No. 20-795

IN THE
Supreme Court of the United States

States of NEW YORK, CONNECTICUT, NEW JERSEY, RHODE ISLAND, and WASHINGTON, and Commonwealths of MASSACHUSETTS and VIRGINIA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The Department of Justice (DOJ) agrees that this petition presents a proper vehicle for resolving a 4 to 1 circuit split on the important question of whether Congress authorized DOJ to impose three new conditions on recipients of formula grants made through the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, which provides hundreds of millions of dollars in funding annually to every State and numerous localities for the support of local criminal justice and law-enforcement efforts. *See* Mem. of Resps. 1, 6-7.

DOJ also agrees that the Court should defer ruling on the petition until the administration of newly inaugurated President Biden has the chance to set forth its position on the challenged conditions. *See* DOJ Letter of Jan. 27, 2021 in No. 20-666; *accord* Pet. 3, 19, 34; *see also* Br. in Opp. of California Resp. 16-19, No. 20-666; Br. in Opp. of San Francisco Resp. 16-22, No. 20-666.

If DOJ decides to maintain and enforce the challenged Byrne JAG conditions, the Court should grant this petition. However, if DOJ indicates that it will not maintain and enforce the conditions, then New York's appeal is likely to become moot, in which case the Court should grant the petition, vacate the decision below, and remand with instructions to dismiss, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

The conditions require state and local government grant recipients to (1) respond to ad hoc requests from federal officials for the release dates of non-citizens in grantees' custody; (2) provide federal agents with access to grantees' jails and police stations in order to

question suspected non-citizens; and (3) certify compliance with 8 U.S.C. § 1373, which purports to prohibit state and local governments from regulating when their employees may share information with federal officials regarding a person's citizenship or immigration status. Pet. App. 13a-15a.

These conditions represent a specific effectuation of the policy set forth in former President Trump's Executive Order No. 13,768, dated January 25, 2017, which directed DOJ to withhold federal grant funds from jurisdictions that limited their cooperation with federal immigration authorities. President Biden rescinded Executive Order No. 13,768 on his first day in office, directing that federal agencies including DOJ "review any agency actions developed pursuant to Executive Order 13768 and take action" to "reset" federal immigration enforcement policies and practices. Exec. Order No. 13,993, §§ 1-2, 86 Fed. Reg. 7,051, 7,051 (Jan. 25, 2021) (Revision of Civil Immigration Enforcement Policies and Priorities). More broadly, President Biden has made clear that he intends to undo the prior administration's immigration-related policies. *See, e.g.*, *id.*

If DOJ changes its policy with respect to the challenged grant conditions, this case is likely to become moot. The FY2017 Byrne JAG funds that are at issue here have already been disbursed to petitioners, *see* Pet. App. 170a, although DOJ reserved the possibility of requiring the grant recipients to comply with the conditions if the conditions are upheld by this Court. If the Biden administration declines to enforce the challenged conditions and withdraws those conditions and similar ones for subsequent Byrne JAG grant cycles, there likely would be no live controversy remaining between the parties. *See New York State*

Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020) (per curiam) (challenge to rule mooted by rule's amendment removing challenged provision); *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15 (1972) (per curiam) (challenge to statute mooted by repeal); *Wyoming v. United States Dep't of Interior*, 587 F.3d 1245, 1253 (10th Cir. 2009) (Gorsuch, J.). Any remaining dispute, over the theoretical lawfulness of a rescinded policy, would have no practical effect on the parties; resolving such a dispute would run afoul of Article III's proscription against taking up "hypothetical issues or . . . giv[ing] advisory opinions." *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam); *accord Wyoming*, 587 F.3d at 1252-53.[1]

As this Court has recognized, where the transition to a new administration suggests that the issue raised in a pending matter may soon become moot, the prudent course is to hold the case and await further information. *See Department of Justice v. House Comm. on the Judiciary*, No. 19-1328, 2020 WL 6811248 (U.S. Nov. 20, 2020) (granting motion to remove the case from the argument calendar in light of potential effect of election results on underlying dispute). DOJ agrees and has asked that "the Court hold the petition [in No. 20-666] in abeyance pending a determination by the current Administration of its position concerning the issues presented"—and to consider doing the same for

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[1] Nor could this issue be considered capable of repetition yet evading review. If the challenged conditions are revoked now but reinstated at a later time, there would be ample time for litigation to progress back to this Court. *See, e.g.*, *Diffenderfer*, 404 U.S. at 414.

this petition and the petition in No. 20-796. DOJ Letter of Jan. 27, 2021 in No. 20-666.

If DOJ does not indicate its intent to withdraw or forgo enforcement of the challenged conditions, this petition should be granted to resolve the lopsided circuit split regarding the conditions' validity. The decision below directly addressed the facial validity of all three of the challenged conditions and cleanly presents all of the legal issues on which the circuits are divided. *See* Pet. 13-16 & nn. 3-4. In contrast, the Ninth Circuit decision from which DOJ has filed a petition for certiorari did not address DOJ's authority to impose the § 1373 compliance condition. The Ninth Circuit instead held that DOJ could not withhold Byrne JAG awards from California and San Francisco based on the § 1373 compliance condition, in light of a prior circuit decision that California and San Francisco complied with § 1373. *See City & County of San Francisco v. Barr*, 965 F.3d 753, 761-764 (9th Cir. 2020); Pet. 14; Br. in Opp. of California Resp. 17-18, No. 20-666; Br. in Opp. of San Francisco Resps. 32-33, No. 20-666. Although DOJ asserts that the Ninth Circuit adopted an "artificially narrow" interpretation of 8 U.S.C. § 1373, DOJ acknowledges that the precise scope of § 1373 was "a question the Second Circuit did not reach." Mem. of Resps. 3. Indeed, the courts of appeals are not divided on how to interpret § 1373—they are divided over whether that statute may be used as a Byrne JAG condition.

On the other hand, if DOJ indicates that it will not enforce or maintain the challenged conditions, and the dispute between the parties becomes moot, the Court should grant this petition, vacate the judgment below, and remand the case to the Second Circuit with

a direction to dismiss the case as moot, pursuant to *Munsingwear, Inc.*, 340 U.S. 36.

CONCLUSION

If the new administration does not disavow its intent to maintain and enforce the challenged conditions, the Court should grant this petition and review the conditions' validity. If the new administration changes its policy such that the dispute between the parties is rendered moot, the Court should grant the petition, vacate the judgment below and remand with a direction to dismiss the case as moot, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted,

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