No. 20-___

In the Supreme Court of the United States

CITY OF NEW YORK,

Petitioner,

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

PETITION FOR A WRIT OF CERTIORARI

JAMES E. JOHNSON
Corporation Counsel of the City of New York

RICHARD DEARING
Counsel of Record
DEVIN SLACK
JAMISON DAVIES
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

Counsel for Petitioner

QUESTION PRESENTED

In 2006, Congress enacted the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") statute, requiring the Department of Justice to provide grants to state and local governments based on a statistical formula, provided that the governments use those funds for one of eight statutorily designated criminal justice purposes. For the 2017 grant year, the DOJ administratively imposed three new substantive requirements conditioning state and local governments' eligibility for the Byrne JAG program on whether they would provide various forms of assistance to federal immigration enforcement over the term of the grant. Four courts of appeals have rejected the new conditions as beyond the DOJ's authority in implementing the grant statute, whereas the Second Circuit upheld the conditions in the decision below.

The question presented is:

> Do the three substantive conditions the DOJ has imposed on Byrne JAG program eligibility exceed its authority under the statute?

PARTIES TO THE PROCEEDING

Petitioner here, plaintiff-appellee below, is the City of New York. The State of New York, the State of Connecticut, the State of Washington, the Commonwealth of Massachusetts, the Commonwealth of Virginia, and the State of Rhode Island were plaintiffs-appellees below and are separately petitioning for certiorari. Respondents, defendants-appellants below, are the United States Department of Justice, and William P. Barr, in his official capacity as Attorney General of the United States.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

City of New York v. Whitaker, No. 18-cv-6474 (Nov. 30, 2018) (granting partial summary judgment)

City of New York v. Whitaker, No. 18-cv-6474 (Jan. 4, 2019) (modifying prior order)

State of New York v. U.S. Dep't of Justice, No. 18-cv-6471 (Nov. 30, 2018) (granting partial summary judgment)

State of New York v. U.S. Dep't of Justice, No. 18-cv-6471 (Jan. 4, 2019) (modifying prior order)

United States Court of Appeals (2d Cir.):

State of New York v. U.S. Dep't of Justice, Nos. 19-267(L), 19-275(con) (Feb. 26, 2020), pet. for reh'g en banc denied (July 13, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Legislative Materials

Page(s)

Other Authorities

In the Supreme Court of the United States

CITY OF NEW YORK,

Petitioner,

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

PETITION FOR A WRIT OF CERTIORARI

This petition for certiorari is filed on behalf of the City of New York. The State of New York and six other States are separately petitioning for certiorari from the same consolidated judgment of the United States Court of Appeals for the Second Circuit.

This case concerns the Executive's attempt to legislate new substantive conditions for Byrne JAG eligibility that Congress did not enact. The Second Circuit, alone among the five courts of appeals to have ruled in this area, held that the Department of Justice has statutory authority to impose the challenged conditions. Absent a reversal in position by the Government, this clear and well-developed

split in authority on questions of nationwide significance can only be resolved by a grant of certiorari.

Indeed, the DOJ itself has asked the Court to grant certiorari in one of the cases on the other side of the split. This case presents a better vehicle for review than that one, however, because it squarely presents questions about the validity of all three conditions. By contrast, in the other case, the court of appeals' resolution as to one condition turned on its construction of a separate federal law and state-specific reasons unrelated to the DOJ's authority to impose the condition in the first place.

Here, in breaking from its sister circuits and finding the three conditions to fall within the DOJ's statutory authority, the Second Circuit misread the plain text of the Byrne JAG statute in two main ways. First, the court failed to honor Congress's core textual choices (a) making grant awards mandatory for state and local governments that commit to use the funds in one of the eight authorized criminal justice categories, (b) allocating grant funds based on a strict statistical formula, and (c) authorizing only minor deviations from that formula under carefully enumerated circumstances. These core provisions foreclose DOJ's assertion of broad substantive discretion to shape the grant program according to its own policy lights.

Second, while minimizing the statute's core terms, the Second Circuit refashioned peripheral and procedural provisions into significant delega-

tions of substantive discretion. The court read the DOJ's authority to determine the "form" of funding applications to confer power to set substantive criteria for grant eligibility. It interpreted a requirement that grantees make annual reports about grant-funded programs as permitting the imposition of an ongoing requirement to share information unrelated to those programs. It reshaped a required certification that an applicant has coordinated with state and local agencies that may be affected by the grant into an authorization for the DOJ to mandate on-demand post-grant coordination with federal officials. And it interpreted a provision requiring applicants to certify compliance with the grant statute's provisions and all other applicable laws to empower the DOJ to impose a separate certification requirement as to any federal law of its choosing, even if not at all grant-related.

The Second Circuit's decision undermines Congress's textual commands, vitiates its historic deference to state and local law enforcement, and improperly transfers its power of the purse to the Executive. Given the well-developed split in authority, and the Government's agreement that issues presented here are cert-worthy, the Court should grant review.

OPINIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a–73a) is reported at 951 F.3d 84. The opinion of the district court (Pet. App. 117a–170a) is reported at 343 F. Supp. 3d 213. A further order of the district court is unreported (Pet. App. 171a–173a). The Second Circuit's order denying rehearing en banc and associated opinions (Pet. App. 74a–116a) are reported at 964 F.3d 150.

JURISDICTION

The Second Circuit entered its judgment on February 26, 2020 and denied rehearing en banc on July 13, 2020 (*see* Pet. App. 1a, 74a). On March 19, 2020, this Court entered an order automatically extending the time to file any petition for certiorari due on or after that day to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for certiorari to December 10, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in the appendix accompanying the petition of the State of New York and six other States (*see* Pet. App. 171a–192a): U.S. Const. amend. X; 34 U.S.C. §§ 10152–58; 8 U.S.C. § 1373.

STATEMENT

1. Congress created the Byrne JAG program in 2006 to provide federal funding for state and local law enforcement. It is the largest federal grant program supporting state and local criminal justice programs.

In enacting the Byrne JAG statute, Congress put state and local autonomy front and center, affording grantees the "flexibility to spend money for programs that work for them" rather than "impos[ing] a 'one size fits all' solution." H.R. Rep. No. 109-233, at 89 (2005). The statute provides that "the Attorney General shall … allocate" the grant money based on a statutory formula. 34 U.S.C. § 10156(a)(1). Grant recipients may put funds toward one or more of eight enumerated areas, ranging from crime prevention and education to mental health treatment. *Id.* § 10152(a)(1)(A)–(H). Immigration enforcement is not among the listed categories.

Given Byrne JAG's nature as a mandatory formula grant program, Congress defined who is entitled to funds, how awards are to be calculated, and the narrow circumstances under which funds can be withheld. The DOJ, which administers the program, is obligated to issue grants in "accordance with the [specified] formula," *id.* § 10152(a)(1), which allocates 60% of funds to States and 40% to local governments, *id.* § 10156(b), and calculates

awards based on relative population and crime rates, *id.* § 10156(a)(1), (d)(2)(A).

When Congress empowered the DOJ to withhold Byrne JAG funds to advance federal policy goals relating to state and local governments' law enforcement practices, it said so explicitly and in detail. Congress specified, for example, no more than 4% of funds for failing to meet reporting requirements relating to firearms background checks, *id.* § 40914(b)(1); no more than 10% for failing to comply with "death-in-custody" reporting requirements, *id.* § 60105(c)(2); no more than 10% for failing to comply with sex offender notification and registration requirements, *id.* § 20927(a); and no more than 5% for failing to comply with measures to eliminate prison rape, *id.* § 30307(e)(2). None of these provisions affords the DOJ discretion to deny an applicant Byrne JAG funds altogether.

To seek Byrne JAG funds, a state or local government submits an application to the DOJ. *Id.* § 10153(a). The applicant must provide a number of assurances and certifications in its application "in such form as the Attorney General may require." *Id.* As relevant here, an applicant must (1) give an assurance that it will "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require" for "each fiscal year" of the grant, *id.* § 10153(a)(4); (2) certify that "there has been appropriate coordination with affected agencies" *id.* § 10153(a)(5)(C); and (3) certify that it "will comply

with all provisions of this subpart and all other applicable Federal laws," *id.* § 10153(a)(5)(D).

The City of New York has received Byrne JAG funds since the statute's enactment. It is a significant funding source. In 2016, the last grant year before the present dispute, the City received nearly $4.3 million to support criminal justice programs that included everything from paying 911 emergency responders to funding school safety initiatives.

2. Beginning with fiscal year 2017 grants, the DOJ sought to impose three new substantive conditions on all Byrne JAG recipients.

- The first—the access condition—would compel state and local governments to adopt a law or policy to "ensure that agents of the United States" have access to every state and local "correctional facility," to "meet with individuals who are (or are believed by such agents to be) aliens" (Joint App., 2d Cir. ECF No. 55 ("A") 292).

- The second—the notice condition—would compel state and local governments to adopt a law or policy guaranteeing prompt compliance with any "formal written request" by Immigration and Customs Enforcement (ICE) or the Department of Homeland Security (DHS) for "advance notice of the

scheduled release date and time for a particular alien" (*id.*).

- The third—the § 1373 condition—would compel a series of certifications about compliance with 8 U.S.C. § 1373, which prohibits state and local governments from having any policy restricting their officials from transmitting information about individual's immigration status to federal immigration authorities (A264, 266–67).

3. The City did not enact either of the access or notice policies demanded by the DOJ. As to the § 1373 condition, the DOJ made a "preliminary" determination that the City did not comply with § 1373 (SDNY ECF No. 41, Ex. B). Later, the DOJ distributed the bulk of Byrne JAG funds to jurisdictions it deemed sufficiently committed to "keeping criminal aliens off our streets and our law abiding citizens safe" (A96). The City was not among them.[1]

[1] The City received its fiscal year 2017 and fiscal year 2018 awards through an injunction in a separate litigation. *City of Evanston v. Barr*, 412 F. Supp. 3d 874, 889 (E.D. Ill. 2019). The DOJ has appealed that decision to the Seventh Circuit, *City of Evanston v. Barr* (7th Cir. No. 19-3358), and has represented that, if the litigation is resolved "in a manner (*cont'd*)

The DOJ's dissatisfaction regarding § 1373 is directed at the City's policies concerning the confidentiality of sensitive information obtained from members of the public by City officials in the course of their duties. These policies trace back over three decades. *See City of New York v. United States*, 173 F.3d 29, 31–32 (2d Cir. 1999).

Their current incarnation covers an array of information beyond immigration status, including sexual orientation, receipt of public assistance, and status as a victim of domestic violence or sexual assault. And they prohibit disclosure broadly, not just to immigration authorities. *See* Mayoral Exec. Order No. 41 §§ 1–2 (Sept. 17, 2003), *available at* https://perma.cc/Y85B-3QEY. The City Council codified and broadened these restrictions in 2017. 2017 N.Y.C. Local Law 245; 2017 N.Y.C. Local Law 247, *codified at* N.Y.C. Admin. Code §§ 23-1201–05.

While the City's confidentiality policies are robust, the City recognizes the importance of working with federal immigration authorities consistent

---

that would permit DOJ to use or enforce" the conditions for these awards, it intends to do so. Office of Justice Programs, *FY 2017 and FY 2018 JAG Award Special Notices*, https://perma.cc/X9SP-P48X; *see also* 2d Cir. ECF No. 169 at 2–5.

with its laws. The confidentiality policies themselves allow for "cooperat[ion] with federal authorities in investigating and apprehending aliens suspected of criminal activity." Mayoral Exec. Order No. 41 § 4(b). The City also responds to ICE detainer requests accompanied by judicial warrants for people who have been convicted of one of around 170 violent or serious crimes or who are present in a terrorist screening database, so that ICE can assume custody (A112). The City similarly cooperates with requests for release information accompanied by administrative warrants for people who meet the same criteria (*id.*). And the City allows ICE to interview inmates who consent (A113).

4. In this suit, the City claims, among other things, that the DOJ has no statutory authority to impose the challenged conditions on the Byrne JAG program. The case was decided together with a similar action brought by the State of New York and six other States. On the parties' cross-motions, the district court granted summary judgment to the City and States and enjoined the DOJ from enforcing the conditions as to fiscal year 2017 awards (Pet. App. 169a–170a). The court rejected the DOJ's claim that it was empowered to impose new conditions on grants based on various procedural or ministerial provisions within and without the Byrne JAG statute (Pet. App. 130a–141a).

5. A panel of the Second Circuit reversed. The court began by rejecting the DOJ's core statutory argument—that the challenged conditions are au-

thorized by 34 U.S.C. § 10102(a)(6), a provision outside the Byrne JAG statute. That provision allows the Assistant Attorney General for the Office of Justice Programs to exercise powers expressly vested in that office elsewhere or delegated by the Attorney General, "including placing special conditions on all grants, and determining priority purposes for formula grants." 34 U.S.C. § 10102(a)(6). The court held that this provision does not confer a standalone power to engraft new substantive conditions onto the Byrne JAG program, because the word "including" indicates "illustration rather than enlargement" and, therefore, any authority to impose the conditions "must originate in other provisions" (Pet. App. 29a).

Nonetheless, the court went on to conclude that the Byrne JAG statute authorizes the challenged conditions, rejecting the contrary holdings of the Third, Seventh, and Ninth Circuits (Pet. App. 7a–8a). The court first held that the § 1373 condition is authorized by the provision requiring grant applicants to certify that they will comply with "all … applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D). The court reasoned that the DOJ is authorized to determine which laws are "applicable" because applications must be in a "form acceptable to the Attorney General" (Pet. App. 34a). The court concluded that "applicable laws" include any law "pertaining either to the State or locality seeking a Byrne grant or to the grant being sought" (Pet. App. 37a). According to the court, any federal laws that could pertain to a State or locality in any

capacity, such as "environmental laws," are fair game (Pet. App. 40a–41a). The court also rejected the City's challenge to the constitutionality of 8 U.S.C. § 1373, reasoning that the statute could be construed as a spending requirement, even though it has no explicit or implicit nexus to spending, and upholding it on that limited basis (Pet. App. 54a–58a).

Next, the court held that the notice condition is authorized in three ways: (1) by a requirement that applicants "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require" for "each fiscal year" of the grant (Pet. App. 59a–61a); (2) by a requirement that applicants certify that there "has been appropriate coordination with affected agencies" (Pet. App. 61a–67a); and (3) by a provision authorizing the Attorney General to "issue rules to carry out this part," although the DOJ never claimed (and has several times disclaimed) that it exercised that authority (Pet. App. 61a).

The court went on to hold that the access condition, requiring States and localities to provide federal immigration authorities access to prisons and jails, is authorized by the "appropriate coordination" provision and by the Attorney General's general rulemaking authority (Pet. App. 67a–68a).

6. The active judges of the Second Circuit denied rehearing en banc by a vote of 8 to 4, with two judges concurring in denial only because it would

be "faster" for this Court "to grant certiorari and reverse" (Pet. App. 87a (Lohier, J., concurring in the denial of rehearing en banc)). In all, four of the five opinions issued note the likelihood of this Court's review, given the sharp split among the circuits (*see id.;* Pet. App. 81a (Cabranes, J., concurring in the denial of rehearing en banc); Pet. App. 108a (Pooler, J., dissenting from the denial of rehearing en banc); Pet. App. 116a (Katzmann, C.J., dissenting from the denial of rehearing en banc)). By the time of the en banc denial, the First Circuit had joined the Third, Seventh, and Ninth Circuits on the other side of the circuit split.

REASONS TO GRANT THE PETITION

A. There is a clear and well-developed split in authority on the question presented.

The DOJ's imposition of new substantive conditions on Byrne JAG eligibility triggered a number of lawsuits from state and local governments around the country. As the Second Circuit acknowledged (Pet. App. 7a), its decision creates a split with every other court of appeals to have addressed such challenges, with all of those other circuits having unanimously concluded that the statute does not empower the DOJ to impose the challenged conditions. *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City of Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276 (3d Cir. 2019). The split deepened with two additional court of appeals

decisions rendered after the decision below. *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *see also 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).

To reach a different result from its sister circuits, the Second Circuit relied on various ministerial provisions of the Byrne JAG statute, adopting "legal arguments that [the DOJ] either had not made, had abandoned, or had even expressly disavowed" (Pet. App. 109a (Katzmann, C.J., dissenting from the denial of rehearing en banc)). In their recent decisions, the First and Ninth Circuits confronted and rejected the Second Circuit's newly raised arguments, thereby cementing the split. *See City of Providence*, 954 F.3d at 32–33; *City of Los Angeles*, 941 F.3d at 944–45.

The Second Circuit's denial of rehearing en banc ensures that the split will not be remedied unless this Court intervenes or the DOJ voluntarily abandons the challenged conditions. There is no alternative procedural path to harmonizing the circuits' rulings. Moreover, given that five courts of appeals have had the opportunity to weigh in, two of them on multiple occasions, the split is well-developed and ripe for this Court's resolution.

The unresolved conflict between the courts of appeals is particularly problematic because of the

way the Byrne JAG statutory formula allocates funding. Money awarded to, or withheld from, certain jurisdictions has to the potential to affect the amount of money available for other jurisdictions, heightening the need for uniform rules. *See City of Chicago*, 961 F.3d at 921. Subjecting States and localities to different rules depending on which circuit they fall in creates an uneven playing field in program meant to have evenhanded application across the nation.

The DOJ itself has sought certiorari in a similar case out of the Ninth Circuit, confirming that issues raised here are cert-worthy. Petition for Writ of Certiorari, *Barr v. City & Cnty. of San Francisco*, No. 20-666 (U.S. Nov. 13, 2020). The DOJ agrees that the split among the circuits is unlikely to be resolved through further lower court proceedings, given the Second Circuit's denial of en banc review. *Id.* at 16. The DOJ also recognizes that the decisions of the courts of appeals reflect fundamental disagreements about the scope of its statutory authority. *Id.* at 32.

But this case presents a better vehicle for review than the case out of the Ninth Circuit. The court of appeals there did not squarely address whether the § 1373 condition is statutorily authorized. Instead, it relied on its existing precedent holding that § 1373 does not require the disclosure of alien release information and, applying that understanding, held that the state and local laws at issue were consistent with the statute. *City & Cnty.*

of San Francisco, 965 F.3d at 763–64. By contrast, the Second Circuit confronted the DOJ's power to impose the § 1373 condition head on, and the decision below thus directly presents the full sweep of legal questions related to the DOJ's authority to adopt the challenged conditions (Pet. App. 33a–58a). Certainly, if the Court is inclined to grant the DOJ's petition in *Barr v. City and County of San Francisco*, it should grant the City's and the States' more comprehensive petitions in this case as well.

B. The decision below departs from the plain statutory text in empowering the DOJ to wield substantive discretion over Byrne JAG program eligibility.

1. The decision below is on the wrong side of the circuit split. It stands at odds with the core statutory text, clear structure, and essential nature of the Byrne JAG program. Recognizing that "crime is essentially a local problem" and that law enforcement is a quintessentially local function, Congress has consistently legislated with the goal of "assist[ing] State and local governments" without dictating how they should operate. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 197–98 & 208 (1968). Congress approached the Byrne JAG program guided by this strong historical tradition and the core precept that the police power belongs to state and local governments. The program's entire purpose is to afford States and localities "flexibility to spend money for programs that work for them," H.R. Rep. No. 109-

233, at 89 (2005), giving them freedom to pursue their own criminal justices priorities in one of eight expansive categories, 34 U.S.C. § 10152(a)(1)(A)–(H).

To protect this flexibility, Congress sharply cabined the DOJ's discretion in administering the program. On the most basic level, Congress opted for a mandatory formula grant structure. The statute mandates that "the Attorney General shall ... allocate" the appropriated funds to States and localities. 34 U.S.C. § 10156(a)(1). And it provides an exacting formula for distributing funds, setting forth amounts to be awarded based on population and crime statistics and providing "precise limits on the extent to which the Attorney General can deviate from that distribution." *City of Chicago*, 961 F.3d at 906; *accord City of Providence*, 954 F.3d at 34.

When Congress authorized the DOJ to withhold funds to advance particular policy goals, it said so explicitly, defining with great care what can trigger the withholding of funds and, in each instance, placing strict limits on the amounts that can be withheld. *See* 34 U.S.C. §§ 20927(a), 30307(e)(2), 40914(b), 60105(c)(2). If Congress gave the DOJ "sweeping authority to withhold all funds for any reason, it would have no need to delineate numerous, specific circumstances under which [he] may withhold limited amounts of funds." *City of Philadelphia*, 916 F.3d at 286; *accord City of Providence*, 954 F.3d at 28.

The Byrne JAG statute contrasts sharply with those where Congress has vested administrators with substantive discretion over grant awards. Take, for example, certain state education grants under the American Recovery and Reinvestment Act, where the statute provides that the Secretary of Education "shall determine" grant recipients and amounts and permits the consideration of "such other criteria as the Secretary determines appropriate." 20 U.S.C. § 10006(b).

For another example, one need look no further than an exception included in the Byrne JAG statute itself, which provides that the DOJ "may reserve" up to 5% of Byrne JAG funds for discretionary grants if it "determine[s]" they are "necessary" to combat enumerated concerns. 34 U.S.C. § 10157(b). While even that discretion is rather limited, the statute permits nothing comparable as to the remaining 95% of Byrne JAG funds.

The same contrast is reflected in the basic architecture of the subchapter governing Bureau of Justice Assistance grants, which is broken into Part A, titled the "Edward Byrne Memorial Justice Assistance Grant Program," and Part B, titled "Discretionary Grants." The provisions in the "Discretionary Grants" part further confirm that Congress uses discretion-conferring language when it intends to vest administering agencies with a measure of substantive discretion. *See, e.g.*, *id.* §§ 10171(a) (providing that the director of the National Institute of Corrections "may make" grants to public

agencies); 10191(a) (providing, that the "Attorney general may provide" certain grants to private crime prevention nonprofits).

For all of these reasons, the Byrne JAG statute's carefully calibrated text and structure make clear that the DOJ has no power to legislate grant conditions to advance its own policy goals. Yet, by ignoring the statute's core textual features and exaggerating the import of peripheral and ministerial provisions, the Second Circuit effectively transformed the statute from a mandatory formula grant into a broadly discretionary one. The marginal provisions relied on—many of which were mentioned only briefly, if at all, by the DOJ below—simply cannot bear the weight.

2. For example, the Second Circuit recast 34 U.S.C. § 10153(a)(4), a grant-auditing mechanism requiring applicants to report "programmatic and financial" information for "each fiscal year," as an obligation to cooperate with federal immigration authorities in real time. The court reasoned that because some detainees will be "aliens subject to removal" and grant-funded programs in some jurisdictions may relate to persons who may eventually be detained, then advance notice of a suspected removable alien's release date is "programmatic" (Pet. App. 60a).

But the term "programmatic," in context, plainly refers simply to "the programs to which [the grant] funds are directed." *City of Philadelphia*, 916

F.3d at 285; *see also* 34 U.S.C. § 10152(a) (listing the "programs" for which Byrne JAG funds may be used); 2 C.F.R. § 200.329 (requiring performance and financial reports comparing "actual accomplishments to the objectives of the Federal award"). The provision simply authorizes yearly reporting in service of grant administration—indeed, it is codified among other similarly ministerial provisions. The clause cannot fairly be read as obliquely conferring upon the DOJ substantive grant-making discretion, contrary to the formula grant program's fundamental design.

Nor can the Second Circuit's gloss on the programmatic reporting provision be reconciled with the expectation that a grantee report the information "for each fiscal year covered by an application." 34 U.S.C. § 10153(a)(4). The provision obviously "contemplates yearly reporting," *City of Los Angeles*, 941 F.3d at 945, requiring applicants to provide annual reports on how their chosen programs are unfolding. Indeed, the DOJ has elsewhere spoken of this simply as an "annual programmatic report." Edward Byrne Memorial Justice Assistance Grant (JAG) Program, *Reporting Requirements*, https://perma.cc/58CU-6VEC; *see also* A202 (explaining that the Office of Justice Programs "will require each successful applicant to submit specific performance measures data as part of its reporting under the award"). The provision does not support on-demand reporting of whatever information DOJ may find to be of interest for the federal government's own distinct activities.

3. No better founded is the Second Circuit's conclusion that 34 U.S.C. § 10153(a)(5)(C) authorizes the notice and access conditions. While that provision merely requires an applicant to certify that "there has been appropriate coordination with affected agencies" before applying for a grant, the Second Circuit read it as an ongoing requirement to honor any notice or access demands that may be made by DHS over the term of the grant.

To reach that reading, the court posited a relationship between the Byrne JAG program and DHS that is so attenuated it takes four steps to describe: (1) some grant-funded programs in some jurisdictions have some relationship to the "prosecution, incarceration, [and] release of persons"; (2) some of the persons prosecuted, incarcerated, and released might be aliens; (3) DHS handles alien removal proceedings; therefore, (4) DHS must be an "affected agency" within the meaning of the clause (Pet. App. 63a–66a). But far from imposing an ongoing duty to cooperate with all requests by DHS throughout the term of a grant, the Byrne JAG statute only requires the applicant to certify that, in the course of the application process, it has coordinated with relevant state and local agencies affected by the grant.

That understanding is confirmed in at least three ways. First, the certification requirement is phrased in the present perfect tense, denoting that the certification covers "an act that has been completed," not acts yet to come. *Barrett v. United*

States, 423 U.S. 212, 216 (1976). Second, the requirement is found among others relating to approvals and procedures involving only state and local bodies, reflecting that it contemplates consultation with state and local agencies that might be affected by the funded program. *See* 34 U.S.C. § 10153(a)(2)–(3), (a)(6)(A). And third, the definition of "public agency" applicable to the Byrne JAG program is limited to state and local agencies, not federal ones. *Id.* § 10251(a)(6).

Separately and together, these points confirm that the coordination requirement simply demands pre-application consultation with the state and local agencies whose operations might be affected by the state or local program that the grant is intended to fund. Nothing more.

4. The Second Circuit likewise misconstrued 34 U.S.C. § 10153(a)(5)(D), which requires applicants to certify that they "will comply with all provisions of this subpart [comprising the Byrne JAG statute] and all other applicable Federal laws."

This provision requires applicants to certify that they comply with the entirety of the Byrne JAG statute's provisions and all other applicable federal laws addressed to grant recipients. *See, e.g.*, 42 U.S.C. § 2000d (prohibiting federal grantees from engaging in discrimination on the basis of "race, color, or national origin,"); 31 U.S.C. § 1352 (prohibiting federal grantees from engaging in certain kinds of lobbying). The "all other applicable Federal

laws" language thus refers to federal laws that pertain to state and local governments "as a grant *applicant* and not merely as a governmental entity." *City of Chicago*, 961 F.3d at 899.

The Second Circuit instead read the statute as authorizing the DOJ to hunt through the United States Code, select any law that could conceivably apply to a State or a locality, and require a separate certification of compliance with that particular law as a precondition to receipt of Byrne JAG funds (Pet. App. 34a–36a). But that reimagining of the clause is fundamentally mistaken: nothing in the statute "even hints that Congress intended to make [Byrne JAG] grants dependent on the Attorney General's whim as to which laws to apply." *City of Chicago*, 961 F.3d at 905; *accord City of Providence*, 954 F.3d at 38.

Several statutory features reinforce this conclusion. The certification provision opens by referring to all provisions of the Byrne JAG statute itself, which by definition pertain to the applicant's receipt of a grant. It thus makes sense to read the ensuing reference to "all other applicable Federal laws" to refer to applicable laws codified outside the Byrne JAG statute that likewise address grant recipients. And the provision is part of a statutory grouping that otherwise includes requirements tied to grant administration, and so should be read to address the same subject matter. *See Lagos v. United States*, 138 S. Ct. 1684, 1688–89 (2018) (ex-

plaining that "statutory words are often known by the company they keep").[2]

The point is driven home by the multiple statutory provisions mandating specific reductions in Byrne JAG funding if grantees fail to meet certain clearly identified statutory requirements (Pet. App. 39a–40a). Thus, where Congress sought to use the Byrne JAG program to incentivize state and local governments' compliance with particular federal policies, it did so directly and explicitly. And in each case, it authorized a modest percentage reduction in funding. *See*, *e.g.*, 34 U.S.C. §§ 30307(e)(2), 60105(c)(2). These provisions undercut the Second Circuit's interpretation of the "applicable law" language as empowering the DOJ to *fully* deny funding based on a state or local government's alleged noncompliance with an extrinsic law that Congress

[2] The canon of constitutional avoidance cuts against the Second Circuit's ruling as well. *See Clark v. Suarez Martinez*, 543 U.S. 371, 381–82 (2005). As the Second Circuit acknowledged, its reading would authorize DOJ to require state and local governments to certify compliance with, for example, "environmental laws" as a condition of receiving Byrne JAG funding (Pet. App. 41a). But that would of course raise serious germaneness concerns. *See South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987). Congress should be presumed not to have empowered DOJ to wade into such a constitutional thicket.

never identified as a permissible basis for reducing funding.

The problems with reading the applicable-laws provision to afford the DOJ unfettered discretion is underscored by examining the particular law that the DOJ selected as a funding condition: 8 U.S.C. § 1373. That provision purports to prohibit state and local governments from "in any way" restricting their own officials from communicating with immigration authorities about the "citizenship or immigration status, lawful or unlawful, of any individual." As this Court recently confirmed, statutes that purport to restrict States and localities from enacting certain policies violate the sovereignty reserved to them by the Tenth Amendment. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018). Section 1373 does precisely what *Murphy* forbids—it dictates that States and localities may not adopt particular policies governing how their officers handle personal information they acquire from individuals in the course of their duties. *See* 8 U.S.C. § 1373(a)–(b).

Because § 1373 is unconstitutional, it cannot constitute an "applicable law" even under the Second Circuit's overly broad understanding of that phrase. The court of appeals did not deny that § 1373 raises Tenth Amendment concerns. The court instead sidestepped those problems by construing § 1373 as if it were simply a spending condition (Pet. App. 54a–58a). But § 1373 is no such thing. Indeed, Congress has rejected multiple pro-

posals to condition state and local governments' receipt of federal funding on compliance with § 1373.[3]

The Second Circuit nonetheless suggested that severability principles support reading § 1373 as a spending condition, supposedly because Congress would have enacted language so framed if it had recognized the actual law's unconstitutionality. But such judicial rewriting flies in the face of the severability doctrine's key benefit, which is to "avoid judicial policymaking or *de facto* judicial legislation." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2351 (2020) (plurality op.). Severability does not permit courts to "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain." *Hill v. Wallace*, 259 U.S. 44, 70 (1922).

In the end, the Second Circuit's reasoning for upholding the § 1373 condition piled error upon er-

---

[3] *See, e.g.*, Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. § 4 (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 4 (2016); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3 (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. § 2(2015); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3(a) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2 (2015); Protecting American Lives Act, S. 1842, 114th Cong. § 3(d) (2015).

ror. The court first held the "all other applicable Federal laws" language to reach § 1373 by misreading the language to extend to any statute that applies with the force of law, rather than reaching only statutes that impose requirements on grant recipients. But when confronted with evidence that affording legal force to § 1373 would be unconstitutional, the court's response was to pretend as if the statute had been enacted as a grant requirement all along. At neither step did the court honor the statutory text.

5. The Second Circuit found it "disquieting" that States and localities could accept federal funds on the one hand and limit their aid to federal immigration enforcement on the other (Pet. App. 40a). But, while Congress could, if it so desired, encourage such state and local assistance by making it a condition of federal funding, the fact is that Congress has declined to do so time and again. *See supra*, n.3.

The more disquieting prospect is that the Second Circuit may have allowed its discomfort with state and local noncooperation with federal immigrant enforcement to cause it to set aside the allocation of powers between Congress and the Executive. Congress alone holds the power of the purse, and its authority over federal spending is perhaps its "most complete and effectual weapon." The Federalist No. 58, at 359 (C. Rossiter ed. 1961); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). But rather than enlist

States and localities in federal immigration enforcement, at every turn Congress structured the Byrne JAG program to safeguard state and local autonomy in law enforcement. *See also* 34 U.S.C. § 10228(a) (prohibiting the use of grant-administration authority to promote federal "direction, supervision, or control over any" state or local criminal justice agency).

The Second Circuit's discomfort was also misplaced. Echoing the judgment of law enforcement experts across the country, the City's experience has shown that everyone benefits when all residents—regardless of personal attributes—feel safe reporting crimes, cooperating with police investigations, and engaging with local authorities. The simple fact is that in many cases undocumented immigrants will not report crimes or cooperate with the police if their personal information is not protected or if the City is seen as an adjunct of federal immigration enforcement. By maintaining good police–community relations, law enforcement solves crime more effectively and keeps residents safer.

This experience finds parallels with the Government's own. It too has used confidentiality guarantees to foster broader participation, including by undocumented immigrants, in federal initiatives such as the census and federal taxes. *See* 13 U.S.C. § 9(a); 26 U.S.C. § 6103. Even more recently, recognizing that undocumented immigrants are more likely to seek out "necessary medical treatment or preventative services" for COVID-19 when

they do not fear reprisal for their immigration status, the Government has exempted such treatment and services from "public charge" inadmissibility determinations. U.S. Citizenship & Immigration Services, *Public Charge*, https://perma.cc/UGF2-Y96J.

In the end, though, it does not matter whether the Second Circuit was correct in its criticisms of the City's assessment that providing enhanced assistance to immigration enforcement would harm public safety. While Congress could have enacted a law that conditioned federal funds on a commitment to provide such assistance, it did not do so. There is nothing to suggest that Congress intended the Byrne JAG program to be the forum for disputes about state and local law enforcement strategy and immigration enforcement. The Second Circuit's contrary ruling dishonors the statute's plain text and upends the separation of powers, and in so doing has opened a sharp circuit split warranting the Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 7, 2020

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel of the City of New York

RICHARD DEARING
Counsel of Record
DEVIN SLACK
JAMISON DAVIES

100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov