Boston College Law Review

Volume 62
Issue 9 *Electronic Supplement*

Article 8

3-23-2021

Are Sanctuary Cities Safe? Evaluating the DOJ's Authority to Impose Immigration Conditions on Criminal Justice Grants

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ARE SANCTUARY CITIES SAFE? EVALUATING THE DOJ'S AUTHORITY TO IMPOSE IMMIGRATION CONDITIONS ON CRIMINAL JUSTICE GRANTS

Abstract: On March 24, 2020, in *City of Providence v. Barr*, the U.S. Court of Appeals for the First Circuit held that the Department of Justice lacked statutory authority to impose immigration-related conditions on Edward Byrne Memorial Justice Assistance Grants awarded to Providence and Central Falls, Rhode Island. As the most recent of five circuit courts to consider this issue, the First Circuit squarely rejected the Second Circuit's holding that the challenged conditions were statutorily authorized. Instead, the First Circuit sided with the Seventh, Third, and Ninth Circuits in striking down the challenged conditions. Although the First Circuit reached the same ultimate conclusion as the Ninth Circuit, it used an alternate reasoning. This Comment argues that the First Circuit in *Providence v. Barr* correctly interpreted the text and structure of the statutes at issue and respected congressional intent, thus serving as a useful model for future courts confronted with this question.

INTRODUCTION

The development of sanctuary policies, or state and local practices aimed at limiting coordination with federal immigration authorities, reflects decades of tension between local and federal government over the role of law enforcement in effectuating immigration laws.[1] In recent years, President Donald Trump's "tough on immigration" stance elicited vigorous reactions from states and municipalities that disagreed with his approach.[2] These disagreements have led to

[1] *See* Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1707 (2018) (arguing that, although sanctuary city debates were particularly prevalent during President Trump's administration, they should be understood within the movement's decades-long history); *see also* Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 576 (2010) (articulating tensions between local and national concepts of "citizenship" and arguing that sanctuary jurisdictions have helped create a sense of membership for undocumented immigrants in their communities); Bridget Stubblefield, *Development in the Executive Branch, Sanctuary Cities: Balancing Between National Security Directives, Local Law Enforcement Autonomy, and Immigrants' Rights*, 29 GEO. IMMIGR. L.J. 541, 542–43 (2015) (discussing legislation and executive programs that required local authorities to assist with federal immigration enforcement).

[2] *See* Claire Felter, Danielle Renwick & Amelia Cheatham, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (June 23, 2020), https://www.cfr.org/backgrounder/us-immigration-debate-0 [https://perma.cc/H3SD-8G36] (noting that over 700 jurisdictions have policies that curb their involvement with immigration enforcement and highlighting legal battles in recent years between the Department of Justice and sanctuary jurisdictions over these policies). A sampling of President Trump's immigration actions include: issuance of executive orders broadening priority deportation

numerous lawsuits, forcing the judiciary to grapple with challenging questions of federalism and separation of powers.[3]

In March 2020, the First Circuit Court of Appeals, in *City of Providence v. Barr*, became the most recent circuit court to consider whether the Department of Justice (DOJ) had statutory authority to condition the receipt of federal funds from the Edward Byrne Memorial Justice Assistance Grant Program on grantees' compliance with immigration-related requirements.[4] Considering four statutory provisions as proffered sources of authority, three of which govern the grant program and one that outlines the Assistant Attorney General's duties, the court held that the DOJ lacked statutory authority to impose the conditions.[5] In doing so, the First Circuit split from the Second Circuit Court of Appeals, which held that the DOJ was statutorily authorized to condition the grants, and joined the Seventh, Third, and Ninth Circuit Courts of Appeals in striking down the challenged conditions.[6]

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categories; construction of a border wall; prohibition of individuals from certain Muslim-majority countries from entering the United States; a drastic reduction in the number of annually admitted refugees; an attempt to eliminate the Deferred Action for Childhood Arrivals program; implementation of a "zero-tolerance policy" that resulted in family separations; creation of the Migrant Protection Protocols, under which asylum seekers arriving at the southern border must remain in Mexico while they pursue their asylum claims; and denial of asylum eligibility to individuals who fail to first seek asylum in a "safe third country" before applying in the United States. *Id.* He also targeted sanctuary jurisdictions through Executive Order 13,768. SARAH HERMAN PECK, U.S. CONG. RSCH. SERV., R44795, "SANCTUARY" JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION 16 (2019). *See generally* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017). The order threatened the retention of federal funds from jurisdictions that did not enforce a federal statute aimed at ensuring local cooperation with federal immigration authorities. PECK, *supra* at 17; *see* 8 U.S.C. § 1373 (preventing federal, state, or local governments from restricting communication with federal immigration authorities regarding individuals' immigration status).

[3] *See* PECK, *supra* note 2, at 19–37 (summarizing ten key lawsuits that cities and states brought to challenge Executive Order 13,768, as well as lawsuits the DOJ brought to challenge California's laws limiting the involvement of local actors in federal immigration enforcement); *see also infra* notes 41–43 and accompanying text (discussing the arguments that Rhode Island cities raised to challenge immigration-related conditions on their federal grant awards, including violations of separation of powers principles, the Tenth Amendment, and the Spending Clause).

[4] City of Providence v. Barr, 954 F.3d 23, 31 (1st Cir. 2020).

[5] *Id.* at 32, 36, 39, 45; *see* 34 U.S.C. § 10153(a)(4) (the data reporting provision of the Byrne JAG Statute); *id.* § 10153(a)(5)(C) (the coordination provision of the Byrne JAG Statute); *id.* § 10153(a)(5)(D) (the applicable laws provision of the Byrne JAG Statute); *id.* § 10102 (the Duties and Functions of the Assistant Attorney General Statute).

[6] *Compare Providence v. Barr*, 954 F.3d at 45 (holding that the DOJ was not authorized to impose the challenged conditions), City of Los Angeles v. Barr, 941 F.3d 931, 944–45 (9th Cir. 2019) (same), City of Philadelphia v. Att'y Gen., 916 F.3d 276, 279 (3d Cir. 2019) (same) *reh'g denied* (June 24, 2019), *and* City of Chicago v. Sessions, 888 F.3d 272, 293 (7th Cir. 2018) (same), *reh'g en banc granted in part on other grounds, vacated in part on other grounds,* No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh'g en banc vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018), *with* New York v. U.S. Dep't of Justice, 951 F.3d 84, 90 (2d Cir. 2020) (holding that the statutes analyzed did provide such authority).

Part I of this Comment provides an overview of sanctuary cities, the grant program at issue, and the facts of *Providence v. Barr*.[7] Part II discusses the circuit split and the various methods of statutory interpretation that the Seventh, Third, Ninth, Second, and First Circuits utilized.[8] Finally, Part III argues that the First Circuit in *Providence v. Barr* rightly rejected the Second Circuit's approach and varied its rationale from that of the Ninth Circuit, providing a helpful model for future courts confronted with this issue.[9]

I. The Legal, Historical, and Factual Context of the First Circuit's Decision in *City of Providence v. Barr*

The circuit split over the DOJ's authority to condition grants to state and local governments through the Edward Byrne Memorial Justice Assistance Grant Program developed in a political environment already highly polarized over immigration issues.[10] Section A of this Part provides a brief historical background of sanctuary jurisdictions.[11] Section B discusses the grant program at issue.[12] Finally, Section C outlines the factual and procedural history of the U.S. Court of Appeals for the First Circuit's 2020 decision in *City of Providence v. Barr*.[13]

A. Sanctuary Jurisdictions Arise in Opposition to Federal Immigration Policies

The modern sanctuary jurisdiction traces its roots to the Sanctuary Movement of the 1980s.[14] As large numbers of asylum seekers fled civil wars in Cen-

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[7] *See infra* notes 10–50 and accompanying text.

[8] *See infra* notes 51–112 and accompanying text.

[9] *See infra* notes 113–133 and accompanying text.

[10] *See* Peck, *supra* note 2, at 16–17 (describing tensions between sanctuary jurisdictions and federal immigration policies). Opinions on immigration remain highly divided across party lines. *See* Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 Harbinger 76, 76 (2020) (citing data from the Public Religion Research Institute). For example, 2019 data demonstrated that 60% of Republicans "perceive[d] immigrants as increasing crime in local communities," compared to only 22% of Democrats. *Id.*

[11] *See infra* notes 14–23 and accompanying text.

[12] *See infra* notes 24–32 and accompanying text.

[13] *See infra* notes 33–50 and accompanying text.

[14] *See* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 Santa Clara L. Rev. 539, 544–45 (2017) (noting that current sanctuary jurisdiction debates are not new and instead reflect four decades of disagreement over sub-federal authorities' roles in implementing federal immigration laws); Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 Colum. Hum. Rts. L. Rev. 1, 16–17 (2018) (explaining how the modern sanctuary jurisdiction developed from the Sanctuary Movement of the 1980s); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 600 (2008) (noting the historic development of this movement). Sanctuary jurisdictions are generally understood as jurisdictions that aim to protect immigrants through laws and practices limiting their involvement in federal immigration enforcement. Massaro &

tral America, churches and other organizations, believing the U.S. government was wrongfully denying asylum, began offering protection of their own accord.[15] Over time, this grassroots movement developed into formal policies at the local level, helping incorporate undocumented immigrants into communities.[16] At the same time, a shifting narrative at the federal level characterizing immigration as "a public safety issue" led to greater overlap between criminal and immigration law, sparking debate over the role of state and local police in enforcing federal immigration laws.[17]

Within this context, state, city, and local authorities (sub-federal authorities) have pushed back against federal immigration enforcement through sanctuary policies.[18] These policies take diverse forms, including law enforcement practices that maintain confidentiality about immigration status, prohibit communica-

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Milczarek-Desai, *supra*, at 16; Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 437 (2018).

[15] *See* Massaro & Milczarek-Desai, *supra* note 14, at 16–17 (noting that the Sanctuary Movement began with churches in the 1980s that provided refuge to Salvadorans and Guatemalans fleeing violence in their home countries); Rodríguez, *supra* note 14, at 600–01 (explaining that cities and states followed the lead of churches and private organizations by passing resolutions to protect individuals in their jurisdictions from arrest). To be granted asylum, individuals must demonstrate that they were persecuted on account of one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(b)(1)(B)(i).

[16] *See* Cuison Villazor, *supra* note 1, at 576 (arguing that sanctuary city policies have helped create "local citizenship" for undocumented individuals in their immediate communities); Massaro & Milczarek-Desai, *supra* note 14, at 17 (contrasting the grassroots origins of the Sanctuary Movement with modern day jurisdictions' use of formal laws and policies to incorporate immigrants). San Francisco, for example, declared itself a "City of Refuge" in 1985 as a way to voice its discontent with the federal government's denial of asylum to, as well as the deportation of, large numbers of Central Americans. Cuison Villazor, *supra* note 1, at 583. In 1989, the city passed a local ordinance requiring its employees to maintain the confidentiality of immigration status information and prohibit the use of city funds to support federal immigration efforts. *Id.*

[17] Lai & Lasch, *supra* note 14, at 544–45 (noting that the characterization of immigration as a public safety concern led to significant changes in immigration law and resulted in a new area of law enforcement known as "crimmigration"). Several key historical events contributed to this shifting narrative, particularly the terrorist attacks of September 11, 2001. *See* Stubblefield, *supra* note 1, at 542 (explaining that augmented national security concerns following the attacks led to a stricter immigration enforcement framework). In response to new federal policies, the modern sanctuary movement gained renewed support. *Id.* For example, as of 2016, some 300 jurisdictions did not comply with U.S. Immigration and Customs Enforcement (ICE) detainers. *Id*. at 544.

[18] Lai & Lasch, *supra* note 14, at 545 (describing sanctuary policies as a form of resistance to the increased overlap between criminal and immigration law over the last four decades). Sanctuary policies developed in four historical "waves." *Id.* The first wave was in the 1980s, as local law enforcement opposed what they viewed as unreasonable federal immigration policies. *Id.* at 546. The second developed as a response to laws passed in the 1990s, including the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), and the September 11, 2001 terrorist attacks. *Id.* The third wave was a response to the "Secure Communities" program, which automatically shared biometric data taken at jails with federal immigration authorities and contributed to massive deportation figures during the Obama administration. *Id.* at 546–47. The fourth wave developed after the presidential election of Donald Trump in response to the nativism underpinning his immigration policies. *Id*. at 548.

tion with federal immigration authorities about the release of noncitizens, and limit compliance with immigration detainers.[19]

Frustrated federal authorities have sought to restrain sanctuary policies and ensure sub-federal cooperation through legislation.[20] At the center of these efforts is 8 U.S.C. § 1373, which prohibits sub-federal authorities from refusing to maintain immigration status information or to share that information with federal immigration authorities.[21] Between 2015 and 2016, Congress proposed multiple bills requiring state and local compliance with § 1373 as a condition of federal funding, but none succeeded.[22] Facing a lack of legislative success, federal agencies contemplated conditioning certain federal grant monies themselves to secure sub-federal cooperation with immigration priorities.[23]

B. The Edward Byrne Memorial Justice Assistance Grant Program

In 2006, Congress created the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG Grant Program or Byrne JAG Grants).[24] The Byrne JAG Grant Program represents the main federal funding source for state and lo-

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[19] *See* City of Providence v. Barr, 954 F.3d 23, 28–29 (1st Cir. 2020) (listing various examples of sanctuary city policies); Lasch et al., *supra* note 1, at 1707 (mentioning five categories of sanctuary policies, including: banning law enforcement investigations into criminal immigration offenses, refusing to comply with immigration detainers, refusing jail access to ICE, promoting confidentiality related to immigration status, and prohibiting joint investigations between local law enforcement and federal immigration authorities). Immigration detainers ask local law enforcement to keep noncitizens in jail past their release date so that federal authorities can detain them for immigration purposes. *Providence v. Barr*, 954 F.3d at 29.

[20] PECK, *supra* note 2, at 14. In 1996, Congress enacted legislation to help counteract local governments' policies of limiting information-sharing with federal immigration authorities, namely the Personal Responsibility and Work Opportunity Reconciliation Act and IIRAIRA. *Id.*

[21] 8 U.S.C. § 1373.

[22] *Providence v. Barr*, 954 F.3d at 29; *see* Lai & Lasch, *supra* note 14, at 552–53 (describing the 2015 "Enforce the Law for Sanctuary Cities Act" that would have withheld funding for multiple federal grants from jurisdictions that violated 8 U.S.C. § 1373 and noting that Congress proposed a total of eight similar bills between 2015 and 2016). *See generally* § 1373 (prohibiting policies that limit the sharing of immigration status information with federal authorities).

[23] Lai & Lasch, *supra* note 14, at 554 (noting that Congress's failure to pass legislation requiring immigration enforcement as a condition of federal funding led Texas Representative John Culberson to push the executive branch to impose such conditions through agency action). In a February 2016 letter, Congressman Culberson urged the Attorney General to require certification of § 1373 compliance from jurisdictions applying for three DOJ grant programs—Byrne JAG Grants, the Community Oriented Policing Services Program (COPS), and the State Criminal Alien Assistance Program (SCAAP). *Id.* Created in 1994, COPS aimed to promote community involvement in crime prevention, but instead program monies have gone in large part toward officer hiring. *Id.* at 553, 598. The SCAAP grant program reimburses localities for jailing "undocumented criminal aliens." *Id.* at 554.

[24] *Providence v. Barr*, 954 F.3d at 27 (providing an overview of the Byrne JAG Grant Program and how it is administered); Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507, 1562 (2018) (noting that Congress created the Byrne JAG Grant Program by merging the preexisting Edward Byrne Memorial State and Local Law Enforcement Program with Local Law Enforcement Block Grants).

cal criminal justice programs.[25] The DOJ's Office of Justice Programs administers the grant program and is led by the Assistant Attorney General (AAG).[26]

Congress articulated the Byrne JAG Grant Program in 34 U.S.C. § 10151 to 10156 (Byrne JAG Statute).[27] The statute establishes the program as a formula grant that calculates award amounts based on relative state populations and rates of violent crimes.[28] Grants may vary from the formula if recipients fail to comply with one of the following federal mandates: (1) creating a sex offender registry, (2) sharing records with a national criminal background check database, or (3) reporting deaths of individuals in custody.[29]

When state and local government entities apply for Byrne JAG funding, they must provide a list of assurances for each grant year covered.[30] For exam-

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[25] Monika Chawla, *Catch Me If You Can: The Federal Government's Long-Winded Chase to Round Up Immigrants and Defund Sanctuary Cities*, 65 VILL. L. REV. 191, 203 (2020); Lai & Lasch, *supra* note 14, at 590–91. Law enforcement entities use Byrne JAG Grants toward programming in any of eight categories: law enforcement; prosecution and court; prevention and education; corrections and community corrections; drug treatment and enforcement; planning, evaluation, and technology improvement; crime victims and witnesses; and mental health. 34 U.S.C. § 10152(a)(1)(A)–(G).

[26] *Providence v. Barr*, 954 F.3d at 27. *See generally About Us*, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, https://www.ojp.gov/about [https://perma.cc/DJB8-CPWR] (describing the Office of Justice Programs, a federal agency under the purview of the DOJ, as focused on building criminal justice system capacity nationwide and helping the country better address crime and support victims). The Office of the AAG oversees the Office of Justice Programs, coordinating its various bureaus and creating policies that reflect executive and legislative priorities. *See Office of the Assistant Attorney General (OAAG)*, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, https://www.ojp.gov/about/offices/office-assistant-attorney-general-oaag [https://perma.cc/KQ7V-J2NY].

[27] 34 U.S.C. §§ 10151–10156. Section 10151 establishes the name of the Byrne JAG Grant Program. *Id.* § 10151. Section 10152 describes the grant program, including the types of authorized and prohibited uses of grant monies, program assessment, and the grant period. *Id.* § 10152. Section 10153 describes the application process, including the types of assurances and certifications that applicants must make. *Id.* § 10153. Section 10154 explains the application review process. *Id.* § 10154. Section 10155 explains how the Attorney General will develop rules to implement the statute. *Id.* § 10155. Finally, § 10156 describes the grant formula for determining awards. *Id.* § 10156.

[28] *Id.* § 10156(a)–(b) (requiring that 60% of grants go to states and 40% to localities); *see Providence v. Barr*, 954 F.3d at 27 (noting that, in determining grant award amounts, the DOJ must comply with the formula established in the Byrne JAG Statute, rather than make its own discretionary decisions). Formula grants are typically available to all state applicants who agree to abide by a certain set of requirements. Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE. L.J. 248, 268 (2014) (comparing formula grants with grants that require applicants to compete for funding). As the name implies, the amount of funding allocated to formula grant recipients is determined by a congressionally set formula that considers a range of factors. *Id.* For example, for Byrne JAG Grants allocated to states, 50% is appropriated based on the ratio of the state's population to the total U.S. population. 34 U.S.C. § 10156(a)(1)(A). The other 50% is based on the ratio of the state's average yearly number of "part 1 violent crimes" over the past three years to the national average crime rate for those same crimes and years. *Id.* § 10156(a)(1)(B). For allocations to local governments, a similar formula is followed, but instead it compares the local government applicant's reported rate of "part 1 violent crimes" with the rate reported by all local government units in that state. *Id.* § 10156(d)(2)(A). Part 1 violent crimes are those defined by the FBI's Uniform Crime Reports. *Id.* § 10156(a)(1)(B)(i).

[29] *Providence v. Barr*, 954 F.3d at 28.

[30] 34 U.S.C. § 10153(a)(1)–(6).

ple, applicants must indicate that they will abide by the requirements of 34 U.S.C. § 10153(a)(4) (the "data reporting provision"), § 10153(a)(5)(C) (the "coordination provision"), and § 10153(a)(5)(D) (the "applicable laws provision").[31] The DOJ notifies grant recipients of their selection in an award letter, in which it typically attaches some special conditions to the grant.[32]

C. Factual and Procedural History of Providence v. Barr

In July 2017, the DOJ announced new conditions on Byrne JAG Grants aimed at increasing information sharing between local law enforcement and federal immigration authorities.[33] Sanctuary jurisdictions across the nation quickly challenged the conditions in court.[34] Providence and Central Falls, Rhode Island,

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[31] *Providence v. Barr*, 954 F.3d at 28 (citing §§ 10153(a)(4), (5)(C)–(D)). To comply with the reporting requirement, applicants must "maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." *Id.* (quoting § 10153(a)(4)). To comply with the coordination requirement, applicants must certify that "there has been appropriate coordination with affected agencies." *Id.* (quoting § 10153(a)(5)(C)). To comply with the certification requirement, applicants must confirm that they "will comply with all provisions of this part and all other applicable Federal laws." *Id.* (quoting § 10153(a)(5)(D)).

[32] *Id.* (providing that "special conditions" are typically related to the recipients' grant administration or their compliance with federal guidelines, regulations, and policies). For example, special conditions might require grantees to collect data on their funded initiatives, participate in DOJ events, or comply with federal nondiscrimination guidelines. *Id.*

[33] *See* Press Release, Dep't of Just., Off. of Pub. Aff., No. 17-826 Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial [https://perma.cc/GEL3-UP57] (announcing that the DOJ would notify Fiscal Year 2017 grant recipients of new immigration enforcement-related conditions); *see also* DEP'T OF JUSTICE, BACKGROUNDER ON GRANT REQUIREMENTS (2017), https://www.justice.gov/opa/press-release/file/984346/download [https://perma.cc/BYY9-H4PB] (accompanying the press release with further details about the new conditions). In 2016, the DOJ's Inspector General published a memorandum identifying sanctuary jurisdictions and suggesting that many of their policies may have violated 8 U.S.C. § 1373. Memorandum from Michael Horowitz, Inspector Gen., Dep't of Just., to Karol V. Mason, Assistant Att'y Gen. for the Off. of Just. Programs, re: Dep't of Just. Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients 1 (May 31, 2016). The Inspector General found that all ten of the jurisdictions that the memorandum focused on had limited their compliance with ICE detainers in some way. *Id*. at 4. Following this report, the DOJ's Office of Justice Programs issued guidance to Byrne JAG and other federal grant program recipients in 2016, requiring certification of compliance with 8 U.S.C. § 1373 as an assurance required of grant applicants. Lai & Lasch, *supra* note 14, at 556. In January 2017, upon taking office, President Donald Trump promptly issued an executive order directing the Attorney General to find § 1373 noncompliant jurisdictions ineligible for federal grant monies. *Id.* at 557. This order was quickly challenged in court, and, in April 2017, the U.S. District Court for the Northern District of California granted a nationwide preliminary injunction, finding that it probably exceeded constitutional spending limits. *Id.* at 559. The Ninth Circuit Court of Appeals upheld the lower court's decision. *Id.*

[34] *See Providence v. Barr*, 954 F.3d at 23; New York v. U.S. Dep't of Just., 951 F.3d 84, 84 (2d Cir. 2020); City of Los Angeles v. Barr, 941 F.3d 931, 931 (9th Cir. 2019); City of Philadelphia v. Att'y Gen., 916 F.3d 276, 276 (3d Cir. 2019); City of Chicago v. Sessions, 888 F.3d 272, 272 (7th Cir. 2018), *reh'g en banc granted in part on other grounds, vacated in part on other grounds,* No. 17-

two cities that had been awarded Byrne JAG grants for over a decade, were among the challengers.[35]

When the cities received their award letters for Fiscal Year 2017 grants, they encountered three new conditions that mirrored those outlined in the July 2017 DOJ materials: the "notice," "access," and "§ 1373 certification" conditions.[36] The notice condition required the cities to provide immigration authorities with advance notice of an alien's scheduled release date and time.[37] The access condition required the cities to give federal immigration authorities access to their correctional facilities to allow them to question aliens about their right to be or remain in the United States.[38] Finally, the § 1373 certification condition required the cities to certify their compliance with 8 U.S.C. § 1373.[39] Section

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2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh'g en banc vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *see also* Andrew F. Moore, *Introduction to the Symposium on Sanctuary Cities: A Brief Review of the Legal Landscape*, 96 U. DET. MERCY L. REV. 1, 7 (2018) (detailing several cities' subsequent legal challenges to the conditions).

[35] Brief for Appellees at 9, Providence v. Barr, 954 F.3d 23 (2020) (No. 19-1802). The city of Providence used past Byrne JAG Grants for police training and patrols in high crime areas. *Id.* Central Falls had become especially reliant on JAG grants following its 2011 bankruptcy and used past grants to upgrade the police department's security and technology systems. *Id.* When the cities applied for Fiscal Year 2017 Byrne JAG Grants, Providence planned to use the funds to pay overtime, hire a bilingual police liaison, and purchase advertisements. *Providence v. Barr*, 954 F.3d at 29. Central Falls intended to use the grant for its police force's information technology needs. *Id.* The DOJ offered Providence and Central Falls awards of $212,112 and $28,677 respectively. *Id.*

[36] *See Providence v. Barr*, 954 F.3d at 29–30 (noting that to comply with the notice and access conditions, grant recipients had to create a "law, policy, or practice" that ensured their compliance, and, to comply with the § 1373 certification condition, recipients had to submit a required "Certification of Compliance" to demonstrate they were in conformity with this law); *see also* DEP'T OF JUSTICE, BACKGROUNDER ON GRANT REQUIREMENTS, *supra* note 33 (outlining the requirements of the notice, access, and § 1373 certification conditions).

[37] *Providence v. Barr*, 954 F.3d at 29; Brief for Appellees, *supra* note 35, at 8; Brief for Appellants at 10, Providence v. Barr, 954 F.3d 23 (2020) (No. 19-1802). The term "alien" as used in the notice and access conditions is defined in 8 U.S.C. § 1101 as "any person not a citizen or national of the United States." 8 U.S.C. § 1101. The widespread use of this term in U.S. immigration law has been criticized for creating a psychological and legal divide between citizens and noncitizens. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIA. INTER-AM. L. REV. 263, 267, 269, 273 (explaining how current terminology in immigration law characterizes citizens as *persons* with dignity and rights, and noncitizens as *aliens* who lack these basic rights) (emphasis added). The use of "alien" legitimizes divergent treatment of noncitizens not only in the legal sphere, but in society at large, too. *Id.* at 273. Upon taking office in January 2021, President Biden instructed immigration authorities to begin using "noncitizen" in place of "alien," and urged for this change to be codified into law. Alison Durkee, *'Aliens' No More: Biden Administration Directs Immigration Officials to Use 'Inclusive Language,'* FORBES (Feb. 16, 2021), https://www.forbes.com/sites/alisondurkee/2021/02/16/aliens-no-more-biden-administration-reportedly-directs-immigration-officials-to-use-inclusive-language/?sh=3c1fdfcc1c33 [https://perma.cc/9PXN-VFF2].

[38] *Providence v. Barr*, 954 F.3d at 29–30; Brief for Appellees, *supra* note 35, at 8; Brief for Appellants, *supra* note 37, at 10.

[39] *Providence v. Barr*, 954 F.3d at 30. *See generally* 8 U.S.C. § 1373 (prohibiting government entities at any level from restricting the sending or receiving of immigration status or citizenship information with federal immigration authorities).

1373 prohibits government entities at the federal, state, and local level from impeding communication with federal immigration authorities about immigration status information.[40]

These conditions conflicted with sanctuary policies in both cities.[41] As such, the cities declined to comply and sued the DOJ in the U.S. District Court for the District of Rhode Island.[42] They argued that the conditions violated the separation of powers, the Tenth Amendment, the Spending Clause, and were ultra vires and arbitrary and capricious agency actions.[43] The cities moved for partial summary judgment and sought to permanently enjoin the DOJ from imposing the challenged conditions.[44] They also sought mandamus relief to require

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[40] 8 U.S.C. § 1373.

[41] *Providence v. Barr*, 954 F.3d at 30; *see* Brief for Appellees, *supra* note 35, at 11–12 (explaining that Providence's Community Police Relations Act prohibited police inquiries about immigration status, and Central Falls's Police Department had a policy of noncompliance with ICE detainers that required officers to hold individuals beyond their eligible release time).

[42] *See* City of Providence v. Barr, 385 F. Supp. 3d 160 (D.R.I. 2019), *aff'd*, 954 F.3d 23 (1st Cir. 2020).

[43] *Providence v. Barr*, 385 F. Supp. 3d at 163 (listing the various counts that the cities raised in their complaint). Providence and Central Falls argued that the conditions represented *ultra vires* agency conduct because the DOJ acted beyond its statutory authority in imposing them. Amended Complaint at 31–33, *City of Providence v. Barr*, 385 F. Supp. 3d 160 (D.R.I. 2019) (No. 1:18-cv-00437-JJM-LDA); *see Ultra Vires*, BLACK'S LAW DICTIONARY (11th ed. 2019) (describing ultra vires conduct as "unauthorized" or "beyond the scope of power allowed or granted by a corporate charter or by law"). The cities also argued that the DOJ violated the Spending Clause and the separation of powers principles because, by creating the grant conditions, it had taken Congress's constitutionally allocated spending power into its own hands. *See* Amended Complaint, *supra*, at 30, 31, 37, 38 (listing Counts I, V, and VI as violations of the separation of powers and the spending clause). *See generally* U.S. CONST. art. I, § 8, cl. 1 (conferring spending powers to Congress). The cities further argued that the DOJ violated the Tenth Amendment by improperly impinging on powers reserved to the states when implementing the challenged conditions. *See* Amended Complaint, *supra*, at 35–36. *See generally* U.S. CONST. amend. X (reserving to the states or the people those rights not explicitly delegated to the federal government). Whereas the federal government is generally recognized as exercising authority over immigration, the states retain general police powers and define their own criminal laws. *See* Philadelphia v. Att'y Gen., 916 F.3d 276, 281 (2019) (comparing broad federal authority over immigration with states' authority over criminal law); *cf.* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 236 (8th ed. 2016) (pointing out that although modern jurisprudence recognizes the federal government's power over immigration matters, it was not until 1891 that the administration of immigration laws shifted from states to the federal government). *See generally* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIA. L. REV. 471, 473, 477 (2004) (discussing the evolving interpretation of police powers). "Police powers" generally refer to state regulatory authority, such as the ability to pass state laws, punish crimes, and regulate commerce within state borders. *Id.* Further, the Anti-Commandeering Doctrine, drawn from the Tenth Amendment, limits the federal government's ability to force states to carry out federal regulatory schemes. *See* Motomura, *supra* note 14, at 446 (noting that sanctuary jurisdictions challenging federal enforcement policies have argued that the Tenth Amendment prohibits federal authorities from directly compelling the states or their officers from enforcing federal regulatory programs).

[44] *Providence v. Barr*, 385 F. Supp. 3d at 163. To enjoin means to legally prohibit a party from doing something by way of a court-ordered injunction. *Enjoin*, BLACK'S LAW DICTIONARY, *supra* note 43. Courts grant permanent injunctions after hearing the merits of the case. *See Injunction*, BLACK'S LAW DICTIONARY, *supra* note 43.

the DOJ to disburse the grant funds.[45] The DOJ moved to dismiss and sought partial summary judgment as well.[46]

In its decision, the district court focused solely on whether the DOJ had statutory authority to impose the immigration-related conditions on Providence and Central Falls's grant awards.[47] Ultimately, it held that the DOJ lacked such authority.[48] The court granted the cities' motion for partial summary judgment and required the DOJ to disburse the cities' grants and issue new award letters free of the conditions.[49] The DOJ appealed to the First Circuit.[50]

II. THE CIRCUIT SPLIT OVER THE DOJ'S AUTHORITY TO IMPOSE IMMIGRATION-RELATED CONDITIONS ON BYRNE JAG GRANTS

In March 2020, in *City of Providence v. Barr*, the First Circuit Court of Appeals became the most recent circuit court to consider the DOJ's authority to impose immigration-related conditions on Byrne JAG grants.[51] Section A of this Part discusses the Seventh, Third, and Ninth Circuits' decisions to strike down the challenged conditions because they concluded that the DOJ lacked statutory authority to impose them.[52] Section B analyzes the Second Circuit's decision to uphold the conditions, creating a circuit split.[53] Finally, Section C discusses the First Circuit's analysis in *Providence v. Barr*, where it sided with the majority of circuits in concluding that the DOJ lacked legal authority to impose the challenged conditions.[54]

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[45] *Providence v. Barr*, 385 F. Supp. 3d at 163. Mandamus relief involves the court issuing a writ to "compel performance of a particular act by a lower court or governmental officer or body . . . to correct a prior action or failure to act." *Mandamus*, BLACK'S LAW DICTIONARY, *supra* note 43.

[46] *Providence v. Barr*, 385 F. Supp. 3d at 165.

[47] *Id.* at 163. The court referred to the issue of statutory authorization as a "threshold issue." *Id.* It noted that if the DOJ lacked statutory authority to impose the challenged conditions, the court did not need to address the constitutional issues and claims of ultra vires and arbitrary and capricious agency conduct. *Id.*

[48] *Id.* at 163–64. In reaching this outcome, the court was particularly persuaded by the Third Circuit, which held, in 2019, in *City of Philadelphia v. Attorney General*, that: (1) a broad power to withhold all of a grantee's grant money lacked textual support in the Byrne JAG Statute; (2) neither the data reporting, coordination, nor applicable laws provisions of that same statute could be read to authorize the challenged conditions; and (3) the duties of the AAG, particularly as enumerated in the special conditions clause of 34 U.S.C. § 10102(a)(6) did not authorize the conditions. *Id. See generally* City of Philadelphia v. Att'y Gen., 916 F.3d 276 (3d Cir. 2019), *reh'g denied* (June 24, 2019) (holding that the DOJ lacked statutory authority for the challenged grant conditions).

[49] *Providence v. Barr*, 385 F. Supp. 3d at 165. The court likewise denied the DOJ's cross-motion for partial summary judgment and enjoined the DOJ from imposing the challenged conditions. *Id.*

[50] *Providence v. Barr*, 954 F.3d at 25.

[51] City of Providence v. Barr, 954 F.3d 23, 26 (1st Cir. 2020) (noting that at the time of trial, three circuit courts had struck down the challenged conditions whereas one circuit, the Second Circuit, had upheld them all).

[52] *See infra* notes 55–79 and accompanying text.

[53] *See infra* notes 80–87 and accompanying text.

[54] *See infra* notes 88–112 and accompanying text.

A. The Seventh, Third, and Ninth Circuits Held the DOJ Lacked Statutory Authority to Impose the Challenged Conditions

In April 2018, in *City of Chicago v. Sessions*, the Seventh Circuit Court of Appeals became the first circuit court to analyze the DOJ's legal authority to impose the notice and access conditions imposed on Byrne JAG Grants.[55] Given Congress's power of the purse, the court reasoned that, for the DOJ to have legally imposed these conditions, Congress must have authorized it to do so.[56]

After acknowledging that the Byrne JAG Statute itself did not explicitly grant such power, the court analyzed the AAG's powers, enumerated in 34 U.S.C. § 10102(a).[57] This provision gives the AAG authority to exercise functions vested in them by Chapter 101 of Title 34 of the U.S. Code, or delegated to them by the Attorney General, "*including placing special conditions on all grants, and determining priority purposes for formula grants*."[58] In examining this special conditions clause, the Seventh Circuit considered the word "including" particularly salient.[59] The court reasoned that because it typically denotes

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[55] City of Chicago v. Sessions, 888 F.3d 272, 278 (7th Cir. 2018), *reh'g en banc granted in part on other grounds, vacated in part on other grounds,* No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh'g en banc vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). The Seventh Circuit did not consider the 8 U.S.C. § 1373 certification condition. *Id*.

[56] *See id.* at 277 (noting that a core issue in the case was the separation of powers). The court reasoned that if the executive branch can exercise both the power to create policy and to compel state and local governments to comply with it via coercive use of the spending power, meaningful checks on tyranny cease to exist. *Id.* Concluding that such a power disbalance was present in this case, the court stated that the Attorney General "used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement." *Id.* Congress's power of the purse is understood as its ability to manage all revenue. Louis Fischer, *Presidential Independence and the Power of the Purse*, 3 U.C. DAVIS J. INT'L L. & POL'Y 107, 107 (1997). The Constitution establishes congressional power over the purse by vesting Congress with the appropriations power, as well spending and taxing powers. *See id*. at 108 (noting the constitutional sources of the power of the purse); *see also* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); *id.* § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States"); *id.* § 8, cl. 2 (establishing Congress's power to borrow money on the United States' credit).

[57] *Chicago v. Sessions*, 888 F.3d at 284. The Attorney General did not contest the lack of a statutory grant of authority within the Byrne JAG Statute itself for his imposition of the immigration enforcement conditions. *Id.* Rather, the Attorney General "place[d] all his purported authorization in one statutory basket, pointing to 34 U.S.C. § 10102(a)(6)" as the sole source of his grant-conditioning power. *Id.*; *see* 34 U.S.C. § 10102(a).

[58] 34 U.S.C. § 10102(a)(6) (emphasis added) (the special conditions clause). Chapter 101 of Title 34 of the U.S. Code is referred to collectively as Justice System Improvement. *See generally id.* §§ 10101–10741. Within Chapter 101, Subchapter I covers the Office of Justice Programs, spanning sections 10101 to 10111. *Id*. §§ 10101–10111.

[59] *See Chicago v. Sessions*, 888 F.3d at 284–85 (beginning with an analysis of the plain meaning of the text as the clearest reflection of congressional intent). The court pointed to the dictionary definition of "including," which it noted "designate[s] that a person or thing is part of a particular group." *Id.* at 284 (citation omitted). Courts often turn to the dictionary definitions of words for guidance, particularly where a phrase is ambiguous. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory*

belonging to a group, this clause was not meant to give the AAG sweeping grant-conditioning authority.[60] Instead, the court concluded that it established a limited class of powers that the AAG could employ only when Chapter 101 or the Attorney General delegated such power.[61] The court also determined that the structure of 34 U.S.C. § 10102(a) supported its reading of the special conditions clause.[62] It reasoned that a single "catch-all provision" at the end of a list of six provisions reciting the AAG's explicit powers was an illogical place for Congress to grant such extensive power.[63] Finally, the court reasoned that a broad reading conflicted with the grant's formula nature,[64] and ran counter to congressional intent, which aimed to maintain state and local government flexibility.[65] Finding no statutory source that gave the DOJ authority to impose the notice and access conditions, the court affirmed the district court's decision in favor of the city.[66]

In February 2019, in *City of Philadelphia v. Attorney General*, the Third Circuit Court of Appeals joined the Seventh Circuit in holding that the DOJ lacked the requisite statutory authority to impose all three challenged conditions.[67] The Third Circuit similarly held that the special conditions clause did not grant such authority.[68] Unlike the Seventh Circuit, however, it also considered

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Interpretation, 115 HARV L. REV 2085, 2103–04 (2002) (noting that courts not only rely on dictionary definitions, but also compare the use of a particular word to other uses of that word throughout the same statute and across different statutes).

[60] *Chicago v. Sessions*, 888 F.3d at 285.

[61] *Id.* When reading "including" in the context of this particular statutory provision, the court held that it indicated "a subcategory of the types of powers and functions that the Assistant Attorney General may exercise" when such powers are vested in him or her. *Id.* Therefore, the court concluded that the DOJ's interpretation of this provision contradicted the statute's plain meaning. *Id.* at 284.

[62] *Id.* at 285. The court rejected the DOJ's broad reading that would grant the AAG power to "impose any conditions he or she sees fit" on both Byrne JAG Grants and grants in other statutes. *Id.* at 284. The narrower reading that the court instead adopted limited the AAG's grant-conditioning power to situations where that power is delegated to him or her by statute or by the Attorney General. *Id.* at 285.

[63] *Id.* at 285, 287 (noting that Congress does not "hide elephants in mouseholes") (citation omitted).

[64] *See id.* at 286 (remarking that because Congress outlined many funding apportionment specifications in the Byrne JAG Statute, it was unlikely that it meant to give the AAG broad authority to bypass the formula entirely).

[65] *Id.* at 285.

[66] *Id.* at 293.

[67] City of Philadelphia v. Att'y Gen., 916 F.3d 276, 279 (3d Cir. 2019), *reh'g denied* (June 24, 2019). At the time of the suit, Philadelphia had policies in place limiting city officials' coordination with federal immigration authorities regarding access to local jails and information about the release of noncitizens. *Id.* at 282.

[68] *Id.* at 288 (holding that 34 U.S.C. § 10102 did not authorize the challenged conditions in light of its text and structure); *see* 34 U.S.C. § 10102(a)(6) (the special conditions clause). The Third Circuit, like the Seventh Circuit, held that the special conditions clause's use of the word "including" signified that the power to place special conditions on grants should be understood as a mere subpart of the AAG's ability to exercise powers when specifically vested in him or her by Chapter 101 of Title 34 of the U.S. Code, or delegated by the Attorney General. *See Philadelphia v. Att'y Gen.*, 916 F.3d at

the Byrne JAG Statute's data reporting and coordination provisions as additional proffered sources of authority but determined that neither authorized the DOJ to impose the notice and access conditions.[69] The data reporting provision, it reasoned, required grant recipients to report only "programmatic and financial" information, which did not include DOJ priorities independent from the Byrne JAG Grant Program, such as the challenged immigration conditions.[70] Similarly, it observed that the coordination provision required only appropriate coordination regarding the grantee's application, not ongoing coordination for unrelated issues.[71] Finally, the court rejected the DOJ's argument that 8 U.S.C. § 1373 qualified as an "applicable law" under the applicable laws provision of the Byrne JAG Statute, which requires grant applicants to certify compliance with "all other applicable Federal laws."[72] The court therefore concluded that the DOJ lacked authority to impose the § 1373 certification condition on Philadelphia's grant.[73]

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287 (explaining that "including" indicates that something is part of a larger whole, which is helpful in understanding the special conditions clause's meaning as part of the larger statutory provision); *Chicago v. Sessions*, 888 F.3d at 284–85 (same). The Third Circuit also noted that § 10102's structure supported a limited scope of the special conditions power, again mirroring the Seventh Circuit's rationale in *City of Chicago v. Sessions*. *See Philadelphia v. Att'y Gen.*, 916 F.3d at 288 (reasoning that it was unlikely that the special conditions clause granted broad grant conditioning powers given its placement at the end of a list of six subsections, the preceding of which explained purely ministerial powers); *Chicago v. Sessions*, 888 F.3d at 285 (noting that a catch-all provision at the end of a list of the AAG's coordination duties was an unlikely place to place a sweeping power allowing the AAG to condition any grants).

[69] *Philadelphia v. Att'y Gen*., 916 F.3d at 285 (noting that the Attorney General's reading of the data reporting and coordination provisions improperly extended their meanings); *see* 8 U.S.C. § 10153(a)(4) (the data reporting provision) (requiring grant applicants to assure that they will maintain and report all data, records, and programmatic and financial information required by the Attorney General); *id.* § 10153(a)(5)(C) (the coordination provision) (requiring grant applicants to certify their coordination with impacted agencies). *See generally Chicago v. Sessions*, 888 F.3d at 280, 284 (noting that the Byrne JAG Statute did not explicitly authorize the challenged conditions and focusing its analysis on the statute outlining the AAG's duties and functions).

[70] *Philadelphia v. Att'y Gen*., 916 F.3d at 285 (interpreting "programmatic and financial" information from the data reporting provision of the Byrne JAG Statute to mean information about the funded grant program and the management of federal funding); *see* 8 U.S.C. § 10153(a)(4) (the data reporting provision).

[71] *Philadelphia v. Att'y Gen*., 916 F.3d at 285 (noting the significance of the use of the past tense in the coordination provision—the requirement that there "'has been' appropriate coordination"—as indicative of a backward looking, rather than ongoing, requirement); *see* 8 U.S.C. § 10153(a)(5)(C) (the coordination provision).

[72] *Philadelphia v. Att'y Gen.*, 916 F.3d at 288, 291; *see* 34 U.S.C. § 10153(a)(5)(D) (the applicable laws provision) (requiring prospective grantees to certify their compliance with all provisions in the same part of the statute, as well as with "all other applicable Federal laws"); 8 U.S.C. § 1373 (preventing sub-federal government entities from prohibiting communication of immigration status information to federal immigration authorities). The DOJ argued that 8 U.S.C. § 1373 qualified as an applicable federal law because it "applie[d] to local government entities." *Philadelphia v. Att'y Gen.*, 916 F.3d at 288. In rejecting this proposition, the court considered the canon against surplusage. *Id.* at 289. Under this doctrine, "every word and every provision in a legal instrument is to be given effect." *Surplusage Canon*, BLACK'S LAW DICTIONARY, *supra* note 43. The Third Circuit reasoned that to give meaning to the word "applicable" in the applicable laws provision, it must limit the federal laws

In October 2019, in *City of Los Angeles v. Barr*, the Ninth Circuit Court of Appeals joined the Seventh and Third Circuits in holding that the DOJ lacked statutory authority to impose the notice and access conditions on Los Angeles's Byrne JAG Grant.[74] Relying on reasoning similar to that of the Third Circuit, the Ninth Circuit rejected the proffered authority of the Byrne JAG Statute's data reporting and coordination provisions.[75] Although it ultimately rejected the special conditions clause as authorizing the DOJ to impose the challenged conditions in this particular case, as the Third and Seventh Circuits did, it arrived at that conclusion differently.[76] The court rejected the city's argument that the spe-

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in question in some meaningful way. *Philadelphia v. Att'y Gen.*, 916 F.3d at 289 (noting that Congress purposefully used the word "applicable," when it could have written the statute to say that applicants "must certify compliance with '*all* other Federal laws'") (emphasis added). The court was also persuaded by the interpretive canon of *noscitur a sociis*, under which an ambiguous word or phrase's meaning "should be determined by the words immediately surrounding it." *Noscitur a Sociis*, BLACK'S LAW DICTIONARY, *supra* note 43; *see Philadelphia v. Att'y Gen.*, 916 F.3d at 289–90 (reasoning that the subsections surrounding the applicable laws provision all related to grant-funded programs, encouraging a narrower reading of the provision than one that would demand applicant cities' compliance with every possibly applicable law).

[73] *Philadelphia v. Att'y Gen*., 916 F.3d at 291.

[74] City of Los Angeles v. Barr, 941 F.3d 931, 934 (9th Cir. 2019).

[75] *See id.* at 944–45 (determining that the data reporting provision only required grantees to report "programmatic" information about Byrne JAG Grant-funded programs and that the coordination provision did not require ongoing coordination). Providing the Department of Homeland Security (DHS) with notice of release of noncitizens to comply with the notice condition would require grant recipients to report information unrelated to their Byrne JAG-funded program, meaning it was not "programmatic." *Id.* The court also highlighted that the notice condition's contemplation of ad hoc reporting of noncitizen release information conflicted with the data reporting provision's *annual* reporting requirement. *Id.* (emphasis added). In rejecting the coordination provision as a source of proffered statutory authority for the access condition, the court agreed with the Seventh Circuit's conclusion that the use of the past tense did not imply an ongoing coordination requirement. *See id.* at 945 (reasoning that the provision's plain language did not demonstrate that grant applicants had to coordinate with DHS, an agency unrelated to their grant activities, nor do so for a continual time period); *see also Philadelphia v. Att'y Gen.*, 916 F.3d at 285 (interpreting the coordination provision to "require certification that there *was* appropriate coordination" related to a grant recipient's application).

[76] *Compare Los Angeles v. Barr*, 941 F.3d at 939 (concluding that the special conditions clause in § 10102(a)(6) provided the DOJ with independent authority to place special conditions on grants), *with* City of Chicago v. Sessions, 888 F.3d 272, 284–85 (7th Cir. 2018), *reh'g en banc granted in part on other grounds, vacated in part on other grounds,* No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *reh'g en banc vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (rejecting the DOJ's argument that the special conditions clause gives the AAG authority to impose any grant conditions and instead concluding more narrowly that it allows the AAG to do so if and when such power is vested in him or her by the statutory chapter or the Attorney General), *and Philadelphia v. Att'y Gen.*, 916 F.3d at 287–88 (same). The Ninth Circuit's reasoning in 2019 in *City of Los Angeles v. Barr*, particularly where it differed from that of the Third and Seventh Circuits, elicited a rather scathing concurrence. *Id.* at 945–46. In her concurrence, Judge Wardlaw argued that the majority, in dicta, unnecessarily found "vague, unidentified powers bestowed upon the DOJ," and created a circuit split by employing an analysis not used by any other circuit court to consider this legal question. *Id.* at 946. (Wardlaw, J., concurring). The majority, Judge Wardlaw contended, misunderstood the Seventh and Third Circuits' holdings. *Id.* She stated that these circuit courts went much further than rejecting a "broad interpretation" of the special conditions clause that would allow the DOJ to place any condi-

cial conditions clause gave the DOJ no independent grant-conditioning authority.[77] This, it reasoned, would render Congress's 2006 amendment to the statue, which added the clause at issue, meaningless.[78] The court recognized the power of the Attorney General, and the AAG by way of delegation, to specially condition all grants but held that, in this case, the challenged conditions were unlawful because they were neither "special conditions" nor "priority purposes" within the meaning of the statute.[79]

B. The Second Circuit Upheld the DOJ's Authority to Impose the Challenged Conditions, Creating a Circuit Split

In February 2020, in *State of New York v. U.S. Department of Justice*, the Second Circuit Court of Appeals split from its sister courts when it held that the DOJ was statutorily authorized to impose the notice, access, and § 1373 certification conditions.[80] It disagreed with the Third Circuit regarding the applicable

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tions on Byrne JAG Grants. *Id.* Instead, they much more narrowly held that the special conditions clause failed to provide "*any* independent grant of authority." *Id.* The majority disagreed with what it considered Judge Wardlaw's "strawman argument." *Id.* at 943 (majority opinion). The majority characterized her argument as failing to grasp its actual holding and to demonstrate how it caused a circuit split. *Id.*

[77] *Los Angeles v. Barr*, 941 F.3d at 939; *see* 34 U.S.C. § 10102(a)(6) (the special conditions clause).

[78] *Los Angeles v. Barr*, 941 F.3d at 939. The 2006 amendment came as part of the 2005 Violence Against Women and Department of Justice Reauthorization Act. *Id.* at 938. Prior to the 2006 amendment, § 10102(a)(6) authorized the AAG to "exercise such other powers and functions as may be vested in [him or her] pursuant to this title or by delegation of the Attorney General." *Id.* at 939. The amendment added the following phrase at the end: "including placing special conditions on all grants and determining priority purposes for formula grants." *Id.* The Ninth Circuit considered this amendment particularly salient, noting that the presumption is that Congress "makes amendments with purpose." *Id.* (citation omitted).

[79] *Id.* at 944. In reaching its interpretation of "special conditions," which the court defined as "the power to impose tailored requirements when necessary, such as when a grantee is 'high-risk,'" the court looked to the regulatory meaning of "special conditions." *Id.* at 941. In that context, "special conditions" meant "individualized requirements included in a specific grant, as set forth in 28 C.F.R. § 66.12(a)(5) (2006)." *Id.* The court concluded that "priority purposes" must be derived from the purposes for Byrne JAG Grants, outlined in 8 U.S.C. § 10152(a)(1), such as providing training and equipment for law enforcement. *Id.* at 942.

[80] New York v. U.S. Dep't of Just., 951 F.3d 84, 123 (2d Cir. 2020). The Second Circuit also considered constitutional issues not addressed by the other circuits. *See id.* at 112 (rejecting the district court's finding that 8 U.S.C. § 1373 violates the Tenth Amendment). The court concluded that the § 1373 certification condition, as applied to the issue of a federal funding requirement in this case, did not violate the anticommandeering doctrine of the Tenth Amendment. *Id.* at 114.The court distinguished this case from the landmark anticommandeering case, *National Federation of Independent Businesses v. Sebelius*, decided in 2012, reasoning that the proportion of funding that Byrne JAG grant recipients risked losing by failing to comply with federal grant conditions did not present risks for federal coercion of state and local governments to the same degree seen in *Sebelius*. *Id.* at 115–16. *Compare* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 685 (2012) (noting that the Medicaid funds at issue amounted to over 10% of the entire annual budget for most states), *with New York v. Dep't of Just.*, 951 F.3d at 116 (noting that the potential loss to New York and Massachusetts for fail-

laws provision of the Byrne JAG Statute, holding that it did authorize the DOJ to impose the § 1373 certification condition.[81] The Second Circuit reasoned that an "applicable" federal law includes not only laws pertinent to the grant program itself but also those applicable to the grant-seeking entity.[82] Because § 1373 applied to the plaintiffs, the DOJ was authorized to impose the condition.[83]

The court also found statutory authority for the notice condition in the Byrne JAG Statute's data reporting and coordination provisions.[84] The court reasoned that information related to noncitizens' release dates was in fact "programmatic" under the data reporting provision.[85] It also concluded that the coordination provision's requirement that grantees appropriately coordinate with impacted agencies meant that they must do so throughout the whole grant period.[86] The court held that the Department of Homeland Security's requirement that

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ing to comply with the Byrne JAG immigration-related conditions was less than 0.1% of their annual state budgets). The Second Circuit reached this constitutional question because the U.S. District Court for the Southern District of New York concluded that 8 U.S.C. § 1373 was unconstitutional on its face and, therefore, could not be considered under the applicable laws provision of the Byrne JAG Statute. *New York v. Dep't of Just.*, 951 F.3d at 111. The Second Circuit lamented the need to address the constitutional issue in light of judicial restraint, noting that the lower court, having already found that the § 1373 certification condition violated the Administrative Procedure Act (APA), could have avoided the Tenth Amendment challenge. *Id*. Yet, because the Second Circuit came out differently than the district court by holding that the DOJ was statutorily authorized to impose the certification condition, the court was compelled to address the argument. *Id.* The Second Circuit also concluded that the conditions were not arbitrarily and capriciously imposed in violation of the APA. *Id.* at 122. It rejected the plaintiffs' argument that the conditions represented a shift in the DOJ's position that lacked adequate reasoning. *Id.* at 123. The court reasoned that the DOJ's position had not in fact changed and that, even if the agency needed to show the reasons behind its new policy, it did so through its 2016 report on the cooperation challenges facing law enforcement and immigration authorities. *Id.* at 123.

[81] *Compare New York v. Dep't of Just.*, 951 F.3d at 106 (rejecting the Third Circuit's rationale that a broad reading of "applicable" in the applicable laws provision would implicate an issue of surplusage), *with Philadelphia v. Att'y Gen.*, 916 F.3d at 291 (determining that the applicable laws provision of the Byrne JAG Statute did not provide authority for the challenged § 1373 certification condition).

[82] *New York v. Dep't of Just.*, 951 F.3d at 105. The court noted that rather than limiting the meaning of "applicable" in the provision "all other applicable Federal laws," the adjective "all" should be understood to broaden its meaning. *Id.* at 106.

[83] *Id.* at 111.

[84] *Id.* at 121.

[85] *Id.* at 117. The court noted that such information was programmatic at least insofar as it related "in any way to the criminal prosecution, incarceration, or release of persons." *Id.* The court determined that this would include nearly all of the programs that Byrne JAG Grant applicants can apply for, including, for example, task forces aimed at combatting specific crimes and prosecutors and defenders programs, because each involves aspects of arrest, prosecution or defense, and incarceration. *Id.*

[86] *See id.* at 118 (reasoning that the dictionary definition of "coordination" implied some kind of ongoing conduct). The court noted that coordination was not a "static concept," but rather, a "relation and sequence" of actors and actions. *Id.* The court contrasted its holding with that of the Third Circuit, which concluded that the coordination provision only required coordination with impacted agencies at the time of the grant application. *Id.*

grantees provide notice about noncitizens' release dates constituted the type of ongoing coordination that the coordination provision contemplated.[87]

C. The First Circuit Sided with the Majority of Circuits in Providence v. Barr

In March 2020, in *City of Providence v. Barr*, the First Circuit joined the majority of circuits in holding that the DOJ lacked statutory authority for all three of the challenged conditions.[88] The DOJ argued that (1) the data reporting provision, (2) the coordination provision, and (3) the applicable laws provision of the Byrne JAG Statute, as well as (4) the special conditions clause of the statute outlining the AAG's duties and functions, gave it authority to impose the challenged conditions.[89]

The court began by considering the data reporting provision of the Byrne JAG Statute.[90] It concluded that this provision only authorized the DOJ to require reporting about either the grant program itself or its funded activities.[91] It reasoned that the DOJ's interpretation of "programmatic" in this provision contradicted the use of "program" and "programmatic" throughout the statute.[92] The DOJ's interpretation, the court noted, would erroneously cover grant recipients' activities in any Byrne JAG program category, regardless of whether their funding was designated for that activity.[93]

Turning to the coordination provision's requirement that applicants "coordinat[e] with affected agencies," the court held that this only covered the coordination needed to prepare the grant application.[94] The provision's use of the past

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[87] *See id.* at 121 (concluding that the DHS was an "affected agency" as specified in the coordination provision because grants related to "prosecution, incarceration or release" of individuals in custody would affect the department's ability to initiate removal proceedings against noncitizens).

[88] City of Providence v. Barr, 954 F.3d 23, 27 (1st Cir. 2020) (noting that despite the DOJ's "kitchen-sink-full of clever legal arguments," it had exceeded its authority when it imposed the immigration-related conditions); *see* Los Angeles v. Barr, 941 F.3d 931, 944–45 (9th Cir. 2019) (striking down the challenged conditions); *Philadelphia v. Att'y Gen.*, 916 F.3d at 279 (same); *Chicago v. Sessions*, 888 F.3d at 293 (same).

[89] *Providence v. Barr*, 954 F.3d at 32, 39; Brief for Appellants, *supra* note 37, at 13, 15; *see* 34 U.S.C. § 10153(a)(4) (data reporting provision); *id.* § 10153(a)(5)(C) (coordination provision); *id.* § 10153(a)(5)(D) (applicable laws provision); *id.* § 10102(a)(6) (duties and functions of the AAG).

[90] *Providence v. Barr*, 954 F.3d at 35; *see* 34 U.S.C. § 10153(a)(4) (the data reporting provision of the Byrne JAG Statute).

[91] *Providence v. Barr*, 954 F.3d at 35.

[92] *See id.* at 32 (noting that throughout the Byrne JAG Statute, "program" consistently referred only to the grant program or the grant-funded activity); *see also* § 10153(a)(4) (requiring that applicants report programmatic and financial information, as required by the Attorney General). The data reporting provision's application to the "fiscal year" of the grant application lent further support for the court's narrow reading of "programmatic," as the temporal aspect of the grant application period pointed specifically to the grant program and its funded activities. *Providence v. Barr*, 954 F.3d at 33.

[93] *See Providence v. Barr*, 954 F.3d at 32–33 (noting that the DOJ offered no reasonable explanation for why the court should interpret "programmatic" in the data reporting provision any differently from its use throughout the rest of the Byrne JAG statute).

[94] *Id.* at 33.

tense showed that continual coordination beyond this period was not required.[95] Further, the court held that the provision only required coordination with agencies that were impacted specifically by the applicants' funded programs.[96] In contrast, the type of coordination with immigration authorities that the DOJ sought through the notice and access conditions related neither to the grant program nor its proposed activities.[97] The court also concluded that the location of these two provisions showed Congress did not intend for them to give the DOJ broad power to impose its own "unrelated law enforcement priorities."[98] The court rejected the DOJ's argument that these provisions authorized its imposition of the notice and access conditions on funding specifically for grant programs related to custody and prosecution.[99]

Next, considering the applicable laws provision as a proffered source of authority for the § 1373 certification condition, the court considered "applicable" ambiguous and turned to legislative intent.[100] Noting that Congress would not have included this word unless it meant to narrow the laws that the provision applied to, the court rejected the DOJ's interpretation, which would cover all laws pertinent to grant applicants and "germane to the grant."[101] The court reasoned that this reading would render the inclusion of "applicable" meaningless.[102] The court favored a narrower interpretation: applicable federal laws were those that applied to governments "in their capacities" as grantees.[103]

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[95] *Id.* Using reasoning similar to that of the Seventh, Third, and Ninth Circuits, the First Circuit highlighted that the coordination provision requires that there "has been" coordination among applicants and affected agencies. *Id.*

[96] *Id.* The court rejected the DOJ's interpretation of this provision, which would require applicants to coordinate with any law enforcement body that was impacted in any way by their activities. *Id*.

[97] *Id.* at 35.

[98] *Id.* at 34. The court noted that these provisions are listed among other assurances grant applicants must make about their applications. *Id.*

[99] *Id.* at 35 (concluding that such a broad reading of the "programmatic" information would essentially cover nearly all law enforcement activities and rejecting such a "capacious view" of this provision). The court maintained that although proposed activities in other grant applications may be sufficiently related to the release of noncitizens to warrant the notice and access conditions, this was not the case for Providence and Central Falls, whose grants were in no way related to removing noncitizens from the United States. *Id.* at 36.

[100] *See id.* at 36 (stating that the dictionary definition of "applicable" did little to illuminate its meaning in the statute). Considering the formula nature of the Byrne JAG grant, the court concluded that it was unlikely that "Congress intended to give the DOJ so universal a trump card" as made possible under the DOJ's broad reading of the applicable laws provision. *See id.* at 38 (noting that the DOJ's interpretation of the applicable laws provision would give it significant ability to diverge from the grant's formula requirements); *see also* § 10153(a)(5)(D) (the applicable laws provision of the Byrne JAG Statute).

[101] *Providence v. Barr*, 954 F.3d at 36–37.

[102] *Id.* at 37. The court rejected the Second Circuit's reading of the applicable laws provision, determining that it defied the canon against surplusage. *Id*. *See generally Surplusage*, BLACK'S LAW DICTIONARY, *supra*, note 43 (defining the canon against surplusage as giving effect to every word of a legal provision). The court reasoned that Congress could have simply drafted the statute to require

Finally, the court considered the AAG's duties and functions in 34 U.S.C. § 10102 as another proffered source of authority.[104] The DOJ argued that the special conditions clause granted it independent authority to place special conditions on all Office of Justice Programs-administered grants.[105] The court disagreed.[106] It held that the statute's plain meaning, the grant's formula nature, and the use of "special conditions" as a term of art made this provision merely illustrative of the types of powers the AAG could exercise *if and when* vested with such power.[107]

Specifically, the court reasoned that "special conditions," which the statute does not define, was a term of art that should be imbued with the meaning typically given to this term.[108] The DOJ and other federal agencies often placed special conditions on "high risk" grantees who they identified as such due to financial challenges or problems complying with previous grant requirements.[109] Therefore, "special conditions," as used in the special conditions clause, meant "individualized requirements" related to high-risk grant recipients, not requirements to be imposed broadly on all Byrne JAG grant recipients.[110] The court also concluded that, under the canon of *noscitur a sociis*, the inclusion of the

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applicants to comply with "all other federal laws." *Providence v. Barr*, 954 F.3d at 37. Therefore, its decision to include "applicable" demonstrated that it meant to specify only a portion of federal laws. *Id.* The Second Circuit, in contrast, relied on the dictionary definition of "applicable" and noted that the use of "all" before "applicable" reflected legislative intent to give this word its broadest meaning. New York v. U.S. Dep't of Just., 951 F.3d 84, 106 (2d Cir. 2020). The First Circuit also rejected the Second Circuit's conclusion that the DOJ had extensive authority to establish which applicants even qualified for grant funding. *Providence v. Barr*, 954 F.3d at 39. It noted that the statutory language listing specific assurances that applicants must make to be grant-eligible did not reflect congressional intent to allow the DOJ to establish disconnected qualifications just to further its own goals. *Id.*

[103] *Providence v. Barr*, 954 F.3d at 37.

[104] *Id.* (determining that, although ultimately unsuccessful, the statute was the DOJ's most convincing argument); *see* 34 U.S.C. § 10102 (defining the duties of the Assistant Attorney General).

[105] *Providence v. Barr*, 954 F.3d at 40.

[106] *Id.* at 41.

[107] *Id.* at 40, 42–43. In considering the statutory text, the court looked to the dictionary definition of "including," which indicates a subset of information. *Id.* at 40. It determined that the special conditions clause's plain meaning therefore demonstrated that placing special conditions on grants was merely an example of a power that the AAG may exercise if and when vested with such power. *Id.* at 40–41. The court also reasoned that the formula nature of the Byrne JAG Grant Program was inconsistent with a broader reading of the special conditions clause. *Id.* at 42. This interpretation was backed by its conclusion that "special conditions" was a term of art and should therefore be understood as having the same meaning as it had in other statutes. *Id.* at 43. The court determined that "special conditions" in other legislative provisions generally meant "individualized requirements imposed on a specific grant." *Id.* at 44. *See generally* § 10102(a)(6) (giving the AAG the authority to exercise certain powers vested in or delegated to the AAG, including the power to impose special conditions and determine key purposes for particular grants).

[108] *Providence v. Barr*, 954 F.3d at 43.

[109] *Id.* The court noted that a regulation allowing the DOJ to place special conditions on high risk grant recipients existed when § 10102(a)(6) was amended and that similar regulations governed other federal agencies, like the Department of Education and the Department of Agriculture. *Id.*

[110] *Id.* at 44; *see* 34 U.S.C. § 10102(a)(6) (the special conditions clause).

special conditions clause at the end of a list of otherwise administrative duties made it unlikely that Congress meant to grant such broad authority there.[111] Finally, the court rejected the DOJ's argument that failing to read this clause broadly would strip all meaning from the 2006 amendment to this provision.[112]

III. The First Circuit Respected Plain Meaning and Legislative Intent by Aligning with the Majority Approach

In March 2020, in *City of Providence v. Barr*, the U.S. Court of Appeals for the First Circuit's thoughtful analysis of the Byrne JAG Statute and the statute setting forth the duties and functions of the AAG respected the plain meaning of and congressional intent behind these statutes.[113] Section A of this Part discusses why the First Circuit was right to reject the U.S. Court of Appeals for the Second Circuit's interpretation of the data reporting, coordination, and applicable laws provisions of the Byrne JAG Statute.[114] Section B argues that although the First Circuit reached the same conclusion as the U.S. Court of Appeals for the Ninth Circuit, it correctly adopted different reasoning regarding the special conditions clause.[115]

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[111] *Providence v. Barr*, 954 F.3d at 41. According to the interpretive doctrine of *noscitur a sociis*, the meaning of an ambiguous word or phrase "should be determined by the words immediately surrounding it." *Noscitur a Sociis*, BLACK'S LAW DICTIONARY, *supra* note 43.

[112] *See Providence v. Barr*, 954 F.3d at 42–43 (noting the shortcomings in the DOJ's argument that a narrow interpretation of the special conditions clause would violate the canon against surplusage). The canon against surplusage instructs that every word of a legal provision must be given effect. *Surplusage*, BLACK'S LAW DICTIONARY, *supra* note 43. The Ninth Circuit relied heavily on the same reasoning articulated by the DOJ regarding the 2006 amendment to the special conditions clause when it held that the DOJ did in fact have independent authority to impose special conditions on grants. *See* City of Los Angeles v. Barr, 941 F.3d 931, 939 (9th Cir. 2019) (noting that Congress amends statute purposefully and that this amendment showed that it meant to give the AAG authority to specially condition grants). The First Circuit, in contrast, noted that this interpretive canon became a "double-edged sword" in this case. *Providence v. Barr*, 954 F.3d at 43. The DOJ's reading of the special conditions clause, it reasoned, would render provisions of other statutes meaningless, particularly those that specify the amount of Byrne JAG funding that can be withheld for specific reasons. *Id.*

[113] *See* City of Providence v. Barr, 954 F.3d 23, 33, 37, 40–42, 44 (1st Cir. 2020) (analyzing the text of the data reporting, coordination, and applicable laws provisions, as well as the special conditions clause, and drawing on interpretive doctrines and the statutory structure to inform their meaning); *see also* 34 U.S.C. § 10153(a)(4) (the data reporting provision); *id.* § 10153(a)(5)(C)–(D) (the coordination provision and the applicable laws provision); *id.* § 10102(a)(6) (the special conditions clause).

[114] *See infra* notes 116–126 and accompanying text.

[115] *See infra* notes 127–133 and accompanying text.

A. The First Circuit Correctly Rejected the Second Circuit's Holding

In *Providence v. Barr*, the First Circuit rightly rejected the Second Circuit's analysis in favor of an approach that respected congressional intent.[116] First, the court correctly applied the meaning of the Byrne JAG Statute's data reporting and coordination provisions.[117] The court was right to criticize the Second Circuit's application that gave the DOJ authority to impose the notice and access conditions on any grant-funded program related to prosecution or custody.[118] By covering nearly all law enforcement activities, this interpretation defied Congress's intent that the grant program provide grantees with flexibility to use funding toward programs that best fit their needs.[119] Further, in considering the applicable laws provision, the First Circuit rightly noted that the Second Circuit's reliance on a dictionary definition of "applicable" led to an extremely

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[116] *See Providence v. Barr*, 954 F.3d at 45 (striking down the challenged grant conditions as unlawful). *But see* New York v. U.S. Dep't of Just., 951 F.3d 84, 90 (2d Cir. 2020) (holding that the challenged conditions were statutorily authorized and did not violate the Constitution). In *Providence v. Barr*, the First Circuit rightly noted that the structure and context of a particular statutory provision illuminate legislative intent. 954 F.3d at 31. *See generally* Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 62–63 (2003) (explaining that where a statute's plain language is ambiguous, courts commonly analyze legislative intent to decipher the meaning of the phrase). Although interpreting congressional intent is at best an estimate of what U.S. representatives mean to communicate when drafting legislation, textualists must make approximations of a statute's "public meaning" as well. Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 805 (2010). The court in *Providence v. Barr* kept congressional intent at the center of its analysis, noting that it served as its "lodestar" in statutory interpretation and repeatedly explaining how the language and structure of the statutes at issue reflected that intent. 954 F.3d at 31, 34, 39, 42, 44. The First Circuit determined that the Byrne JAG Statute's characterization of the grant program as a "formula grant" was clear evidence that Congress did not mean to allow for discretionary imposition of sweeping conditions. *Id.* at 34. Further, the court rejected the DOJ's broad reading of the applicable laws provision because it concluded that Congress did not intend to require grant applicants to comply with "*every law* that mandates some form of cooperation with the federal government on criminal justice matters." *Id.* at 39 (emphasis added). It reasoned that where Congress meant to require compliance with other statutes as a condition of grant funding, it made its intent explicit. *Id.*

[117] *Compare Providence v. Barr*, 954 F.3d at 35 (concluding that noncitizens' release dates were not "programmatic" information within the meaning of the Byrne JAG Statute), *with New York v. Dep't of Just.*, 951 F.3d at 117 (determining that the data reporting provision is limited to "programmatic and financial" information, but reasoning that the noncitizen release information was 'programmatic,'" at least for certain types of grant programs).

[118] *See New York v. Dep't of Just.*, 951 F.3d at 117 (holding that the DOJ had authority to require grant recipients to share release information of noncitizens because this was "programmatic" information, as referred to in the data reporting provision of the Byrne JAG Statute). The Second Circuit interpreted "programmatic" to refer to Byrne JAG programs related to prosecution, incarceration, or release, which it noted would naturally include some non-citizens. *Id*.

[119] *See Providence v. Barr*, 954 F.3d at 35 (noting that this interpretation would give the DOJ the ability to require Byrne JAG applicants to coordinate with them across a vast range of the applicants' operations); *see also New York v. Dep't of Just.*, 951 F.3d at 93 (noting that Congress drafted the Byrne JAG Statute to provide flexibility to use grant monies to meet recipients' vast array of needs, rejecting a "'one-size fits all' solution").

broad reading of the provision that failed to account for the narrower legislative intent evidenced by the inclusion of this limiting word.[120]

Additionally, in discussing legislative intent, the First Circuit, in stark contrast to the Second Circuit, properly weighed the significance of the formula nature of the grant.[121] The First Circuit concluded that the statute's specification of how to account for population and violent crime rates in determining grant amounts, as well as particular instances in which the DOJ may vary from this formula, demonstrated clear intent for the Byrne JAG Program to be a formula grant.[122] The Second Circuit, in contrast, attempted to reason its way around this intent.[123] It recharacterized the DOJ's denial of all funds to jurisdictions that refused to comply with the challenged conditions, an obvious variance from the grant's formula, as merely a preliminary issue of applicant qualifications.[124] In a convoluted argument, it determined that conditioning Byrne JAG Grants in this way did not upset the formula grant structure because these cities were not qualified applicants to begin with.[125] The First Circuit astutely criticized this rationale, explaining that the Byrne JAG Statute at no point expresses Congress's intent to authorize the DOJ to change the statutorily enumerated grant qualifications on its own accord and in ways unrelated to the grant program.[126]

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[120] *Compare Providence v. Barr*, 954 F.3d at 37 (noting that Congress could have simply phrased the provision to require compliance with "all other Federal laws," but it chose to limit this to "applicable" federal laws), *with New York v. Dep't of Just.*, 951 F.3d at 106 (relying on the dictionary definition of "applicable," meaning "capable of being applied: having relevance," to construe any "applicable Federal law" as that which "pertain[s] either to the State or locality seeking a Byrne grant or to the grant being sought"). The First Circuit rebuked the Second Circuit for its "blind allegiance to the dictionary definition of 'applicable'" that it contended failed to answer the question of what would make a federal law "relevant" so as to come within the applicable laws provision. *Providence v. Barr*, 954 F.3d at 37.

[121] *Compare Providence v. Barr*, 954 F.3d at 34 (explaining how the Byrne JAG Grant is allocated based on the statutory formula), *with New York v. Dep't of Just.*, 951 F.3d at 103 (providing little discussion of the formula nature of the grant and instead emphasizing the Attorney General's authority in helping prescribe how application qualifications prescribed by Congress will be met). *See generally supra* note 28 and accompanying text (describing formula grants and the specific formula employed by the Byrne JAG Grant).

[122] *Providence v. Barr*, 954 F.3d at 34 (commenting that Congress's intent for the Byrne JAG Grant to be a formula grant was "nose-on-the-face plain"). The court referenced specific examples of how the Byrne JAG Statute allowed for deviations from the formula, such as setting aside up to 5% of grant monies for "extraordinary increases in crime" and retaining 10% from applicant states that do not comply with the federal sex offender registry requirement. *Id.*

[123] *See New York v. Dep't of Just.*, 951 F.3d at 103 (acknowledging briefly the formula nature of Byrne JAG Grants but stating that applicants must first demonstrate their qualifications and emphasizing the Attorney General's "considerable authority" in determining the requirements to qualify as an applicant).

[124] *Id.* at 103–04.

[125] *See id.* at 107 (stating that the Byrne JAG Grant's formula nature did not warrant a narrow reading of the applicable federal laws provision because formula grant applicants must meet program requirements to be considered eligible for funding in the first place).

[126] *Providence v. Barr*, 954 F.3d at 39.

B. The First Circuit Rightly Distinguished Its Analysis of the Special Conditions Clause from That of the Ninth Circuit

Despite agreeing with the Ninth Circuit's ultimate conclusion that the DOJ lacked authority to impose the challenged conditions, the First Circuit correctly interpreted the special conditions clause differently.[127] The Ninth Circuit held that the DOJ had independent authority to impose special conditions on Byrne JAG Grants but determined that the conditions at issue were simply not "special conditions" nor "priority purposes" under the statute.[128] In contrast, the First Circuit held that no such independent authority existed at all.[129]

At face value, the Ninth Circuit's reasoning, which highlighted the need to give meaning to Congress's 2006 decision to add the special conditions clause to the statute outlining the AAG's duties, appears persuasive.[130] Yet, the First Circuit's rationale is more persuasive still: it noted that its reading of the clause in no way deprives the amendment of meaning because the AAG can still impose such special conditions if and when vested with such power.[131] The First Circuit also pointed out the faulty logic behind the Ninth Circuit's application of the canon against surplusage in this instance.[132] In attempting to ensure that the special conditions clause was not deprived of meaning by reading the DOJ's grant conditioning authority broadly, the Ninth Circuit's interpretation effectively gutted other statutory provisions of their meaning.[133]

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[127] *Compare id.* at 42, 45 (concluding that the DOJ impermissibly imposed the conditions absent congressional authority to do so, but rejecting the Ninth Circuit's interpretation of the special conditions clause), *with* City of Los Angeles v. Barr, 941 F.3d 931, 939, 944 (9th Cir. 2019) (rejecting the City of Los Angeles's argument to find that the special conditions clause did provide the DOJ with independent authority to impose special conditions, but ultimately concluding that in this particular case, the challenged conditions were unlawful because they were neither "special conditions" nor "priority purposes" within the meaning of the statute).

[128] *Los Angeles v. Barr*, 941 F.3d at 939–40.

[129] *Providence v. Barr*, 954 F.3d at 40–41.

[130] *See Los Angeles v. Barr*, 941 F.3d at 939 (rejecting the city's argument that the special conditions clause did not grant the AAG any independent authority to condition grants). The court reasoned that the city's interpretation would deprive all meaning from Congress's 2006 amendment to the statute outlining the AAG's duties and functions. *Id.*

[131] *See Providence v. Barr*, 954 F.3d at 43 (noting that "the canon against surplusage is not a straightjacket" and should not be used to eliminate all interpretations where language serves only an illustrative purpose).

[132] *See id.* (noting the unlikelihood that Congress would have set specific percentages of grant funds that the DOJ could withhold from applicants who did not comply with certain requirements—such as a 10% withholding for failure to document fatalities in custody—if the special conditions clause gave it sweeping authority to withhold all funding simply by creating a special condition); *Los Angeles v. Barr*, 941 F.3d at 939 (holding that Congress's inclusion of the special conditions clause in its 2006 amendment to the Byrne JAG Statute demonstrated that it meant to give the DOJ power to specially condition all grants).

[133] *See Providence v. Barr*, 954 F.3d at 43 (noting that provisions that carefully enumerate the specific circumstances in which the DOJ may reduce grant awards would be rendered meaningless if the special conditions clause was read so as to give the AAG independent grant-conditioning authori-

CONCLUSION

In March 2020, the First Circuit Court of Appeals in *City of Providence v. Barr* held that the DOJ lacked statutory authority to impose immigration enforcement-related conditions on Providence and Central Falls's Byrne JAG Grants. This decision respected congressional intent and correctly interpreted the plain language of the Byrne JAG Statute and the statute governing the AAG's duties. The court rightly rejected the Second Circuit's holding that would make Byrne JAG Grants almost entirely discretionary in defiance of the statutory language and aims. It also rightly course-corrected from the Ninth Circuit's interpretation of the special conditions clause that would give the DOJ limited independent authority to impose special conditions on grants. Courts facing similar legal questions in the future should adopt the First Circuit's well-reasoned approach.

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Preferred citation: Heather Odell, Comment, *Are Sanctuary Cities Safe? Evaluating the DOJ's Authority to Impose Immigration Conditions on Criminal Justice Grants*, 62 B.C. L. REV. E. SUPP. II.-102 (2021), http://lawdigitalcommons.bc.edu/bclr/vol62/iss9/8/.

ty). *But see Los Angeles v. Barr*, 941 F.3d at 939 (rejecting the City of Los Angeles's argument that the 2006 amendment to § 10102(a)(6) failed to give the DOJ any independent authority because such a reading would render the amendment meaningless).