

Nos. 20-795 and 20-796

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

Both of the petitions for writs of certiorari seek review of the Second Circuit's judgment in *New York v. United States Department of Justice*, 951 F.3d 84 (2020), and each presents the question whether three conditions that the Department of Justice adopted for awards under the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program for Fiscal Year 2017 are valid exercises of the Department's statutory authority, 20-795 Pet. i; 20-796 Pet. i. The government previously filed a petition for a writ of certiorari that

seeks review of a decision of the Ninth Circuit involving challenges to the same three Byrne JAG conditions, *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753 (2020), petition for cert. pending, No. 20-666 (filed Nov. 13, 2020), and that raises substantially similar issues of the conditions' validity and enforceability, 20-666 Pet. at I, 15-35. Moreover, the conditions are the subject of an entrenched circuit conflict, including between the Ninth Circuit's decision in *San Francisco* and the Second Circuit's decision here. *Id.* at 32-35. Accordingly, although the government agrees with the Second Circuit that all three conditions are statutorily authorized, it agrees with petitioners that the question presented warrants this Court's review.

The Court should grant both of the petitions in this case, as well as the government's petition in No. 20-666, because each of the Second and Ninth Circuits' respective decisions addresses at least one issue that the other decision does not. As petitioners observe (20-795 Pet. 34-35; 20-796 Pet. 2, 15-16), the Second Circuit here squarely addressed the statutory authorization for all three conditions, whereas the Ninth Circuit in *San Francisco* decided the validity of only two conditions (reserving judgment on the validity of the third). Conversely, the Ninth Circuit in *San Francisco* resolved a question the Second Circuit did not reach, adopting an artificially narrow interpretation of a key statutory provision (8 U.S.C. 1373) that the third condition implements—a ruling that largely eviscerates Section 1373 and, with it, the third condition. To ensure that the Court can address all relevant issues, it should grant all three petitions (Nos. 20-666, 20-795, and 20-796), and it should consolidate the cases and realign the parties for purposes of briefing and argument.

1. The Byrne JAG program, see 34 U.S.C. 10151 *et seq.*, “is the vehicle through which Congress annually provides more than \$250 million in federal funding for State and local criminal justice efforts.” 20-795 Pet. App. (Pet. App.) 8a. The program is administered by the Office of Justice Programs (OJP) within the Department of Justice, and Congress has authorized and directed the Attorney General to “issue rules to carry out” the program. 34 U.S.C. 10155; see Pet. App. 11a-12a.

Byrne JAG funds are divided among recipients based on a statutory formula, largely premised on population and crime statistics. See 34 U.S.C. 10156. But Congress has expressly authorized OJP to “plac[e] special conditions on all grants.” 34 U.S.C. 10102(a)(6). In addition, the statute requires each Byrne JAG applicant to provide to OJP an “assurance” that the applicant “shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require”; and to submit a “certification, made in a form acceptable to the Attorney General,” that “there has been appropriate coordination with affected agencies” and that the applicant “will comply with” the principal statutory provisions establishing the Byrne JAG program “and all other applicable Federal laws.” 34 U.S.C. 10153(a)(4), (5)(C), and (D).

Exercising that statutory authority, for Fiscal Year 2017, OJP announced three grant conditions that all applicants for Byrne JAG funds must satisfy. First, the “[n]otice [c]ondition” requires a grantee to have a policy designed to ensure that its facilities provide, upon a request by the Department of Homeland Security, advance notice of the scheduled release date and time for a particular alien. Pet. App. 6a. Second, the “[a]ccess

[c]ondition” requires a grantee to have a policy to “afford federal authorities access” to its facilities to meet with an alien. *Id.* at 6a-7a. Third, the “certification condition” requires a grantee to comply with 8 U.S.C. 1373—which generally bars state and local governments from restricting the sharing of “information regarding the citizenship or immigration status * * * of any individual” with federal immigration authorities, *ibid.*—and to certify such compliance. Pet. App. 6a.

2. a. In 2018, petitioners—New York and six other States in No. 20-795, and the City of New York in No. 20-796—brought separate suits challenging the three conditions, alleging (as relevant here) that the Department of Justice lacks statutory authority to impose them. Pet. App. 127a. In a consolidated decision, the district court granted summary judgment to petitioners in both suits, concluding that the conditions are not statutorily authorized. *Id.* at 117a-170a.

b. A panel of the court of appeals reversed. Pet. App. 1a-73a. The panel determined that all three conditions are statutorily authorized. *Id.* at 26a-68a. Although it disagreed with the government’s contention that the conditions are authorized by 34 U.S.C. 10102(a)(6)—which authorizes OJP to “plac[e] special conditions on all grants,” *ibid.*—the panel concluded that provisions of the Byrne JAG statute itself empower OJP to impose the conditions. Pet. App. 34a-46a, 58a-68a. The panel found that the notice and access conditions are authorized by the statutory provisions requiring grantees to ensure “appropriate coordination with affected agencies,” 34 U.S.C. 10153(a)(5)(C), and directing the Attorney General to issue rules to implement the Byrne JAG program, 34 U.S.C. 10155; that the notice condition is additionally authorized by the

provision requiring grantees to report “such * * * information * * * as the Attorney General may reasonably require,” 34 U.S.C. 10153(a)(4); and that the certification condition is authorized by the provision requiring grantees to comply (and to certify their compliance) with “all other applicable Federal laws,” 34 U.S.C. 10153(a)(5)(D), including 8 U.S.C. 1373. Pet. App. 33a-46a, 58a-68a.

c. The court of appeals denied rehearing en banc. Pet. App. 74a-76a. Twelve judges joined a total of five separate opinions concurring in or dissenting from the denial of rehearing. *Id.* at 77a-81a (Cabranes, J., joined by Livingston, Sullivan, Bianco, Nardini, and Menashi, JJ., concurring); *id.* at 82a-87a (Lohier, J., joined by Hall, J., concurring); *id.* at 88a-90a (Sullivan, J., joined by Cabranes, Livingston, and Bianco, JJ., concurring); *id.* at 91a-108a (Pooler, J., joined by Chin and Carney, JJ., dissenting); *id.* at 109a-116a (Katzmann, C.J., dissenting).

3. The present petitions seek review of the court of appeals’ determination that all three conditions are statutorily authorized. 20-795 Pet. i, 12-34; 20-796 Pet. i, 13-29. Although the government agrees with the Second Circuit panel’s ultimate conclusion that the Department of Justice has statutory authority to impose each of the conditions, the government agrees that the question warrants this Court’s review.

As petitioners observe (*e.g.*, 20-795 Pet. 13), the government has filed a petition for a writ of certiorari seeking review of substantially the same issues in *San Francisco, supra*, which concerns a challenge to the same three conditions. 20-666 Pet. at I, 15-32. In *San Francisco*, the Ninth Circuit concluded that the notice and access conditions are not statutorily authorized.

965 F.3d at 760-761. The court did not address whether the certification condition is authorized; instead, it concluded that the grantees in that case are not violating the certification condition, based on a narrow interpretation of the statute (8 U.S.C. 1373) with which that condition requires Byrne JAG grantees to comply. 965 F.3d at 761-764.

As the government explained in its *San Francisco* petition, the Ninth Circuit's decision is erroneous and warrants this Court's review. 20-666 Pet. at 15-35. The panel there misread the relevant statutory provisions by disregarding the statutory text and context and by reading in limitations that Congress did not enact. *Id.* at 16-32. And the decision implicates an entrenched circuit conflict—including with the decision below in this case—that is unlikely to resolve itself in light of the Second Circuit's denial of rehearing en banc. *Id.* at 32-35. The present petitions seek review of the same central question—the Department's statutory authority to impose (and to withhold funding for noncompliance with) the three conditions—and likewise warrant review.

4. Petitioners suggest (20-795 Pet. 34-35; 20-796 Pet. 2, 15-16) that the Court should grant only their petitions, and not the government's petition in *San Francisco*, because the Second Circuit panel here squarely addressed the validity of all three conditions, whereas the Ninth Circuit reserved judgment on whether the certification condition is statutorily authorized. The government agrees that the Court should grant the present petitions to avoid any potential obstacle to resolving the certification condition's validity. But the Court should grant review in *San Francisco* as well, so that it may address the Ninth Circuit's misreading of Section 1373—which the Second Circuit did not reach, but

which has the practical effect of eviscerating the certification condition. 20-666 Pet. at 28-32. The Court thus should grant all three petitions, consolidate the cases, and realign the parties for purposes of briefing and argument.

Respectfully submitted.

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