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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
San Francisco City Attorney
JESSE C. SMITH
RONALD P. FLYNN
YVONNE R. MERÉ
SARA J. EISENBERG
AILEEN M. MCGRATH
Counsel of Record
Deputy City Attorneys
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Telephone: (415) 554-4691
Aileen.McGrath@sfcityatty.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, codified at 34 U.S.C. §§ 10151-10158, is the main source of federal criminal justice funding for state and local governments. Congress structured Byrne JAG as a formula grant, with each jurisdiction receiving a prescribed amount of funding on an annual basis. *Id.* § 10156(d).

In 2017, the Department of Justice (DOJ) announced it would begin withholding Byrne JAG funding from any jurisdiction that refused to adhere to three new immigration-related conditions. The "notice condition" requires grant recipients to comply with federal immigration authorities' requests for the scheduled release date and time of any person in local custody who is believed to be an alien. The "access condition" requires Byrne JAG grantees to allow federal immigration authorities access to local jails. And the "certification condition" requires Byrne JAG applicants to certify that they will comply with 8 U.S.C. § 1373, which limits state and local governments' ability to restrict their employees and officials from sharing immigration status information with federal authorities. The questions presented are:

1. Whether DOJ has the statutory authority to withhold Byrne JAG funding from grantees who do not comply with the notice and access conditions.

QUESTIONS PRESENTED—Continued

2. Whether DOJ may withhold Byrne JAG funding from respondent City and County of San Francisco pursuant to the certification condition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ... i

TABLE OF AUTHORITIES ... iv

INTRODUCTION ... 1

STATEMENT OF THE CASE ... 4

A. Background ... 4

B. Proceedings Below ... 9

REASONS WHY THE PETITION SHOULD BE DENIED ... 16

I. Certiorari Is Unnecessary at This Time ... 16

II. The Decision Below Is Correct ... 22

A. The Court of Appeals Correctly Held That 34 U.S.C. § 10102(a)(6) Does Not Authorize the Conditions ... 22

B. The Court of Appeals Correctly Held That the Byrne JAG Statute Does Not Authorize the Notice and Access Conditions ... 25

C. DOJ May Not Withhold Byrne JAG Funding from San Francisco On the Basis of 8 U.S.C. § 1373 ... 30

CONCLUSION ... 36

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 18

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006) 1

Azar v. Allina Health Servs.,
139 S. Ct. 1804 (2019) 26

Beecham v. United States,
511 U.S. 368 (1994) 28

Carr v. United States,
560 U.S. 438 (2010) 27

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 33

City & County of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018)......................................7

City of Arlington v. FCC,
569 U.S. 290 (2013) 1

City of Chicago v. Barr,
961 F.3d 824 (7th Cir. 2020)............................*passim*

City of Los Angeles v. Barr,
941 F.3d 931 (9th Cir. 2019)............................*passim*

City of Los Angeles v. McLaughlin,
865 F.2d 1084 (9th Cir. 1989)..............................5, 29

City of Philadelphia v. Attorney General,
916 F.3d 276 (3d Cir. 2019) ....*passim*

City of Providence v. Barr,
954 F.3d 23 (1st Cir. 2020) ....*passim*

TABLE OF AUTHORITIES—Continued

Page

Colorado v. U.S. Dep't of Justice,
455 F. Supp. 3d 1034 (D. Colo. 2020),
appeal docketed, No. 20-1256
(10th Cir. July 13, 2020)..19

County of Santa Clara v. Trump,
275 F. Supp. 3d 1196 (N.D. Cal. 2017)......................7

County of Santa Clara v. Trump,
250 F. Supp. 3d 497 (N.D. Cal. 2017)..................7, 17

FAA v. Cooper,
566 U.S. 284 (2012) 24

Lamar, Archer & Cofrin, LLP v. Appling,
138 S. Ct. 1752 (2018) 32

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 32

New York v. U.S. Dep't of Justice,
951 F.3d 84 (2d Cir. 2020), *petitions for cert. docketed*, Nos. 20-795, 20-796 (U.S. Dec. 10, 2020) 16, 19, 20, 21

Steinle v. City & County of San Francisco,
919 F.3d 1154 (9th Cir. 2019).................................20

Train v. City of New York,
420 U.S. 35 (1975) 29

United States v. California,
921 F.3d 865 (9th Cir. 2019),
cert. denied, 590 U.S. ___ (U.S. Jun. 15, 2020)
(No. 19-532) 14, 15, 20, 21

TABLE OF AUTHORITIES—Continued

Page

United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) 34

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 35

Yates v. United States, 574 U.S. 528 (2015) 34

STATUTES

8 U.S.C.
§ 1184(k)(3)(A) 31
§ 1231(a)(3)(C) 31
§ 1360(c)(2) 31
§ 1367(a)(2) 31
§ 1373 .... *passim*
§ 1373(a) 3, 8, 30, 31, 32
§ 1373(c) 31

20 U.S.C.
§ 1232f(a) 27

29 U.S.C.
§ 3245(c)(2) 27

34 U.S.C.
§ 10102(a) 23
§ 10102(a)(6) .... *passim*
§§ 10151-10158 i
§ 10151(b)(1) 4
§ 10152 26
§ 10152(a)(1)(A)-(H) 5
§ 10153 28

TABLE OF AUTHORITIES—Continued

Page

§ 10153(a) 6, 28
§ 10153(a)(4)..................................... 6, 13, 25, 26
§ 10153(a)(5)..6, 26
§ 10153(a)(5)(A)-(C)...34
§ 10153(a)(5)(C)............................ 13, 14, 25, 27, 28
§ 10153(a)(5)(D)..................................... 10, 33, 34
§ 10156(a) 35
§ 10156(a)(1)..5, 29
§ 10156(a)(1)(A)...5
§ 10156(a)(1)(B)...5
§ 10156(b) 5
§ 10156(d) i
§ 10157(a) 6
§ 10157(b) 5
§ 10157(b)(1)..29
§ 20305(a)(2)(B)..27
§ 20927(a) 6, 29
§ 60105(c)(2) 6, 29

42 U.S.C.
§ 300ff-14(h)(3)(A) 27

Illegal Immigration Reform and Immigrant
Responsibility Act of 1996,
Pub. L. No. 104-208 § 384,
110 Stat. 3009-546 31

Pub. L. No. 109-162,
§ 1111, 119 Stat. 2960 (2006)..................................4

TABLE OF AUTHORITIES—Continued

Page

LOCAL STATUTES AND CODES

San Francisco, California, Administrative Code
§ 12H.1 8
§ 12H.2 .... 9, 30
§ 12I.1 8
§ 12I.3 9

REGULATIONS

28 Code of Federal Regulations
§ 66.12 (2006) 12, 23, 25
§ 66.12(a) (2006) 24
§ 66.12(b) (2006) 24

OTHER REFERENCES

Exec. Order No. 13,768
82 Fed. Reg. 8799 (Jan. 25, 2017) 7, 17

Office of Justice Programs: Edward Byrne Memorial Justice Assistance Grant Program, https://www.bja.gov/program/jag/overview (last visited Jan. 11, 2021) 4

OJP Grant Process Overview, https://www.ojp.gov/funding/apply/ojp-grant-process (last visited Jan. 11, 2021) 4, 5

The Biden Plan for Securing Our Values as a Nation of Immigrants, https://joebiden.com/immigration/ (last visited Jan. 11, 2021) 16, 17

INTRODUCTION

When an executive agency administers a federal statute, the agency's power to act is "authoritatively prescribed" by Congress. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). This limitation has special importance when an agency is administering a federal funding statute. Congress alone controls the federal spending power, and Congress alone may "set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Applying these straightforward and established principles, the court of appeals in this case struck down two immigration-related conditions DOJ imposed on Byrne JAG formula-grant funding for the 2017 fiscal year. The court of appeals joined three of its sister circuits in holding that neither the Byrne JAG statute nor any other provision of federal law allows DOJ to impose these requirements. The court of appeals also considered a third condition requiring Byrne JAG grantees to certify their compliance with 8 U.S.C. § 1373, which addresses information sharing between federal immigration authorities and state and local officials. The court of appeals held that respondent San Francisco complies with § 1373, so DOJ may not withhold Byrne JAG funding from the City under the certification condition.

In seeking review, petitioners argue that the court of appeals' decision is incorrect because congressional authorization for the conditions can be found in

various statutory provisions. Petitioners also point to a lopsided split in the circuits regarding the conditions' validity: While four of the five courts of appeals to have addressed these conditions have held them invalid, the Second Circuit alone has upheld the conditions.

Despite this split, the Court's intervention is unwarranted at this time. The challenged conditions are part of the outgoing presidential administration's immigration agenda. The incoming presidential administration may reconsider enforcing these conditions or defending their legality. The new administration's position will affect whether this Court's intervention is necessary or appropriate. Granting certiorari now, before hearing from the incoming administration, is premature.

Review is unwarranted for other reasons, as well. The decision below correctly rejected petitioners' attempts to identify a source of statutory authority for the challenged conditions. The court of appeals held that statutory requirements that Byrne JAG grantees disclose "programmatic and financial" information and demonstrate "appropriate coordination" with affected stakeholders do not authorize the challenged conditions. Pet. App. 11a. Those Byrne JAG provisions concern information and conduct related to grant administration and do not authorize DOJ to impose substantive conditions of its choice. The court of appeals also rejected the argument that a provision outside the Byrne JAG statute, 34 U.S.C. § 10102(a)(6), empowers DOJ to enact the immigration-related conditions at issue here. Pet. App. 10a-11a. While that

provision allows DOJ to attach "special conditions" to certain Byrne JAG grants, the conditions here are not "special conditions" as that phrase is used in § 10102(a)(6). Finally, the court of appeals held that 8 U.S.C. § 1373(a) only applies to information "strictly pertaining to immigration status" and does not apply to other categories of information like a person's release date or home address. Pet. App. 14a. Because San Francisco does not restrict its employees from sharing information "strictly pertaining to immigration status" with federal authorities, the City complies with § 1373. Pet. App. 17a-18a.

Although the court of appeals' decision implicates a conflict in the circuits, the conflict is narrower than petitioners describe. All courts to have considered the challenged conditions have rejected the argument that § 10102(a)(6) authorizes them. Thus, there is no conflict on petitioners' primary justification for these conditions. *See* Pet. 17-18. Further, there is no conflict among the circuits on the meaning and scope of § 1373, and thus no reason for the Court to decide whether San Francisco complies with that provision.

The best course is for the Court to deny or defer review in this case—and in the Second Circuit case regarding the same conditions (Nos. 20-795, 20-796)—to allow the incoming administration time to evaluate these conditions. As petitioners acknowledge (Pet. 34), the same questions will be presented in at least one other case currently pending in the court of appeals. Because that case is likely to be a suitable vehicle, the Court can deny these petitions and take up the

questions presented, if necessary, at a future time. Alternatively, the Court should hold these petitions until the incoming presidential administration has reviewed the conditions and expressed its view to the Court.

STATEMENT OF THE CASE

A. Background

1. The Byrne JAG program is the primary source of federal criminal justice funding for state and local governments. The program has existed in its current form since 2006, when Congress merged two long-standing criminal justice assistance grant programs to create Byrne JAG. *See* Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006); *see also* 34 U.S.C. § 10151(b)(1). The program is designed to provide state and local governments with "critical funding necessary" to support a wide range of criminal justice initiatives. Office of Justice Programs: Edward Byrne Memorial Justice Assistance Grant Program.[1]

Byrne JAG is structured and administered as a formula grant. In a formula grant program, Congress appropriates a set amount of funding and specifies "how the funds will be allocated among the eligible recipients, as well as the method by which an applicant must demonstrate its eligibility for that funding." OJP

[1] *Available at* https://www.bja.gov/program/jag/overview (last visited Jan. 11, 2021).

Grant Process Overview;[2] *see also City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) (formula grants "are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula").

The Byrne JAG statute directs the Attorney General to allocate grant funding based on a prescribed formula. 34 U.S.C. § 10156(a)(1). The Byrne JAG formula awards fifty percent of allocated funds to states based on their populations relative to the population of the United States, *id.* § 10156(a)(1)(A), and the other fifty percent to states based on relative rates of violent crime, *id.* § 10156(a)(1)(B). Once funding is allocated to a state under this formula, forty percent of the total is distributed to local governments within the state, while the state itself retains sixty percent of the funding. *Id.* § 10156(b). Grant recipients may use grant funding to support programs in one of eight broad areas, such as law enforcement and prosecution or crime prevention and education. *Id.* § 10152(a)(1)(A)-(H).

Congress permits the Attorney General to depart from this formula in limited circumstances. For instance, the Attorney General may reserve up to five percent of Congress's total appropriation to address a significant increase in crime or "significant programmatic harm resulting from operation of the formula." *Id.* § 10157(b). The Attorney General can also withhold prescribed amounts to support local governments'

---

[2] *Available at* https://www.ojp.gov/funding/apply/ojp-grant-process (last visited Jan. 11, 2021).

technology initiatives or antiterrorism training programs. *Id.* § 10157(a). In addition, a number of other federal statutes provide grounds for withholding a specified percentage of Byrne JAG funding. For instance, the Attorney General may reduce a Byrne JAG award by ten percent if a state fails to comply with federal reporting requirements for in-custody deaths. *Id.* § 60105(c)(2). The Attorney General is directed to make a similar reduction when a recipient state fails to "substantially implement" the Sex Offender Registration and Notification Act. *Id.* § 20927(a).

The Byrne JAG statute sets out the process applicants must follow to receive Byrne JAG funds. The Attorney General has the discretion to dictate the "form" of the application. *Id.* § 10153(a). But the substantive requirements are set forth by the Byrne JAG statute, which describes the certifications and assurances applicants must make. Most pertinent here, the applicant must verify that it will maintain and report such "data, records, and information (programmatic and financial) as the Attorney General may reasonably require." *Id.* § 10153(a)(4). The applicant must also execute a certification "made in a form acceptable to the Attorney General" that the program to be funded complies with statutory requirements, the application's information is correct, "there has been appropriate coordination with affected agencies," and the applicant "will comply with all provisions of this part and all other applicable Federal laws." *Id.* § 10153(a)(5).

San Francisco has received Byrne JAG funding every year since the program began. The City uses that

funding to support a number of public safety and criminal justice initiatives. *See* 18-17308 C.A. S.E.R. 145-147. For instance, San Francisco uses Byrne JAG funds to provide a dedicated court for young adult offenders. *Id.* at 145-146. Byrne JAG funds also support various City programs that aim to reduce the drug trade, eliminate recidivism, and connect individuals with substance and mental health problems with appropriate services. *Id.* at 146-147.

2. In 2017, DOJ announced that Byrne JAG applicants would be required to comply with several new immigration-related conditions. C.A. E.R. 256-257. The announcement came on the heels of other executive-branch attempts to withhold Byrne JAG funding from so-called "sanctuary" jurisdictions, which have laws limiting their employees' authority to assist in the enforcement of federal immigration laws. Pet. App. 2a-3a. In January 2017, the President issued an executive order that directed the Attorney General and Secretary of Homeland Security to withdraw all federal funding from these jurisdictions. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). That executive order was temporarily enjoined in April 2017, *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017), and later struck down permanently, *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1218 (N.D. Cal. 2017), *aff'd in relevant part by City & County of San Francisco v. Trump*, 897 F.3d 1225, 1243 (9th Cir. 2018). In the wake of that injunction, DOJ took a more specific approach by announcing the conditions at issue here.

The first condition—the "access condition"—requires state and local governments to adopt a law or policy permitting "personnel of the U.S. Department of Homeland Security ('DHS') to access any correctional or detention facility in order to meet with an alien (or individual believed to be an alien) and inquire as to his or her right" to be present in the United States. Pet. App. 6a; C.A. E.R. 437.

The second condition—the "notice condition"—requires state and local jurisdictions to adopt a law or policy "to provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody, when DHS requests such notice." C.A. E.R. 257; *see also* Pet. App. 6a.

The final condition—the "certification condition"—requires recipients to certify compliance with 8 U.S.C. § 1373, which prohibits state and local governments from restricting their employees and officials from sharing "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with DHS. Pet. App. 6a, 13a; *see also* 8 U.S.C. § 1373(a).

San Francisco could not adopt the notice or access conditions because those conditions conflict with the City's own laws and policies. Local law prohibits City employees from using City funds or resources—including work time—to assist federal officials in enforcing immigration laws, except where required by law. S.F., Cal., Admin. Code §§ 12H.1, 12I.1. City law also generally prohibits employees from informing federal officials about when people detained in San Francisco jails

will be released. *Id.* §§ 12H.2, 12I.3. Local policies further restrict sheriff's department employees from providing immigration officials with access to inmates in jail or informing them about release dates and times for inmates. *See* 18-17308 C.A. S.E.R. 220-228.

B. Proceedings Below

1. Respondents San Francisco and the State of California filed lawsuits challenging the three conditions. Pet. App. 38a. Respondents argued that Congress did not authorize DOJ to impose the challenged conditions on Byrne JAG grants, so the conditions are ultra vires and violate constitutional separation of powers, the Spending Clause, and the Administrative Procedure Act. *See* 17-cv-4642 Am. Compl. (D.Ct. Doc. 61 (Dec. 12, 2017)); 17-cv-4701 Am. Compl. (D.Ct. Doc. 11 (Oct. 13, 2017)). As to the certification condition, respondents argued that 8 U.S.C. § 1373 is unconstitutional because it violates the Tenth Amendment. 17-cv-4701 Am. Compl. ¶¶ 149-153. In the alternative, respondents argued that they satisfy the certification condition because they comply with § 1373. *Id.*; *see also* 17-cv-4642 Am. Compl. ¶¶ 157-165. The cases were assigned to the same district court judge, who decided them together. Pet. App. 38a.

The parties cross-moved for summary judgment. Pet. App. 42a. The district court granted summary judgment in respondents' favor on all causes of action and permanently enjoined the Attorney General from enforcing the conditions. Pet. App. 112a-113a.

The district court held that the Attorney General lacks the authority to impose the notice and access conditions. Pet. App. 53a-56a. The district court rejected DOJ's argument that the conditions are authorized by 34 U.S.C. § 10102(a)(6)'s language permitting the Assistant Attorney General for the Office of Justice Programs (OJP) to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to [Chapter 101] or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." Pet. App. 54a. The district court held that the provision refers to powers vested elsewhere and does not confer independent authority on the Attorney General to attach conditions to Byrne JAG grants. *Id.* The district court did not consider whether other portions of the Byrne JAG statute authorized the notice and access conditions because DOJ did not identify any such provisions. *See generally* 17-cv-4642 Defs.' Mot. for Summ. J. (D.Ct. Doc. 114 (Aug. 1, 2018)); 17-cv-4701 Defs.' Mot. for Summ. J. (D.Ct. Doc. 124 (July 31, 2018)).

As to the certification condition, the district court held that 34 U.S.C. § 10153(a)(5)(D)'s requirement that grantees comply with "applicable Federal laws" did not authorize it. Pet. App. 68a. The district court held that § 1373 is not "applicable" because it violates the Tenth Amendment's anti-commandeering principle. Pet. App. 63a-64a. In the alternative, the district court held that § 10153(a)(5)(D) does not allow DOJ to require grantees to comply with federal laws of DOJ's choosing. Pet.

App. 70a. The district court interpreted the statute's reference to "all other applicable Federal laws" to encompass only federal laws "about the grant-making process," which § 1373 is not. Pet. App. 69a-70a.

The district court also issued a declaratory judgment that San Francisco's laws and policies comply with § 1373. The district court held that § 1373's requirements apply to "information strictly pertaining to immigration status (i.e. what one's immigration status is)." Pet. App. 98a. The district court determined that San Francisco's laws and policies do not restrict the sharing of this information and thus comply with § 1373. Pet. App. 100a.

Finally, the district court issued an injunction prohibiting DOJ from enforcing the challenged conditions against any Byrne JAG recipient. Pet. App. 110a. The district court stayed the nationwide aspect of the injunction pending the court of appeals' resolution of the case. *Id.*

2. A unanimous panel affirmed the district court's judgment striking down the conditions, but vacated the nationwide scope of the injunction. Pet. App. 1a-23a. The court of appeals noted that "recent precedential opinions" in other cases within the circuit "have done the heavy lifting with regard to the merits of the relief granted by the district court." Pet. App. 3a.

a. As to the notice and access conditions, the court of appeals followed its decision in *City of Los Angeles v. Barr*, 941 F.3d 931, 945 (9th Cir. 2019), which had upheld a preliminary injunction against

DOJ's enforcement of the two conditions. The court of appeals concluded that *Los Angeles* foreclosed the two arguments that DOJ offered in defense of the notice and access conditions.

First, the court of appeals followed *Los Angeles* in holding that 34 U.S.C. § 10102(a)(6) does not authorize the notice and access conditions. Pet. App. 11a. As the court noted, the *Los Angeles* panel concluded that § 10102(a)(6) gives DOJ "independent authority" to impose special conditions on formula grants. *Id.* But the court of appeals rejected DOJ's argument that the notice and access conditions are "special conditions" within the statute's meaning. *Id.* The *Los Angeles* panel had determined that Congress intended to adopt the contemporaneous understanding of "special conditions" reflected in the "regulatory backdrop" in place at the time. 941 F.3d at 940. When Congress enacted the "special conditions" language, a regulation setting out "administrative requirements for grants and cooperative agreements to State and local governments" stated that "special conditions" related to "'high-risk grantees.'" *Id.* at 940-941 (citing 28 C.F.R. § 66.12 (2006)). The regulation provided that "special conditions" could include additional requirements tailored to particular grants, such as changes to grant funding distribution and requirements for additional reporting and project monitoring. *Id.* at 941. The court concluded that "special conditions" in § 10102(a)(6) has the same narrow meaning and refers only "to the power to impose tailored requirements when necessary, such as when a grantee is 'high-risk.'" *Id.* Because the notice

and access conditions do not satisfy this definition, § 10102(a)(6) does not authorize them. Pet. App. 11a; *see also Los Angeles*, 941 F.3d at 942. This holding reflected the court of appeals' "agree[ment] with our sister circuits that § 10102(a)(6) does not give the Assistant [Attorney General] broad authority to impose any condition it chooses on a Byrne JAG award." *Los Angeles*, 941 F.3d at 942.

Second, the court of appeals held that *Los Angeles* foreclosed DOJ's argument that the notice and access conditions are authorized by the Byrne JAG provisions requiring applicants to certify that "there has been appropriate coordination" between the applicant and "affected agencies," 34 U.S.C. § 10153(a)(5)(C), and to assure that they will maintain such "programmatic and financial" information "as the Attorney General may reasonably require," *id.* § 10153(a)(4).[3] Pet. App. 11a. In *Los Angeles*, the court of appeals had "disagree[d]" with this assertion. 941 F.3d at 944. The court had instead concluded that § 10153(a)(4)'s reference to "programmatic" information refers solely to "a program or programs supported by Byrne JAG funding . . . such as a particular law enforcement program," and does not include the information DOJ seeks in the

[3] The court of appeals considered this argument even though petitioners raised it for the first time on appeal. *See* p. 10, *supra*. Before the district court, petitioners had argued that only § 10102(a)(6) authorized the conditions. *See* 17-cv-4642 Defs.' Mot. for Summ. J. 9-14; 17-cv-4701 Defs.' Mot. for Summ. J. 11-15. On appeal, petitioners identified 34 U.S.C. §§ 10153(a)(4) and (5)(C) as newfound sources of authority for the conditions. U.S. Gov't C.A. Br. 22-24.

notice condition. *Id.* Similarly, the court construed the "coordination" certification in § 10153(a)(5)(C) to refer to coordination regarding "the program to be funded by the Byrne JAG award." *Id.* at 945. The court also held that the "coordination" certification refers to coordination that has already occurred. *Id.* It does not "impose an ongoing obligation on the applicant to coordinate with DHS agents throughout the life of the grant, as required under the access condition." *Id.*

The court of appeals observed that the circuits had diverged regarding the notice and access conditions' validity. Pet. App. 12a. But the court noted that "only the Second Circuit has held that the Access and Notice Conditions were imposed pursuant to appropriate authority," while "[t]he First, Third, and Seventh Circuits have held to the contrary." *Id.* at 12a, n.3.

b. The court of appeals also affirmed the district court's holding that DOJ may not enforce the certification condition against San Francisco. Pet. App. 12a. The court of appeals agreed with the district court that San Francisco's laws comply with 8 U.S.C. § 1373, so "DOJ cannot withhold Byrne funds pursuant to the Certification Condition" for noncompliance with that provision. *Id.*

In so holding, the court of appeals again relied on recent circuit authority. The court explained that it had interpreted § 1373 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). In that decision, the court of appeals had held that § 1373 applies to state and

local laws and policies governing information " 'strictly pertaining to immigration status (i.e. what one's immigration status is).' " Pet. App. 14a-16a (quoting *California*, 921 F.3d at 891). The court had rejected DOJ's argument that § 1373's language "referring to 'information regarding . . . citizenship or immigration status' " embraces all information bearing on whether a person may be subject to detention or removal, such as a person's release date from state or local custody. Pet. App. 14a. The court of appeals held that San Francisco's laws comply with § 1373 because they do not prohibit the sharing of information relating to "what one's immigration status is." Pet. App. 15a-17a.

The court of appeals thus held that DOJ could not enforce the certification condition against San Francisco because San Francisco complies with the condition's requirements. Pet. App. 12a. The court found it unnecessary to consider the various reasons the district court had found the condition unlawful. *Id.*

c. Finally, the court of appeals vacated the nationwide injunction. Pet. App. 18a. But it upheld the injunction to the extent it "barr[ed] DOJ from enforcing the Challenged Conditions within California's geographical limitations." Pet. App. 21a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Certiorari Is Unnecessary at This Time.

As petitioners point out, a lopsided split regarding the validity of the challenged conditions has developed in the circuits. *See* Pet. 33-35. Four of the five circuits to have considered the conditions have found that DOJ lacks the statutory authority to impose them. *See* Pet. App. 2a-23a; *see also City of Providence v. Barr*, 954 F.3d 23, 32-36, 39-45 (1st Cir. 2020); *City of Philadelphia v. Attorney General*, 916 F.3d 276, 284-288 (3d Cir. 2019); *City of Chicago v. Barr*, 961 F.3d 882, 892-894 (7th Cir. 2020). The Second Circuit alone has upheld the conditions. *New York v. U.S. Dep't of Justice*, 951 F.3d 84, 116-122 (2d Cir. 2020), *petitions for cert. docketed*, Nos. 20-795, 20-796 (U.S. Dec. 10, 2020).

But despite this unbalanced split, certiorari is not warranted now. Certiorari is premature at this time, on the cusp of a new presidential administration that may choose not to enforce or defend the conditions. And there is no urgent need for review, regardless, because the split is narrower than petitioners describe.

1. Certiorari is not warranted now, before the incoming presidential administration has the opportunity to evaluate the conditions and inform the Court of its litigating position.

The incoming administration has made clear that it intends to swiftly undo the outgoing administration's immigration-related policies. *See The Biden Plan*

for Securing Our Values as a Nation of Immigrants.[4] The challenged conditions are one component of those policies. The outgoing administration imposed the conditions as part of its efforts to withhold federal funding from "sanctuary" jurisdictions. *See* p. 7, *supra*. The administration initially attempted to withhold all federal funding from these jurisdictions. Exec. Order No. 13,768, 82 Fed. Reg. 8799, §§ 2(c), 9(a) (Jan. 25, 2017). After a district court enjoined enforcement of the broad funding ban, *County of Santa Clara*, 250 F. Supp. 3d at 508, DOJ pursued a targeted approach by placing immigration-related conditions on Byrne JAG funds. C.A. E.R. 228-268. Because these conditions are part of the outgoing administration's immigration-related policies, it is likely the incoming administration will scrutinize them closely.

This close scrutiny is especially likely because substantive requirements like the challenged conditions were previously unknown in the Byrne JAG program. Petitioners imply that DOJ has imposed substantive conditions on Byrne JAG grants since the program's inception. Pet. 3. But the conditions DOJ has previously imposed were either mandated by statute or connected to the grant itself. *Chicago*, 961 F.3d at 901-902; *see also Philadelphia*, 916 F.3d at 290 ("The Attorney General has not pointed to any historical precedent for the kind of unconditional requirement it now seeks to impose."); *see also* C.A. E.R. 399-416. Because the challenged conditions are novel to Byrne

[4] *Available at* https://joebiden.com/immigration/ (last visited Jan. 11, 2021).

JAG, it is all the more probable that the incoming presidential administration will reexamine them.

The incoming administration's position will impact whether the questions presented in this petition are suitable for review. The administration could determine that it will no longer enforce the challenged conditions against Byrne JAG grants, including the fiscal year 2017 grants at issue here. In that instance, the petition would no longer present a live controversy. *See*, *e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). The administration could instead decide that it will no longer impose these or similar conditions on Byrne JAG grants. In that circumstance, the petition would no longer raise an "important and recurring question" (Pet. 16), and the need for this Court's intervention would diminish. The administration could also re-evaluate its litigating position by raising new or different arguments from those in the petition.

In all events, giving the incoming administration the opportunity to form its position and express it to the Court will bear on whether certiorari is appropriate. The best course is for the Court to deny this petition, as well as the petitions arising out of the Second Circuit decision (Nos. 20-795, 20-796). Denying review will allow sufficient time for the incoming administration to assess the conditions and determine its litigating position. If the questions presented here remain important, they can be raised in a petition for certiorari seeking review of the Tenth Circuit's decision in a pending appeal addressing the same challenged

conditions. *Colorado v. U.S. Dep't of Justice*, 455 F. Supp. 3d 1034 (D. Colo. 2020), *appeal docketed*, No. 20-1256 (10th Cir. July 13, 2020).

In the alternative, the Court should hold the petitions until the incoming administration has informed the Court of its view on the questions presented. This view will bear on whether certiorari is warranted and, if so, which of the petitions presents an appropriate vehicle for review.

2. Denying or deferring review is especially appropriate because there is no pressing need for this Court's intervention. Although this petition implicates a circuit split, that split is narrower and less consequential than petitioners describe.

a. As to the first question presented—regarding the validity of the notice and access conditions—every court of appeals has rejected petitioners' main argument, which is that 34 U.S.C. § 10102(a)(6) authorizes these conditions. Pet. 17. Petitioners describe § 10102(a)(6) as providing the "shortest and simplest path" to upholding the conditions. *Id.* But every circuit has disagreed. *See* Pet. App. 11a; *see also Providence*, 954 F.3d at 41-43; *New York*, 951 F.3d at 101-102; *Philadelphia*, 916 F.3d at 287-288; *Chicago*, 961 F.3d at 894. Although those courts have taken different paths in reaching that result (Pet. 33), that difference in analysis does not warrant this Court's review.

Because there is no split about DOJ's authority under § 10102(a)(6), the court of appeals' decision does not threaten to "curtail" OJP's authority as it relates

to other grant programs (Pet. 16), or raise broader questions about the "obligations of state and local governments that seek and accept federal law-enforcement assistance." Pet. 32. The courts agree that § 10102(a)(6) does not allow DOJ to impose broadly applicable conditions on federal formula grants. The courts have only diverged as to whether the Byrne JAG statute, in particular, authorizes DOJ to impose the challenged conditions. *See New York*, 951 F.3d at 116-123. That conflict does not affect DOJ's authority as to other grant programs, or threaten to "destabilize" other formula grants. Pet. for Cert., *New York v. U.S. Dep't of Justice*, No. 20-795, p. 13 (docketed Dec. 10, 2020).

b. There is no conflict at all regarding the second question presented, which asks whether DOJ may withhold Byrne JAG funding from San Francisco for noncompliance with 8 U.S.C. § 1373. The court of appeals held DOJ may not do so because San Francisco complies with that provision. Pet. App. 12a-18a. The court based its ruling on its recent decision in *California*, which had interpreted § 1373 to concern "information strictly pertaining to immigration status." Pet. App. 15a. This decision does not implicate a conflict among the circuits.

There is no disagreement in the courts about § 1373's meaning. Rather, every court has interpreted it the same way as the court of appeals here. Pet. App. 16a; *see also California*, 921 F.3d at 891-892; *Steinle v. City & County of San Francisco*, 919 F.3d 1154, 1163-1164 (9th Cir. 2019). Those courts have rejected

petitioners' argument (Pet. 31-32) that § 1373 applies not only to "information strictly pertaining to immigration status" but also to various other information, such as a person's release date or home address. *See* Pet. App. 15a-17a; *California*, 921 F.3d at 891-892. No court has interpreted § 1373 differently—not even the Second Circuit, which upheld the certification condition but did not consider whether the plaintiffs comply with § 1373. *New York*, 951 F.3d at 100-124.

Further, this Court recently denied review in *California*, where the petitioners raised similar questions about the meaning of § 1373. *See United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 590 U.S. ___ (U.S. Jun. 15, 2020); *see also* Pet. for Cert., *United States v. California*, No. 19-532, pp. 21-24 (docketed Oct. 22, 2019). There is no reason for a different result here.

Petitioners also refer to the conflict regarding whether DOJ has statutory authority to impose the certification condition. Pet. 29-31. Several courts of appeals have held that DOJ lacks this authority. *Providence*, 954 F.3d at 39-40; *Philadelphia*, 916 F.3d at 289-291; *Chicago*, 961 F.3d at 889-909. The Second Circuit reached a contrary conclusion. *New York*, 951 F.3d at 100-124.

But any conflict regarding DOJ's authority to impose the certification condition is not a basis for review. This case does not implicate the conflict, or squarely present the question whether DOJ has statutory authority to require grantees to comply with § 1373.

Because San Francisco complies with the certification condition, the court of appeals expressly found it "unnecessary" to decide whether DOJ has the statutory authority to enact the condition in the first place. Pet. App. 12a. Even if the Court is inclined to address this split, this case is a poor vehicle for doing so.

II. The Decision Below Is Correct.

The bulk of the petition (Pet. 16-32) argues that the court of appeals erred in holding that DOJ lacks the statutory authority to impose the notice and access conditions and that San Francisco complies with the certification condition. Petitioners are incorrect. The court of appeals correctly rejected the various sources of statutory authority that DOJ claimed authorize the notice and access conditions. The court of appeals also correctly construed 8 U.S.C. § 1373 in holding that San Francisco's laws and policies comply with that statute. Petitioners' extended merits discussion does not identify a reason for review.

A. The Court of Appeals Correctly Held That 34 U.S.C. § 10102(a)(6) Does Not Authorize the Conditions.

Petitioners' merits arguments about 34 U.S.C. § 10102(a)(6) do not warrant the Court's review.

Petitioners primarily justify the conditions as an exercise of power they claim is bestowed by § 10102(a)(6). Pet. 23-25. This provision appears in a

statutory section outside the Byrne JAG statute describing the general powers that the Assistant Attorney General overseeing OJP may exercise. 34 U.S.C. § 10102(a). Last in the list of functions the Assistant Attorney General may perform, § 10102(a)(6) provides that the Assistant Attorney General will "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."

The court of appeals correctly rejected this argument, as every other court to address it has done. *See* p. 19, *supra*. While acknowledging that the provision grants the Assistant Attorney General some independent authority, the court of appeals rejected the capacious definition of "special conditions" that petitioners advance. Pet. App. 11a. Instead, the court concluded that "special conditions" has a narrower meaning, and refers to particular grant conditions that differ from those at issue here. *Los Angeles*, 941 F.3d at 940-943.

Although the term "special conditions" is undefined in § 10102(a)(6), the court of appeals construed that term by reference to the "regulatory backdrop" in place at the time. *Id.* at 940-941. That backdrop included a regulation setting forth the "administrative requirements for grants and cooperative agreements to State and local governments," which gave meaning to the phrase "special conditions." 28 C.F.R. § 66.12 (2006). That regulation stated that "[s]pecial grant or subgrant conditions" could be imposed on " 'high-risk'

grantees," such as grantees who had a history of poor grant performance, had violated the terms of a previous grant award, or were "otherwise not responsible" in administering the grant. *Id.* § 66.12(a). Those "special conditions" could include "additional project monitoring," further reporting, sequenced disbursal of the grant, or other tailored requirements. *Id.* § 66.12(b). The court of appeals concluded that "special conditions" has the same meaning in § 10102(a)(6), and embraces "individualized requirements included in a specific grant" rather than generally applicable substantive requirements like the challenged conditions. *Los Angeles*, 941 F.3d at 941. The court of appeals found this definition consistent with the dictionary meaning of "special," which concerns actions taken "to meet a particular need." *Id.* at 940 (internal quotation marks omitted).

None of petitioners' claims of error (Pet. 23-25) has merit, or otherwise suggests that certiorari is warranted. Petitioners principally contend that the court of appeals should not have defined "special conditions" by reference to existing regulations. Pet. 24-25. But the court of appeals applied the straightforward proposition that "when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (internal quotation marks omitted); *see also Los Angeles*, 941 F.3d at 941. Petitioners do not point to any source of authority for a broader or different construction of the term. Pet. 23-25. "In the absence of some indication to the contrary," the court

of appeals correctly held that "special conditions" has the meaning set forth in contemporaneous regulations. *Providence*, 954 F.3d at 43-44.

Alternatively, petitioners argue that program-wide conditions can still "meet a particular need," as petitioners claim the challenged conditions do with respect to the "need for basic cooperation between state and local law enforcement." Pet. 24. But that interpretation is contrary to the regulatory background, which reflects a concern with individual "high-risk grantees." 28 C.F.R. § 66.12 (2006). For this reason, the court of appeals interpreted "special conditions" with reference to the "particular need[s]" of individualized grantees, *Los Angeles*, 941 F.3d at 940, not to the unbounded needs of the granting agency.

B. The Court of Appeals Correctly Held That the Byrne JAG Statute Does Not Authorize the Notice and Access Conditions.

Petitioners also err in arguing that the Byrne JAG statute authorizes the notice and access conditions. Petitioners claim (Pet. 25-26) that the notice condition is authorized by 34 U.S.C. § 10153(a)(4), which requires that applicants "report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." Petitioners also argue (Pet. 27-28) that § 10153(a)(5)(C)'s requirement that applicants certify that "there has been appropriate coordination with affected agencies" authorizes

both the notice and access conditions. The court of appeals properly rejected both arguments.

1. The court of appeals correctly held that references to "programmatic" information and "coordination" in the Byrne JAG statute do not authorize the notice and access conditions. Pet. App. 11a. Petitioners' proposed reading of these terms "stretch[es] the statutory language beyond hope of recognition." *Providence*, 954 F.3d at 32.

a. As to § 10153(a)(4)'s reference to "programmatic" assurances, the court of appeals properly concluded that this term refers to the program administered with Byrne JAG funding. Pet. App. 11a. The word "program" is used in this way throughout the Byrne JAG statute. *See Los Angeles*, 941 F.3d at 944. For instance, § 10152 describes the various types of "programs" that Byrne JAG funding may support. And elsewhere in § 10153 itself, Congress used "programs" to refer to "the programs to be funded by the grant." 34 U.S.C. § 10153(a)(5). Petitioners offer no reason why "program" would have a different and broader meaning in § 10153(a)(4) that includes activities "that relate in any way" to the eight listed Byrne JAG program categories, regardless whether those activities are funded with Byrne JAG dollars. Pet. 26.

Petitioners' argument also fails because courts must "not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Congress commonly uses

the term "programmatic" to describe a grant program and the activities it funds. *Providence*, 954 F.3d at 32-33 (citing 20 U.S.C. § 1232f(a); 29 U.S.C. § 3245(c)(2); 34 U.S.C. § 20305(a)(2)(B); 42 U.S.C. § 300ff-14(h)(3)(A)). To read "programmatic" to include any programs touching on law enforcement and criminal justice, and to require disclosure of any information collected in those programs that DOJ may seek, contravenes this principle.

b. Petitioners' argument that 34 U.S.C. § 10153(a)(5)(C) authorizes the notice and access conditions fares no better. Pet. 27-28. Petitioners argue that the requirement that Byrne JAG applicants certify "there has been appropriate coordination with affected agencies" authorizes DOJ to direct Byrne JAG recipients to comply with DHS requests for release dates of incarcerated persons and for access to local jails. Pet. 27.

As the court of appeals held, petitioners misread the statutory text, which requires certification that there "*has been* appropriate coordination." 34 U.S.C. § 10153(a)(5)(C) (emphasis added). The court of appeals respected Congress's use of the past tense in this provision. *Los Angeles*, 941 F.3d at 945; *see also Carr v. United States*, 560 U.S. 438, 448 (2010) (courts must "look[ ] to Congress' choice of verb tense to ascertain a statute's temporal reach"). That use of the past tense establishes "that the coordination to which the statute alludes must take place *before* a state or local government submits its application." *Providence*, 954 F.3d at 33-34; *see also Philadelphia*, 916 F.3d at 285. The

coordination requirement does not allow DOJ to demand that grantees coordinate with DHS throughout the duration of the grant.

Further, petitioners' interpretation of § 10153(a)(5)(C) (Pet. 27) would expand the scope of "coordination" far beyond what Congress intended. The provision is part of the statutory section containing various "application" requirements. 34 U.S.C. § 10153. And the "coordination" requirement is part of a list of certifications grant applicants must make *in the application*. *Id.* § 10153(a). "Coordination" must be construed with reference to the purpose of this statutory subsection, and in light of the certification's placement amidst a list of other straightforward application requirements. *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). This context and structure suggest the provision "require[s] certification that there *was* appropriate coordination *in connection with the grantee's application*." *Philadelphia*, 916 F.3d at 285 (second emphasis added). It does not impose a far-reaching requirement relating to " 'DHS's performance of its own statutory duties.' " Pet. 27 (quoting *New York*, 951 F.3d at 120).

2. Petitioners' reading of the Byrne JAG statute is also implausible in light of the grant program's formula structure. *Chicago*, 961 F.3d at 903; *Providence*, 954 F.3d at 34, 38-39; *Philadelphia*, 916 F.3d at 290. Congress established Byrne JAG as a formula grant and directed the Attorney General to allocate funds according to the method prescribed in the statute. *See*

pp. 4-6, *supra*; *see also* 34 U.S.C. § 10156(a)(1). Under this model, Congress, not the Attorney General, "determines who the recipients are and how much money each shall receive." *McLaughlin*, 865 F.2d at 1088.

Consistent with the formula model, Congress has "carefully prescribed" the limited reasons the Attorney General may withhold grant funding from Byrne JAG recipients and specified the amount of funding that may be withheld in those circumstances. *See Los Angeles*, 941 F.3d at 942; *Providence*, 954 F.3d at 34. For instance, the Attorney General may reserve no more than five percent of the total appropriation to address increases in crime, 34 U.S.C. § 10157(b)(1), and it may withhold ten percent of a jurisdiction's allocated funding for noncompliance with the Sex Offender Registration and Notification Act or the Death in Custody Reporting Act. *Id.* §§ 20927(a), 60105(c)(2).

Petitioners' reading of the "coordination" certification and "programmatic" assurance cannot be reconciled with this formula structure. Congress would not have methodically set out a precise formula for disbursing funds, and defined the limited circumstances in which funds may be withheld, only to "scuttle[] the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation." *Train v. City of New York*, 420 U.S. 35, 45-46 (1975). Interpreting the "coordination" certification and "programmatic" disclosure requirement as petitioners argue would have such an effect, because DOJ could withhold *all* grant funding based on a jurisdiction's noncompliance with *any* executive priority.

C. DOJ May Not Withhold Byrne JAG Funding from San Francisco On the Basis of 8 U.S.C. § 1373.

Finally, petitioners' merits arguments about the meaning of 8 U.S.C. § 1373 do not warrant review.

1. The court of appeals correctly held that San Francisco complies with § 1373 and thus with the certification condition. Pet. App. 12a-18a. Section 1373 provides that a state or local government may not restrict the sharing of information "regarding the citizenship or immigration status, lawful or unlawful, of any individual" with federal immigration authorities. 8 U.S.C. § 1373(a). San Francisco does not restrict the sharing of this information, and indeed directs its employees to comply with federal laws like § 1373. Pet. App. 17a; *see also* S.F., Cal., Admin. Code § 12H.2.

Petitioners claim that § 1373 extends to the sharing of release status and contact information, which San Francisco's local laws do restrict. Pet. 30-31. Petitioners argue that the use of the word "regarding" in § 1373 reflects Congress's desire to reach all information "bearing on federal enforcement of the immigration laws against individuals in state or local criminal custody." *Id.* But the text does not support petitioners' expansive interpretation of the phrase "information regarding . . . citizenship or immigration status" to include release date, personal contact information, or the other categories of information petitioners identify. Pet. 29-32.

If Congress wished § 1373 to reach this additional information, it would have said so. Other parts of the Immigration and Nationality Act (INA) demonstrate that Congress uses different words when it intends to describe broader categories of information. *California*, 921 F.3d at 892. For instance, the same bill that enacted § 1373 also enacted a statute prohibiting the disclosure of "any information which relates to an alien who is the beneficiary of an application for relief under [specific provisions] of the [INA]." 8 U.S.C. § 1367(a)(2); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 384, 642, 110 Stat. 3009-546, 3009-652, 3009-707. Other provisions of the INA refer to "information regarding the name and address of the alien," 8 U.S.C. § 1360(c)(2); "information concerning the alien's whereabouts and activities," *id.* § 1184(k)(3)(A); and information "about the alien's nationality, circumstances, habits, associations, and activities," *id.* § 1231(a)(3)(C). Congress would have used similar language if it wanted § 1373 to include these categories of information.

The absence of the term "regarding" in § 1373(c) does not support a broader reading of § 1373(a), as petitioners argue. Pet. 31. Instead, the term distinguishes between the types of information that federal, versus state and local, authorities possess. Subsection (c) is addressed to federal immigration authorities, and directs them to verify or ascertain "the citizenship or immigration status of any individual within the jurisdiction of the agency." 8 U.S.C. § 1373(c). Because

Congress addressed *official* federal immigration and citizenship records held by federal officials, there was no need for it to use the word "regarding" in this subsection. By contrast, § 1373(a) concerns information held by state and local personnel, who possess only *unofficial* immigration status information, such as an individual's self-report about immigration status or copies of immigration or visa documents. This information is not official immigration status, but is instead information "regarding" immigration status. The difference between subsections (a) and (c) reflects this distinction, but does not suggest that "regarding" captures any information that a federal immigration officer might find useful or relevant, as petitioners suggest.

It is true that words like "regarding" may "ha[ve] a broadening effect" in some circumstances. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018); *see also* Pet. 31. But it is equally true that these terms do not "extend to the furthest stretch of [their] indeterminacy." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Petitioners' expansive reading of § 1373(a) would do just that. The court of appeals properly rejected petitioners' arguments (Pet. 12a-18a), as every other court has done, *see* pp. 20-21, *supra*.

2. Because San Francisco complies with the certification condition, the court of appeals did not need to address the district court's conclusion that DOJ lacks the authority to impose it. Pet. App. 12a. Petitioners address the merits of the district court's holding

(Pet. 29-30), even though the court of appeals did not do so. This case is a poor vehicle for considering issues the court of appeals did not address. *See* pp. 20-21, *supra*. But regardless, petitioners' merits arguments do not justify review.

Petitioners claim (Pet. 29-30) that the certification condition is authorized by 34 U.S.C. § 10153(a)(5)(D), which requires Byrne JAG applicants to certify compliance with "all provisions of [the Byrne JAG statute] and all other applicable Federal laws." Petitioners argue that this reference to "all other applicable Federal laws" authorizes DOJ to connect Byrne JAG eligibility to compliance with any federal law that applies to state or local governments or their officials. Pet. 29-30.

But this broad reading of "applicable Federal laws" is contradicted by the Byrne JAG statute's text and structure. For this reason, the majority of the circuits have rejected it and concluded that this language refers to federal laws that govern federal *grants* or *grantees*. *Providence*, 954 F.3d at 39; *see also Philadelphia*, 916 F.3d at 291; *Chicago*, 961 F.3d at 899.

The text supports the consensus interpretation. Section 10153(a)(5)(D) refers to compliance "with all provisions of this part and all other applicable Federal laws." Its use of a specific term ("all provisions of this part") followed by a residual term ("all other applicable Federal laws") suggests that the residual term gains meaning with reference to the preceding phrase. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001). The phrase "all other applicable Federal

laws" must be read in harmony with the preceding reference to the Byrne JAG statute, and therefore as referring to *other* federal statutes that likewise refer to federal grant recipients. *See Chicago*, 961 F.3d at 899.

Petitioners' contrary argument offends not only this interpretive aid, but also the presumption against surplusage. That canon directs courts to give effect to every word in a statute. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011). But under petitioners' reading (Pet. 29-30), the term "applicable" would have no function because § 10153(a)(5)(D) actually requires compliance with *all* federal laws. The word "applicable" must therefore "have a narrower meaning than one that sweeps in all possible laws that independently apply to a grant applicant." *Philadelphia*, 916 F.3d at 289; *see also Chicago*, 961 F.3d at 898-899; *Providence*, 954 F.3d at 37.

The statutory context provides that narrower meaning, which is that "all other applicable Federal laws" are those that apply to federal grants or federal grantees. The "all other applicable Federal laws" language appears in a list of requirements that all pertain to the grant: The applicant must certify that the programs to be funded meet the statute's requirements; that the information contained in the application is correct; and that the applicant has coordinated with "affected agencies." 34 U.S.C. § 10153(a)(5)(A)-(C). These surrounding provisions give meaning to the term "applicable." *Yates v. United States*, 574 U.S. 528, 543 (2015) (providing that a word is known "by the company it keeps"). That fourth requirement, like the

ones that precede it, likewise refers to the applicant's conduct with respect to the grant. *See*, *e.g.*, *Philadelphia*, 916 F.3d at 289-290.

This reading is also consistent with Byrne JAG's larger structure and purpose. Congress structured Byrne JAG as a formula grant with the goal of providing state and local governments with a predictable source of funding. *See* pp. 28-29, *supra*; *see also* 34 U.S.C. § 10156(a). It is difficult to imagine that Congress would have hidden, among the list of application requirements, permission for the Executive to inject its own policy preferences. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Likewise, petitioners' argument that DOJ has authority to withhold *all* Byrne JAG funding for noncompliance with *any* federal law (Pet. 29-30) is belied by the statutory provisions allowing DOJ to withhold *limited* amounts from jurisdictions that fail to comply with *specific* federal laws. *See* p. 29, *supra*. These "carefully delineated" reductions contrast sharply with petitioners' argument. *Chicago*, 961 F.3d at 906. By contrast, construing "all other applicable Federal laws" to mean those laws applicable to federal grants or grantees creates no such inconsistencies.

* * *

The court of appeals' decision is correct on the merits. Although that decision implicates a conflict in

the circuits, it is premature to resolve that conflict at this time. San Francisco acknowledges that the State of New York and New York City have petitioned for certiorari in the one outlier case on the questions presented here. Pets. for Cert. in Nos. 20-795, 20-796. San Francisco's position is that all the petitions should be denied. In the alternative, the Court should hold the petitions to hear the incoming presidential administration's position. That position will bear, among other things, on which if any of these cases might be an appropriate vehicle for addressing the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DENNIS J. HERRERA
San Francisco City Attorney
JESSE C. SMITH
RONALD P. FLYNN
YVONNE R. MERÉ
SARA J. EISENBERG
AILEEN M. MCGRATH
Counsel of Record
Deputy City Attorneys
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Aileen.McGrath@sfcityatty.org