 10153(a). For example, applicants must certify that the "information contained in the application is correct," *id.* § 10153(a)(5)(B), and that JAG funds will "not be used to supplant State or local funds," *id.* § 10153(a)(1).

But none of the statutorily required certifications relates to immigration enforcement, *see* 34 U.S.C. § 10153, and nothing about the statutory scheme suggests that Congress authorized petitioners to "specify additional conditions" in response to any "contingency" that Congress "could not foresee," Pet. 20. Had Congress wanted to give petitioners the authority to impose conditions beyond those specified by statute, it knew how to do so: elsewhere in Title 34, Congress authorized the Attorney General to "impose reasonable conditions" on grants disbursed to prevent violence against women, 34 U.S.C. § 10446(e)(3), and to "establish appropriate grant conditions" on funds allocated to analyze DNA samples, *id.* § 40701(c)(1). It did not grant any similar authority with respect to the JAG program.

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[6] The JAG statute authorizes the Attorney General to depart from the formula for awarding grants in certain limited circumstances; but none relates to the conditions at issue here. *See* 34 U.S.C. §§ 10157, 20927(a), 30307(e)(2), 60105(c)(2).

2. Petitioners argue that 34 U.S.C. § 10102(a)(6) authorizes them to impose each of the conditions challenged here. *See* Pet. 20-25, 29. That provision directs that the Assistant Attorney General for Office of Justice Programs (OJP) "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." Petitioners contend that the penultimate clause—"including placing special conditions on all grants"—empowers the Assistant Attorney General to impose any "additional conditions" he deems appropriate on any grants administered by OJP. Pet. 20.

But every court of appeals to address that argument has rejected it, including the Second Circuit decision embraced by petitioners.[7] As the courts have recognized, petitioners' interpretation would read the word "including" out of the statute. In "both lay and legal usage, 'include' generally signifies that what follows is a subset of what comes before." *City of Providence*, *v. Barr*, 954 F.3d 23, 40 (1st Cir. 2020). Here, what comes before the word "including" is an instruction that 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*[.]" 34 U.S.C. § 10102(a)(6) (emphasis added). In other words, the only "special conditions" that the Assistant

[7] *See* Pet. App. 10a-12a (citing *City of Los Angeles v. Barr*, 941 F.3d 931, 938-944 (9th Cir. 2019)); *City of Chicago*, 961 F.3d at 893-984; *City of Providence*, 954 F.3d at 39-45; *New York*, 951 F.3d at 101-102; *City of Philadelphia*, 916 F.3d at 287-288; *see also City of Chicago*, 961 F.3d at 933 (Manion, J., concurring).

Attorney General may impose are those "vested" in him by other provisions of chapter 101 of Title 34 or those delegated to him by the Attorney General. Petitioners do not identify any provision or delegation that would empower the Assistant Attorney General to impose the conditions at issue here. And their assertion that Section 10102(a)(6) grants him "independent authority" to impose conditions in response to any "issue that might arise" (Pet. 17) cannot be reconciled with the statutory text. *See, e.g.*, *City of Chicago v. Barr*, 961 F.3d 882, 893-894 (7th Cir. 2020); *City of Providence*, 954 F.3d at 40; *New York*, 951 F.3d at 101-102; *City of Philadelphia v. Att'y Gen. of the United States*, 916 F.3d 276, 287-288 (3d Cir. 2019).

Moreover, even if petitioners were correct that Section 10102(a)(6) grants the Assistant Attorney General some power beyond that vested in him by other provisions of law, petitioners' broad view of the scope of any such power would be foreclosed by the provision's history. At the time Congress adopted the "special conditions" clause, a regulation authorized federal grant-administering agencies to impose "[s]pecial conditions or restrictions" on "'high-risk'" grantees—*i.e.*, those that had a "history of unsatisfactory performance" or were "not financially stable." 28 C.F.R. § 66.12(a), (b) (2006). If the term "special conditions" in Section 10102(a)(6) were construed in light of that regulation, the special conditions clause could conceivably be read as authorizing the Assistant Attorney General to "impose tailored requirements when necessary, such as when a grantee is 'high risk.'" *City of Los Angeles v. Barr*, 941 F.3d 931, 941 (9th Cir.

2019) (Ikuta, J.).[8] Even under that view, however, Section 10102(a)(6) would not allow petitioners to impose conditions requiring state and local governments to help "enforce federal immigration laws." Pet. 22; *see also City of Los Angeles*, 941 F.3d at 944.[9]

Petitioners claim that OJP's "[s]ettled practice" of imposing "special conditions [on] all participants in a specific grant program" supports their interpretation. Pet. 23; *see also id.* at 3, 20 (listing conditions). But unlike the three conditions challenged here, many of the conditions petitioners previously imposed were actually authorized or required by other provisions of law. *See*, *e.g.*, 28 C.F.R. § 46.103 (protections for human research subjects). And even if some were not, an agency's practice has "scant value in determining the actual authority that the statute confers upon the agency." *City of Providence*, 954 F.3d at 45; *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 & n.5 (2001) (courts should not "replace the plain text and original understanding of a statute with an amended agency interpretation" absent "overwhelming evidence" that Congress acquiesced in that understanding).

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[8] *See also FAA v. Cooper*, 566 U.S. 284, 292 (2012) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.").

[9] The legislative history of the JAG program also undermines petitioners' broad understanding of their authority. It shows that Congress created the program to provide local governments with resources to develop "*local* solutions to their unique crime problems," H.R. Rep. No. 104-24, at 9 (1995) (emphasis added), and to give grant recipients "more flexibility to spend money *for programs that work for them* rather than to impose a 'one size fits all' solution" for policing, H.R. Rep. No. 109-233, at 89 (2005) (emphasis added).

3. Petitioners next argue that the notice and access conditions are authorized by 34 U.S.C. § 10153(a)(4) and (a)(5)(C). Pet. 25-28. Those arguments are also incorrect.

As relevant here, Section 10153(a)(4) requires JAG grantees to provide an "assurance" that they will "maintain and report such . . . information (programmatic and financial) as the Attorney General may reasonably require." Petitioners argue that this provision authorizes them to impose the notice condition. Pet. 25-27. But they do not contend that release-date information is "financial," and their assertion that it is "programmatic" cannot be reconciled with the ordinary understanding of that word or the context in which it is used here. The plain meaning of "programmatic" is "of, resembling, or having a program." *Programmatic*, Webster's New Int'l Dictionary (3d ed. 2002). Here, the JAG statute specifies eight "programs" on which JAG funds may be spent, including, for example, "[l]aw enforcement programs," "[p]revention and education programs," and "[d]rug treatment and enforcement programs." 34 U.S.C. § 10152(a)(1). Section 10153(a)(4) authorizes petitioners to require grant recipients to furnish information about the particular state and local "programs" identified in the statute—but none of those programs relates to immigration enforcement. *See City of Providence*, 954 F.3d at 32-33; *City of Los Angeles*, 941 F.3d at 944-945; *City of Philadelphia*, 916 F.3d at 285.

Section 10153(a)(5)(C) requires JAG grantees to certify that "there has been appropriate coordination with affected agencies," and petitioners argue that it authorizes both the notice and access conditions. Pet 27-28. But Congress's use of the past tense—"there has been"—demonstrates that the coordination at

issue must take place *before* an application is submitted.[10] And that temporal limitation makes "manifest that the required coordination concerns the preparation of an application," and therefore requires only coordination with those agencies that will be "affected by the programs for which the applicant seeks funding." *City of Providence*, 954 F.3d at 33-34. Section 10153(a)(5)(C) does not allow petitioners to require coordination on matters relating to any of the "far-flung law enforcement operations" that petitioners conduct. *Id.* at 34; *see also City of Los Angeles*, 941 F.3d at 945; *City of Philadelphia*, 916 F.3d at 285.

Petitioners embrace the Second Circuit's constructions of these provisions, *see* Pet. 26-28, but those interpretations are not persuasive. With respect to Section 10153(a)(4), the Second Circuit held that information about a non-citizen's release date is "programmatic," at least with respect to those "Byrne-funded programs that relate in any way to the criminal prosecution, incarceration, or release of persons, some of whom will inevitably be aliens subject to removal." *New York*, 951 F.3d at 117. With respect to Section 10153(a)(5)(C), it concluded that DHS was an "affected agency" because "[w]hen States use Byrne grants in ways related to the prosecution, incarceration or release of aliens, the DHS Secretary's performance of numerous statutory responsibilities with respect to such aliens is affected." *Id.* at 119. As discussed, however, both statutory provisions relate "unreservedly to the applicant, grant, and programs *to be funded*"—none of which have any "direct connection either to the removal of noncitizens or to [respondents']

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[10] *See generally Carr v. United States*, 560 U.S. 438, 448 (2010) (this Court "frequently look[s] to Congress' choice of verb tense to ascertain a statute's temporal reach").

relationships with federal immigration authorities." *City of Providence*, 954 F.3d at 34, 36 (emphasis added). The Second Circuit's contrary reading of the words "programmatic" and "affected agency" would empower petitioners to impose reporting and coordination conditions with respect to almost any state or local criminal justice initiative, nearly all of which relate in some way to the "criminal prosecution, incarceration, or release of persons." *New York*, 951 F.3d at 117; *see City of Providence*, 954 F.3d at 35-36.

4. Finally, petitioners contend that they may withhold JAG funds from respondents based on the certification condition because of purported noncompliance with 8 U.S.C. § 1373. Pet. 28-32.

Petitioners first argue (at 29-30) that they have statutory authority to impose the certification condition under 34 U.S.C. § 10153(a)(5)(D), which requires grant recipients to certify that they will "comply with all provisions of this part and all other applicable Federal laws." That argument is incorrect, as the First, Third, and Seventh Circuits have all recognized. *See City of Providence*, 954 F.3d at 36-39; *City of Philadelphia*, 916 F.3d at 288-291; *City of Chicago*, 961 F.3d at 898-909. But it is not squarely presented in this case: the court of appeals below did not address petitioners' interpretation of Section 10153(a)(5)(D), instead holding that even if Section 1373 were an "applicable Federal law," respondents comply with it. *See* Pet. App. 12a-18a.

That holding is correct. Section 1373 prohibits state and local governments from restricting the sharing of "information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). That phrase is most "naturally un-

derstood as a reference to a person's legal classification under federal law." *United States v. California*, 921 F.3d 865, 891 (9th Cir. 2019), *cert. denied*, 590 U.S. ___ (Jun. 15, 2020) (No. 19-532); *see also* Pet. App. 16a. California's laws do not prohibit the sharing of that kind of information; indeed, they expressly allow it. *See* Cal. Gov't Code § 7284.6(e). California only prohibits the sharing of some individuals' "release date[s]" or their "personal information," such as their "home address or work address." *Id.* § 7284.6(a)(1)(C), (D); *see also id.* §§ 7282.5(a)(1)-(5), (b), 7284.4(a), 7284.6(a)(1)(C), (D) (listing exceptions, including for individuals who have been convicted of serious or violent felonies).

Petitioners emphasize that Section 1373 applies to information "'*regarding* [an individual's] citizenship or immigration status." Pet. 31 (alterations in original). While words like "regarding" or "relating to" may "ha[ve] a broadening affect," *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018), this Court has consistently rejected construing them in a way that would take them to the "furthest stretch of [their] indeterminacy," *N.Y. State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Petitioners' expansive interpretation of the word "regarding" would have just that effect, extending Section 1373 to apply to broad swaths of personal information, ranging from vaccination history to financial resources. *See* 8 U.S.C. § 1182 (listing admissions criteria).[11]

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[11] Petitioners assert that California "accepted without objection a special condition requiring it to confirm its compliance with Section 1373" in 2016. Pet. 20. While OJP did ask California to validate its compliance with Section 1373 in connection with the

II. THIS COURT SHOULD TEMPORARILY DEFER ACTING ON THE PETITION

Petitioners are correct that this case implicates a lopsided circuit conflict over their statutory authority to impose the three grant conditions challenged here. Pet. 32; *see also* Pet. 13-19, *New York v. U.S. Dep't of Justice*, No. 20-795; Pet. 13-16, *City of New York v. U.S. Dep't of Justice*, No. 20-796. While a circuit conflict regarding the legality of a national policy might normally warrant plenary review by this Court, the circumstances here counsel against any immediate grant of certiorari. As the petitioners in the Second Circuit case have noted, the impending transition in federal administrations creates a distinct possibility that the Executive will change its policy and abandon some or all of the grant conditions at issue here. *See* Pet. 3, 19, *New York v. U.S. Dep't of Justice*, No. 20-795. Such a policy change could affect the appropriate scope of plenary review or eliminate the need for further review altogether. Under these circumstances, it would be appropriate for the Court to defer action on this petition (and the petitions in the Second Circuit case) until the incoming administration can apprise the Court of its plans. When the Court has that information it will be better positioned to decide whether plenary review is warranted and, if so, which petition presents the most suitable vehicle. *Cf.* Shapiro et al., *Supreme Court Practice* § 5.9, p. 5-31 (11th ed. 2019) (observing that the Court occasionally holds a petition

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2016 JAG grant funding, *see* C.A. E.R. 350, the State's response was consistent with its position here: that it complied with Section 1373 because its laws did not "in any way restrict the sharing of citizenship or immigration status information" with federal immigration officials, *id.* at 356-357.

"until some anticipated event occurs that may make the case moot").

At present, it appears that the petitions in the Second Circuit case may offer more suitable vehicles for resolving the circuit conflict than this petition. To be sure, the Ninth Circuit's decision directly implicates the conflict "over whether the notice and access conditions are authorized by statute." Pet. 33. *Compare New York*, 951 F.3d at 116-122 (2d Cir.), *with* Pet. App. 10a-12a; *City of Chicago*, 961 F.3d at 892-894 (7th Cir.); *City of Providence*, 954 F.3d at 32-36, 39-45 (1st Cir.); *City of Philadelphia*, 916 F.3d at 284-288 (3d Cir.). But it does not squarely implicate the "conflict[] . . . about the certification condition." Pet. 33. That conflict concerns whether 8 U.S.C. § 1373 qualifies as an "applicable Federal law[]" for purposes of 34 U.S.C. § 10153(a)(5)(D). *Compare New York*, 951 F.3d at 104-111 (2d Cir.), *with City of Chicago*, 961 F.3d at 898-909 (7th Cir.); *City of Providence*, 954 F.3d at 36-39 (1st Cir.); *City of Philadelphia*, 916 F.3d at 288-291 (3d Cir.). As noted above, the Ninth Circuit did not rule on that question; it instead held that even if Section 10153(a)(5)(D) authorizes the certification condition, respondents' laws comply with that condition and thus cannot be a basis for withholding funds. *See supra* pp. 14-15; Pet. App. 16a-18a.

The petitions arising from the Second Circuit's decision are thus the only ones that "cleanly present[] all of the issues on which the circuits are split." Pet. 34, *New York v. U.S. Dep't of Justice*, No. 20-795. With respect to the certification condition, the petition in this case principally challenges the Ninth Circuit's interpretation of Section 1373 and its application of that provision to the particular features of certain state and local laws. Pet. 30-32. But this Court

recently denied a petition filed by the United States that advanced very similar arguments. *See United States v. California*, *cert. denied*, 590 U.S. ___ (Jun. 15, 2020) (No. 19-532). And while the court of appeals' construction of Section 1373 may affect whether particular laws or policies are a proper basis for withholding JAG funds under the certification condition, *see* Pet. 34-35, it does not affect petitioners' authority to adopt that condition, and it does not implicate any "circuit conflict" or "fundamental disagreement" among the lower courts, *id.* at 32.

CONCLUSION

The Court should defer action on the petition until it can determine, in light of the position of the incoming administration, whether there remains any need for plenary review, and then either deny the petition or grant the most suitable vehicle based on the circumstances at that time.

Respectfully submitted,

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