



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

December 20, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *City & County of San Francisco v. Garland*, No. 18-cv-5146 (C.D. Cal. Mar. 26, 2019); *State of California v. Garland*, No. 18-cv-5146 (C.D. Cal. Mar. 26, 2019); *State of Oregon v. Biden*, No. 18-cv-1959 (D. Or. Aug. 29, 2019); *City of Los Angeles v. Garland*. No. 18-cv-7347 (C.D. Cal. Feb. 15, 2019)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to notify you that the Department of Justice has decided not to appeal certain rulings in the above-captioned cases. In each case, the district court held that certain conditions that the Department had imposed on grants awarded under the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, see 34 U.S.C. 10151 *et seq.*, exceeded the Department's statutory authority, and the court enjoined the conditions. In addition, the court in each case addressed the constitutionality of the conditions and of certain federal statutes.

The Byrne JAG program is the primary provider of federal grant dollars to support state and local criminal-justice programs. The program is administered by the Office of Justice Programs (OJP) within the Department of Justice. Byrne JAG funds are divided among recipients based on a statutory formula, largely premised on population and crime statistics. 34 U.S.C. 10156. Funds may be used for any purpose specified in 34 U.S.C. 10152(a)(1); see 34 U.S.C. 10152(a)(2).

For Fiscal Year (FY) 2017 and FY 2018, OJP included in Byrne JAG awards several conditions relating to cooperation by state and local governments with federal immigration authorities. One of the conditions required grantees to certify their compliance with 8 U.S.C. 1373, which generally bars federal, state, and local officials from prohibiting or restricting state and local governments from providing to federal immigration authorities information about the "citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a). Another condition, imposed in FY 2018, required a jurisdiction to certify its compliance with 8 U.S.C. 1644. Section 1644 similarly provides that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from" federal immigration authorities "information regarding the immigration status, lawful or unlawful, of an alien in the United States." *Ibid.* Other challenged conditions required grantees to respond to requests for information

regarding prisoner release dates; to afford federal immigration authorities access to meet with a detained noncitizen; not to disclose certain sensitive federal law-enforcement information; and to provide specified information about the grantee's laws and policies.

Many jurisdictions commenced suits challenging the conditions on a variety of grounds. The district courts in each of these four cases held that various conditions exceeded OJP's statutory authority. 18-cv-5169 D. Ct. Doc. 47, at 11-20 (Mar. 4, 2019) (*San Francisco and California*); 18-cv-1959 D. Ct. Doc. 36, at 21-34 (Aug. 7, 2019) (*Oregon*); 18-7347 D. Ct. Doc. 62, at 4-8 (Feb. 15, 2019) (*Los Angeles*). Each court also concluded that certain statutory provisions or the conditions violated the Constitution. The district court in *San Francisco and California* (which were decided together) issued a declaratory judgment that 8 U.S.C. 1373 violates the Tenth Amendment and that, "to the extent Congress conferred authority on the Attorney General" to impose the conditions—which the court concluded Congress had not done—the conditions "exceed Congress's spending powers under Article I of the Constitution." 18-cv-5169 D. Ct. Doc. 51, at 1 (Mar. 26, 2019). The court in *Oregon* issued a declaratory judgment that both 8 U.S.C. 1373 and 1644 violate the Tenth Amendment and that the conditions "are unconstitutional and unlawful because they exceed the congressional authority conferred on the Executive Branch." 18-cv-1959 D. Ct. Doc. 38, at 3 (Feb. 15, 2019). And the court in *Los Angeles* stated in its order granting summary judgment that 8 U.S.C. 1373 and 1644 "violate the anticommandeering principle of the Tenth Amendment," 18-cv-7347 D. Ct. Doc. 62, at 7, but the court did not issue a declaratory judgment embodying that statement or any injunctive relief relating to enforcement of those provisions outside the context of the grant programs at issue in that case. The government filed notices of appeal in each of these cases.

The government also appealed adverse rulings involving the conditions in other cases, and it filed a petition for a writ of certiorari to review an adverse decision of the Ninth Circuit regarding OJP's statutory authority to impose some of the same conditions and acquiesced to two other petitions filed by jurisdictions challenging the conditions. See *Barr v. City & County of San Francisco*, No. 20-666 (filed Nov. 13, 2020); *State of New York v. Department of Justice*, No. 20-795 (filed Dec. 7, 2020); *City of New York v. Department of Justice*, No. 20-796 (filed Dec. 7, 2020). Following the change in Administration, however, the Department determined no longer to enforce the challenged conditions, and the parties stipulated to the dismissal of the certiorari petitions in those cases. See 141 S. Ct. 1291, 1292 (2021).

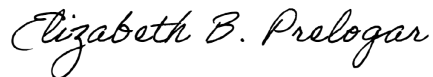
The Department intends to pursue its appeals in cases that are the subject of this letter, to the extent that the district courts' judgments declared federal statutes unconstitutional. Specifically, the Department will pursue its appeal of the consolidated declaratory judgment in *San Francisco and California* that 8 U.S.C. 1373 violates the Tenth Amendment, and the declaratory judgment in *Oregon* that 8 U.S.C. 1373 and 1644 violate the Tenth Amendment.

In light of the Department's determination no longer to enforce the challenged conditions, however, the Department does not intend to pursue its appeals of the judgments in these cases to the extent that they held that the Department lacks statutory authority to impose the conditions. The Department also does not intend to pursue its appeals in these cases of the courts' conclusions that the conditions themselves were or might have been unconstitutional. Specifically, the Department does not intend to pursue its appeal of the district court's declaration in the alternative in *San Francisco and California* that, if the conditions were statutorily authorized, then the statutes

authorizing them would have violated the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1. That alternative conclusion has no present legal or practical significance; it is premised on a hypothetical determination that the challenged conditions were statutorily authorized, but the court concluded that they were not authorized. The Department also does not intend to pursue its appeal of the district court's declaration in *Oregon* that, because the conditions exceeded the Department's statutory authority, they are unconstitutional. That statement likewise has no independent legal or practical significance, but merely translated the court's statutory-authority holding into constitutional-law terminology. Finally, the Department does not intend to pursue its appeal in *Los Angeles*, in which the district court stated that 8 U.S.C. 1373 and 1644 violate the Tenth Amendment, but issued no relief that would affect the ability to enforce that statute. The court's statements in its opinion that were not reduced to judgment have no operative or precedential effect.

The government's opening brief in the consolidated *San Francisco, California, and Oregon* appeals is due today, December 20, 2021. The government intends to file its brief in those cases pursuing the issues discussed above. In the *Los Angeles* case, a status report by the government is also due today. The government intends to dismiss its appeal in *Los Angeles* within 30 days of this letter in light of the absence of any practical effect of the statement in the district court's opinion.

Sincerely,



Elizabeth B. Prelogar
Solicitor General

Enclosures