Honorable Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP *et al.*,

Defendants.

No. 17-cv-00497RAJ

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

NOTE ON MOTION CALENDAR: August 4, 2017

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

At no point in their Opposition do the Cities of Seattle, Washington and Portland, Oregon ("the Cities") contend that defendants have taken any concrete action against them as a result of Executive Order 13,768. They do not assert that the defendants have declared the Cities to be "sanctuary jurisdictions" pursuant to the process contemplated in the Executive Order; they fail to identify *any* federal grant program as having been altered pursuant to the authority contained in the Executive Order; and they do not contend that *any* federal money to which they claim to be entitled has been withheld or revoked pursuant to the Order. The Cities' purported fear that defendants might, at some point in the future, abandon their current position regarding the scope and meaning of the Executive Order and instead interpret and apply the Order in an unconstitutional manner, is not credible and rests on speculation and conjecture. Alleged harms arising from that purported fear, such as the Cities' claimed harm of "budgetary uncertainty," are thus insufficient to meet the related constitutional requirements of standing and ripeness.

The Cities devote much of their Opposition to attempting to undermine the validity of the Attorney General's Memorandum of May 22, 2017 ("AG Memorandum"), which sets forth the Attorney General's conclusive interpretation regarding the scope of the challenged provision of the Executive Order. That approach is perhaps unsurprising given the AG Memorandum eliminates the supposed "budgetary uncertainty" by clarifying that the grant eligibility provision in Section 9(a) of the Order will be applied only with respect to grants administered by the Department of Justice (DOJ) or the Department of Homeland Security (DHS) and only where those agencies are independently authorized to condition grants in the manner the Executive Order contemplates. *See* AG Mem. at 1-2 (ECF No. 24-1). The AG Memorandum is a formal statement by the Cabinet official responsible for "[f]urnish[ing] advice and opinions . . . on legal matters to the President and the Cabinet and to the heads of the executive departments and

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agencies of the Government." 29 C.F.R. §0.5(c). Further, every aspect of the AG Memorandum is supported by express language in the Executive Order, the goal of which is to establish immigration enforcement as a priority of the administration and to direct relevant Cabinet officers to achieve that priority "to the extent consistent with law[.]" Exec. Order No. 13,768, § 9(a) 82 Fed. Reg. 8,799 (Jan. 30, 2017).

Particularly in light of the AG Memorandum, the Executive Order is consistent with the Spending Clause of the Constitution and the Tenth Amendment. The Cities' claims under those constitutional provisions fail as an initial matter because the Executive Order does not directly impose any spending conditions on any federal grant programs. Thus, the Cities are incapable of stating a valid claim that the Order itself unlawfully conditions federal spending or that it commandeers local resources. Moreover, the Cities fail to show that "no set of circumstances exists under which [the Order] would be valid," thereby rendering their facial challenge to the Order subject to dismissal. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Nor have the Cities established that a controversy exists regarding their purported compliance with 8 U.S.C. § 1373, or that a cause of action exists that would allow them to pursue a judicial declaration regarding their compliance with that statute. As such, the declaratory relief the Cities seek is unavailable to them, and providing such relief would require the Court to render an advisory opinion, which is constitutionally forbidden.

Finally, the Cities appear to acknowledge in their Opposition that claims under the Constitution's Take Care Clause are impermissible. The Cities purport to recast their Take Care Clause claim as one arising under more general separation of powers principles. But even if the Court were to accept that re-characterization, the claim would remain subject to dismissal on the

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ground that the Executive Order does not directly condition federal spending. Accordingly, the Cities are incapable of identifying a separation of powers infirmity in the Executive Order.

ARGUMENT

I. The AG Memorandum Is an Authoritative Elucidation of the Executive Order.

The AG Memorandum is a formal, authoritative statement by a member of the President's Cabinet, and the single official ultimately responsible for "[f]urnish[ing] advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the Government." 28 C.F.R. § 0.5(c); *see also* 28 U.S.C. § 512 (Attorney General's duty to advise executive department heads on "questions of law"). The Attorney General is the "chief legal advisor" to the President, *United States v. Ehrlichman*, 546 F.2d 910, 925 (D.C. Cir. 1976), and one of the two officials, along with the Secretary of DHS, charged with implementing Section 9 of the Executive Order. Moreover, the statute that sets forth the "powers and duties" of the Secretary of DHS provides that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1). And the Attorney General is responsible for representing the defendants in this matter (as well as nearly all federal agencies) in litigation, 28 U.S.C. § 516; defendants' litigation position, therefore, could not contradict the interpretation set forth in the memorandum.

The Cities argue that these authorities are inapplicable here because the AG Memorandum was not issued through the Department's Office of Legal Counsel. *See* Pls.' Opp'n at 7 (ECF No. 38). But "it is well established that the head of an agency retains the authority to make final decisions for the agency even if he or she delegates the authority to make these decisions to his or her subordinates." *Heggestad v. Dep't of Justice*, 182 F. Supp. 2d 1, 9 (D.D.C. 2000). The Cities also argue that the AG Memorandum does not contain sufficient "legal analysis," Pls.' Opp'n at

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7, but there is no indication in 28 U.S.C. § 512 or 28 C.F.R. § 0.5(c) that an opinion issued thereunder must contain any particular quantum of "analysis" to be effective.

The Cities also argue that the Court should disregard the AG Memorandum as contrary to the plain language of the Executive Order. *Id.* at 8. But the language of Section 9(a), which directs "*the Attorney General and the Secretary*" to carry out its mandates, Exec. Order No. 13,768, § 9(a) (emphasis added), fully supports the Attorney General's position that the provision applies "solely to federal grants administered by [DOJ] or [DHS]." AG Mem. at 1.

Further, the AG Memorandum provides that DOJ will require jurisdictions applying for certain DOJ-administered grants "to certify their compliance with federal law, including 8 U.S.C. § 1373," but only where the agency is "statutorily authorized to impose such a condition" and only where "grantees . . . receive notice of th[at] obligation[.]" AG Mem. at 2. That position is consistent with the Order's instruction that compliance with Section 1373 be imposed as a grant condition "to the extent consistent with law." Exec. Order No. 13,768, § 9(a). The "extent consistent with the law" qualification would be unnecessary – and self-defeating – if the Order intended to condition all federal grants without regard to existing law, as the Cities suggest. *See, e.g., Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002) (the President may instruct his subordinates to follow certain guidance "to the extent permitted by law," such that "if an executive agency . . . may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by statute or other law, from implementing the Executive Order, then . . . the agency [must] follow the law").

II. The Cities Lack Standing and Their Claims Are Unripe.

Defendants have not designated the Cities as "sanctuary jurisdictions" pursuant to the terms of the Executive Order, have not withheld any funds from the Cities pursuant to the grant

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eligibility provision of the Order, and have not initiated any other action against the Cities. Those uncontroverted facts are fatal to the justiciability of the Cities' claims.

In attempting to identify harm sufficient to satisfy the related constitutional requirements of standing and ripeness, the Cities first contend that the Order impairs their constitutionally protected interest in self-governance. Pls.' Opp'n at 11-12. The Cities' position is based on the premise that the Order "compel[s] the Cities to change their policies and enforce the Federal government's immigration laws in violation of the Tenth Amendment . . . ." *Id.* at 11. That premise is inaccurate. The Order does not compel the Cities to change their policies. The AG Memorandum specifies that application of the grant eligibility provision will turn on compliance with 8 U.S.C. § 1373, which is a federal statute with which the Cities are required to comply, regardless of the existence of the Executive Order.

The Cities' efforts to establish compulsion are based on the speculative theory that the Executive Branch will, without notice and without any independent statutory authorization, withhold all federal grant funding to the Cities unless the Cities amend certain immigration-related policies. That theory is not credible; both the AG Memorandum and the litigation position taken by the defendants in this matter directly controvert that theory. Moreover, the Cities identify no factual support for the theory; they point to no funding that has been withheld or any funding that has been conditioned pursuant to the Executive Order on a change in municipal policy.[1] Accordingly, the Cities' purported fear of potentially being deprived of their right to self-governance is insufficient to support standing.

[1] The Cities cite to litigation recently filed by the City of Chicago, Illinois, challenging certain conditions that DOJ imposed on the Fiscal Year 2017 Edward Byrne Memorial Justice Assistance Grant Program. Pls.' Opp'n at 21. The Cities suggest that DOJ imposed those conditions pursuant to the Executive Order, without any statutory authorization. *Id.* That suggestion is inaccurate. DOJ had imposed one of the conditions in 2016, well prior to the issuance of the Order, and all of the relevant conditions were imposed pursuant to express statutory language authorizing the relevant officials at DOJ to "plac[e] special conditions on all grants," 34 U.S.C. § 10102(a)(6), to "determin[e] priority purposes for formula grants," *id.*, and to require grantees to comply with "all . . . applicable Federal laws," including Section 1373. *Id.* § 10153(a)(5).

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Similarly, vague claims of "budgetary uncertainty," *see* Pls.' Opp'n at 13, are not the type of "concrete" and "palpable" injury needed to meet the constitutional requirement of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The Cities do not identify any legal authority that entitles them to budgetary certainty. To the contrary, uncertainty is the natural state of any municipality's fiscal affairs, which necessarily involve imprecise questions of costs (which are based on services provided) and income (which is based in part on tax revenues). In any event, the AG Memorandum nullifies the Cities' claims of alleged "budgetary uncertainty" by confirming that the grant eligibility provision (1) will be applied only to grants administered by DOJ or DHS where the agency has authority independent of the Executive Order to require compliance with 8 U.S.C. § 1373, and (2) where grant applicants receive notice of any obligations imposed on federal funding. *See* AG Mem. at 1-2. Thus, the Cities' claims that they have sustained "current injuries" because they face the prospect of losing *all* of their federal funding without notice, *see* Pls.' Opp'n at 15, are not credible or correct.

Finally, the Cities assert a purportedly "concrete" injury based on the potential loss of future federal grant funding. Pls.' Opp'n at 14. The Cities have not actually lost any federal grant funding, accordingly, like their other allegations of harm, their claim of a potential loss of future grant funding rests on speculation that the defendants might one day amend or withdraw the AG Memorandum, abandon their current legal position, and interpret and apply the Executive Order in a constitutionally impermissible manner. *Id.* The Cities hypothesize that such a course of action could theoretically result in the loss of all federal grant funding. *Id.* Contrary to the Cities' assertions, this alleged injury is not concrete, nor is it "certainly impending." *Id.* Rather, the Cities' allegations rely on a string of hypothetical events, including assumptions that the defendants: (1) will abandon their current position; (2) will interpret Section 9(a) inconsistent with the law, despite the Order's contrary direction; (3) will make a factual determination that the Cities are "sanctuary jurisdictions" pursuant to that section; and (4) will rely on those findings to withhold funding or take some other form of adverse action against the Cities.

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Despite the inherently speculative nature of these allegations, the Cities also claim that their purported injuries are "imminent" because the Cities "have shown a concrete plan to violate the Order by continuing to maintain their . . . policies." *Id.* That position, however, is logically untenable. The Cities seek a declaration that they comply with Section 1373, while simultaneously stating that they have a "concrete plan" to violate that statute. *Id.* They attempt to explain this inconsistency by hypothesizing that the defendants might one day incorrectly interpret Section 1373 and subsequently take some enforcement action against the Cities as a result of the incorrect interpretation. *Id.* at 16. But the Cities' speculation that defendants will adopt an invalid interpretation of a federal statute and take some adverse action in the future based on that invalid interpretation is not a "concrete" or "imminent" injury required to establish standing. *See Whitmore*, 495 U.S. at 155. Moreover, engaging that theory of harm would require the Court to consider "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Because the Cities' purported injuries are not concrete or imminent, and because those injuries rest on speculation about contingent future events, the Cities are incapable of satisfying the constitutional requirements of standing and ripeness.

III. The Cities Are Not Entitled to a Declaration Regarding Compliance with Section 1373.

This Court has held that, because "the Declaratory Judgment Act does not create an independent cause of action[,] . . . in the absence of a substantive cause of action, the Court cannot grant declaratory relief." *Hummel v. Nw. Tr. Servs., Inc.*, 180 F. Supp. 3d 798, 810 (W.D. Wash. 2016) (Jones, J.); *accord Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014) (To be entitled to declaratory relief, "Article III requires the existence of adverse legal interests *arising from a legal claim*.") (emphasis added). The Cities fail to allege a cause of action in the First Amended Complaint that would allow them to pursue declaratory relief regarding their compliance with Section 1373.

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The Cities argue that the United States could "bring a civil action asserting that the Cities' policies are preempted by Section 1373," and that the Cities, therefore, might be entitled to declaratory relief under the theory that they are merely asserting a reverse-preemption style of claim. Pls.' Opp'n at 19. But the First Amended Complaint does not state a so-called reverse-preemption claim. Moreover, the basic issues at play in a federal preemption suit fundamentally differ from those at issue in this case. In a typical federal preemption action brought by the United States, the issue is whether a State or local government's law must be enjoined as constitutionally preempted by federal law. By contrast, the issue the Cities attempt to litigate here is whether their local policies are consistent with the requirements of a provision of a federal statute. That question is not one of federal preemption, and the Constitution allows for the existence of the first kind of action, but not the second.

Moreover, despite the Cities' conclusory allegations to the contrary, there is no live controversy regarding the Cities' compliance with Section 1373. Defendants have not declared the Cities to be noncompliant with that statute pursuant to the process contemplated in the Executive Order or pursuant to any process relating to the awarding of federal funding, nor have the defendants taken any adverse action against the Cities based on an alleged noncompliance with that statute. Public statements by federal officials that are critical of the Cities' immigration policies are not equivalent to formal agency action declaring the Cities to be noncompliant with federal law. Thus, deciding a hypothetical dispute regarding the Cities' compliance with Section 1373 would constitute an advisory opinion, which is "constitutionally forbidden." *United States v. Guzman-Padilla*, 573 F.3d 865, 879 (9th Cir. 2009).

IV. The Cities Fail to State a Claim Under the Tenth Amendment.

In their Opposition, the Cities argue that a Tenth Amendment challenge to the Executive Order can survive because the Order itself "requires the Cities to change their longstanding

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practices of not inquiring into an individual's immigration statuts[.]" Pls.' Opp'n at 20. That interpretation of the Order is inaccurate; the Cities have not been compelled to change any of their local policies; no adverse action has been taken against them for maintaining their current policies; and, as confirmed in the AG Memorandum, the Order is an internal Executive Branch directive that does not impose any affirmative duties on the Cities. AG Mem. at 1-2.

Because the Executive Order is not self-executing, the directives contained in the Order must be implemented separately through agency action. *See* Exec. Order 13,768, § 9(a) (directing the Attorney General and the Secretary of DHS to implement the policies contained in the Order). Should the Attorney General or the Secretary of DHS decide to impose obligations on grant programs pursuant to the directives contained the Order, then, "consistent with the law," *id.*, those obligations may be imposed only where existing legal authority allows, and only where grantees are given "notice of their obligation[s.]" AG Mem. at 2. Accordingly, as the Order itself does not require the Cities to engage in *any* action, it cannot violate the Tenth Amendment's anti-commandeering principle.

Moreover, if Cities have Tenth Amendment concerns (or any other legal concerns) with the future imposition of conditions on federal grants, the Cities can choose to challenge the validity of those conditions once they are imposed and a concrete dispute actually exists. Indeed, because the Cities can decline participation in affected grant programs, Tenth Amendment typically would not arise. *See S. Dakota v. Dole*, 483 U.S. 203, 210 (1987) (conditioning federal funding does not violate the Tenth Amendment, so long as the recipient "could . . . adopt the simple expedient of not yielding to what she urges is federal coercion"). But the Cities have not challenged an actual application of the Executive Order, and because they cannot establish that "no set of circumstances exists under which [the Order] would be valid," their facial challenge must fail. *Salerno*, 481 U.S. at 745.

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The Cities also fail to address adequately an independent basis for the rejection of their Tenth Amendment claim, namely, that such claims are unsustainable against policy directives that do not carry an independent force of law. *See* Pls.' Opp'n at 20 n.6. The Cities conclude that the Order must carry the force of law because it will have an "inevitable practical impact." *Id.* at 20. But, as is evident by the Order's plain terms, and as explained in the AG Memorandum, the Order's policies are not self-enforcing, rather, they must be implemented by the Attorney General and the Secretary of DHS. Exec. Order 13,768 § 9(a). Thus, the Cities' claim that that the Order directly commandeers local employees in violation of the Tenth Amendment must fail. *Cf. United States v. Pickard*, 100 F. Supp. 3d 981, 1011 (E.D. Cal. 2015) (rejecting a Tenth Amendment challenge to a statement of agency policy).

V. The Cities Fail to State a Claim Under the Spending Clause.

The Cities' mischaracterization of the Executive Order as directly imposing conditions on federal grants similarly dooms their Spending Clause claims. The Executive Order does not directly impose conditions on federal grants; rather, it instructs certain federal officials to implement the Order's policy objectives, and to do so in a manner "consistent with law[.]" Exec. Order 13,768 § 9(a); *see also* AG Mem. at 2. Despite their contention that the Order directly imposes conditions on all federal grants, the Cities identify *no* federal grant programs that contain conditions purportedly imposed by the Order, and, despite alleging that their local policies are noncompliant with federal immigration prerogatives, the Cites identify *no* federal funding that has been withheld or revoked. Thus, because the Order does not directly condition federal spending, the Court should dismiss the Cities' Spending Clause claims outright.

In addition to failing on the threshold ground described above, the Cities' specific claims that the purported conditions imposed by the Order are ambiguous, unrelated to the federal interest in the particular program, and coercive, Pls.' Opp'n at 22-24, fail for independent reasons.

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The Cities' ambiguity concern is nullified by the AG Memorandum, which specifies that "[a]ll grantees will receive notice of . . . obligations" imposed pursuant to the Order. AG Mem. at 2. The Cities' relatedness concern fails because the grant eligibility provision does not "target *all* federal funds," as the Cities suggest. Pls.' Opp'n at 23 (emphasis in original). Rather, that provision is directed only to the Attorney General and the Secretary of DHS, *see* Exec. Order 13,768 § 9(a), and the directives of that provision "will be applied solely to federal grants administered by [DOJ] or [DHS] and not to other sources of federal funding." AG Mem. at 1.

Similarly, the Cities' coerciveness concern fails because of the limited application of the challenged provision. The Supreme Court has admonished that "courts should not conclude that [an enactment] is unconstitutional on [coercion] ground unless the coercive nature of an offer is unmistakably clear" such as where States are subjected to the risk of losing "over 10 percent of a State's overall budget" if they declined to adopt certain conditions. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581-82 (2012). The Cities' coercion arguments rely on the premise that the Order applies to *all* federal funds, *see* Pls. Opp'n at 24; they have made no allegations that the limited universe of funding to which the Order actually applies meets the high threshold for constitutional coercion identified by the Supreme Court.

VI. The Cities Fail to State a Claim Under the Take Care Clause.

The Cities do not contest defendants' position that claims under the Constitution's Take Care Clause are "purely executive and political," and not subject to judicial direction. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866). Rather, the Cities attempt to replace the Take Care Clause claim asserted in their First Amended Complaint, *see* First Am. Compl. ¶ 189 (ECF No. 27), with one asserted under constitutional separation of powers principles. Pls.' Opp'n at 24. The assertion of new claims via an opposition brief is procedurally improper and should be

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rejected. *See generally Echols v. Morpho Detection, Inc.*, No. C 12-1581 CW, 2013 WL 752629, at *10 (N.D. Cal. Feb. 27, 2013).

In any event, the Cities are incapable of stating a separation of powers claim here. The Supreme Court has held that, "[i]ncident to [the Spending] power, Congress may attach conditions on the receipt of federal funds . . . ." *Dole*, 483 U.S. at 206. Importantly, Congress may delegate to the Executive Branch the authority to condition federal funding. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 488 (1998) ("Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money.").[2]

The Executive Order does not "expand the existing statutory or constitutional authority of the Attorney General or the Secretary of [DHS] in any respect." AG Mem. at 2. Thus, those officers may impose conditions on federal grants pursuant to the policy priorities set forth in the Order only where existing authority allows. *Id.*; *see also supra* at fn.1 (identifying statutory authority that exists independent of the Executive Order that allows DOJ to impose conditions on certain grants administered by DOJ). The Cities do not argue that conditioning federal spending pursuant to an explicit statutory delegation of authority would result in a constitutional violation. Accordingly, their purported separation of powers claim is unsustainable.

CONCLUSION

For these reasons, defendants respectfully request the Court dismiss the Cities' claims.

[2] As the Cities mention, a Court in the Northern District of California has interpreted the Executive Order as attempting to impose conditions on federal spending and has partially enjoined the Order. *See* Pls.' Opp'n at 24. Defendants respectfully disagree with that Court's holding, but note that, under its separation of powers analysis, the Court held that "Congress can delegate some discretion to the President to decide how to spend appropriated funds." *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21 (N.D. Cal. Apr. 25, 2017), *reconsideration denied*, No. 17-CV-00485-WHO, 2017 WL 3086064 (N.D. Cal. Jul. 20, 2017). Accordingly, the Court did not enjoin defendants from imposing conditions on federal spending pursuant to authority that exists independent of the Executive Order. *Id.*

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Date: Sept. 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2017, I caused the foregoing Reply in Support of Defendants' Motion to Dismiss to be filed electronically and that this document is available for viewing and downloading from the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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