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Federal Grant Legal Update

Key Cases and Hot Topics

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October 21, 2019

CHANGING Maryland FOR THE BETTER

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- Well known for his expertise in federal grants, government reimbursement, payment and administrative issues, and his strategic handling of organizations facing crises, Ted has been selected as a “Super Lawyer” for Health Care in Washington, D.C. again in 2019.
- Ted has been counsel to a wide variety of federal grantees in the past 25+ years as well as many other entities such as managed care organizations and federal contractors, and has represented clients in front of federal and state courts, administrative tribunals, Offices of Inspector General and federal agencies.
- Ted has been Managing Partner of Feldesman Tucker since 2003 and each Spring teaches, what he believes is the first and only, law school class in the country on federal grant at the George Washington University School of Law.

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- Partner at Feldesman Tucker Leifer Fidell.
- Counsels federal grant recipients on financial assistance administrative requirements and cost reimbursement, and represents grant recipients in grant disputes including cost disallowances.
- Assists grant recipients undergoing government investigations.
- Assists government contractors with various contracting matters, including compliance and disputes.
- Prior to joining Feldesman Tucker, Scott was a procurement attorney with the United States Navy, counseling Navy contracting officers and program managers on, among other things, federal acquisition laws and regulations, claims, and bid protests.

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AGENDA

1. Sanctuary Cities
2. Challenges to Terms of Funding Opportunity Announcements
3. Award Timing and Applicability of Terms Incorporated by Reference
4. False Claims, Recent Events
5. Passthrough Entity Matters
6. Court of Federal Claims Jurisdiction

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Preliminary Caveats

PRELIMINARY CAVEATS

1. This is an overview.
2. We are covering much ground, and not addressing every aspect of each case.
3. Views and interpretations expressed in these slides and on this webinar are those of the speakers and specific to the facts of the cases.
4. These are important cases and we encourage (i) our fellow attorneys in this field to read these cases, and (ii) our non-attorney colleagues to bring these cases to the attention of their counsel.

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1. Sanctuary Cities

SANCTUARY CITIES: BACKGROUND

Executive Order ("EO") 13768 (Jan. 25, 2017):

- Section 9(a) prohibits awarding federal grants to jurisdictions who refuse to comply with 8 U.S.C. 1373 ("Section 1373").

The DOJ's Interpretation (May 22, 2017):

- The EO only applies to "federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding."
- Grantees will have to certify their compliance with Section 1373 to be eligible for federal grants from the DOJ and DHS.
- "Sanctuary jurisdiction" refers only to "jurisdictions that 'willfully refuse to comply with [Section] 1373."

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SANCTUARY CITIES: 8 U.S.C. § 1373

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

1. Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
2. Maintaining such information.
3. Exchanging such information with any other Federal, State, or local government entity.

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SANCTUARY CITIES: DOJ SEEKS ASSURANCE OF COMPLIANCE

In April 2017, the DOJ sent letters to several jurisdictions, requesting evidence that the jurisdictions complied with Section 1373 throughout the duration of its Byrne Justice Assistance Grant ("JAG") in FY 2016.

In June 2017, the DOJ issued another statement which imposed additional requirements on JAG awards in FY 2017. The new funding conditions are:

1. **The Access Condition**: Permit Homeland Security ("DHS") to access detention facilities to meet with undocumented immigrants.
2. **The Notice Condition**: Provide DHS at least 48 hours' notice before releasing an undocumented immigrant when DHS requests such notice.
3. **The Certification Condition**: Certify compliance with Section 1373, which prohibits local governments from restricting their personnel from sharing information with federal law enforcement personnel.

On November 15, 2017, the DOJ sent letters to 29 jurisdictions "that may have laws, policies, or practices that violate [Section 1373], a federal statute that promotes information sharing related to immigration enforcement."

- Unlike the DOJ's previous letters, the Nov. 15, 2017 letters addressed specific policies in each state that the DOJ believes indicate a lack of compliance with Section 1373.

All these statements included language that the DOJ will take all lawful steps to reclaim any funds awarded to a jurisdiction that violates its grant agreement, including the condition to comply with Section 1373.

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CITY OF CHICAGO V. SESSIONS

The City of Chicago challenged the "notice," "access," and "compliance" conditions. The legal battle commenced in 2017 and stretched through the summer of 2018. Key events and citations:

- Northern District of Illinois preliminary Injunctions (nationwide) against the notice and access conditions, with no injunction against the compliance condition. 264 F. Supp. 3d 933 (Sep. 15, 2017).
- Appeal by DOJ to the Seventh Circuit, challenging all of the above. The Seventh Circuit upheld all aspects of the Northern District of Illinois. 888 F.3d 272 (Apr. 19, 2018)
- Upon acceptance for *en banc* review, the Seventh Circuit stayed the nationwide effect of the injunction, limiting it only to this case. 2018 WL 4268817 (Jun. 4, 2018).
- Northern District of Illinois granted summary judgement to plaintiff on conditions, adding the compliance condition to the list of invalid conditions by holding 8 U.S.C. § 1373 unconstitutional and therefore not an "other applicable law" regarding which the Attorney General's has authority to demand compliance.

Of all of the "sanctuary city" cases, this one provides the best discussion of the key grant law principles.

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CITY OF CHICAGO V. SESSIONS

Key Issues:

- The District Court and Seventh Circuit found that, as a formula grant with no independent source of specific statutory authority to attach the notice and access conditions, the Attorney General simply lacked authority to impose them.
- Notably, the Court decline to address whether Congress could have attached such conditions under its Spending Clause authority.
- The District Court originally held (at the PI stage) that applicable statutory language permitting the AG to require grantees comply with "all applicable laws" authorized the imposition of the compliance condition.
- The District Court originally further held 8 U.S.C. § 1373 to be constitutional. If found that it did not violate anti-commandeering principles because precedent on such issues distinguished between affirmative commands and mere prohibitions against states interfering with federal activities. By summary judgment, however, that changes.

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CITY OF CHICAGO V. SESSIONS

Key Issues:

- On summary judgment, the District Court reverses course, finding 8 U.S.C. § 1373 unconstitutional. Between the issuance of the PI in September 2017 and the summary judgment decision, the Supreme Court issued its decision in *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461 (2018). In holding that the Congress could not prohibit New Jersey's legislature, through a federal statute, from legalizing sports gambling, it instructed that a distinction between affirmative commands and prohibitions is an empty distinction.
- In light of this new precedent, the Northern District of Illinois found § 1373 to be unconstitutional commandeering, knocking it out of the realm of "other applicable laws" with which the AG could require compliance as a condition of grant funding.

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CHICAGO HAS NOT BEEN ALONE ADDITIONAL CASES

Los Angeles v. Sessions, 293 F.Supp.3d 1087 (C.D. Cal. 2018), *rev'd by* Los Angeles v. Barr, 929 F.3d 1163 (9th 2019) (COPS program).

Oregon v. Trump, No. 6:18-cv-01959, 2019 WL 3716932 (D. Or. Aug. 7, 2019).

Philadelphia v. Attorney General, 916 F.3d 276 (3d Cir 2019), *aff'g* Philadelphia v. Session, 309 F.Supp.3d 289 (E.D. Pa. 2018):

Philadelphia v. Sessions, 280 F. Supp. 3d 579 (E.D. Pa. 2017), *appeal dismissed sub nom.* City of Philadelphia v. Attorney Gen. United States, No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018).

Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Pa. 2018), aff'd in part, denied in part 915 F.3d 276 (3d Cir. 2019).

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ADDITIONAL CASES CONTINUED . . .

San Francisco v. Sessions, 349 F.Supp.3d 924 (N.D. Cal. 2018), *appeal pending* No. 18-18308 (9th Cir.).

Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017), reconsideration denied, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), appeal dismissed as moot sub nom. City & Cty. of San Francisco v. Trump, No. 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

Santa Clara v. Trump, 275 F. Supp. 3d 1196 (N.D. Cal. 2017), *aff'd in part, vacated in part, remanded sub nom.* City & Cty. of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018).

Seattle v. Trump, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017) (denying Government's motion to dismiss).

New York v. Dep't of Justice, 343 F.Supp.3d 213 (S.D.N.Y. 2018), *pending appeal New York v. Whitaker*, No. 19-275 (2d Cir).

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BUT – WHAT IF THE DOJ AWARD IS NOT IN A RESTRICTIVE FORMULA GRANT PROGRAM

COPS GRANT CONDITIONS LEAD TO A DIFFERENT RESULT

***Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019):**

The Community-Oriented Policing Services ("COPS") grant program required applicants to select one of 8 focus areas when applying for grant funding. Additional points awarded to applicants choosing violent crime, homeland security, or illegal immigration focuses.

Bonus points also awarded to applicants who included a "Certificate of Illegal Immigration Cooperation" form (the "Certification Form"), which included an agreement to adhere to the Access and Notice conditions.

Los Angeles neither choose one of the three bonus focuses nor signed the Certification Form. Los Angeles did not receive funding.

NOTE: Not every jurisdiction receiving funding chose a focus receiving the bonus or signed the Certification Form.

For reasons similar to *Chicago*, the district court found that DOJ exceeded its power in imposing the Certification Form.

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COPS GRANT CONDITIONS LEAD TO A DIFFERENT RESULT

***Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019):**

NINTH Circuit Reverses:

"[A]pplicable Spending Clause principles do not readily apply to an allocation of grant funds through a competitive process."

DOJ neither reinterpreted the terms of the grant nor offered a financial inducement to cooperate.

Congress gave DOJ broad authority to implement the COPS program and including a focus on illegal immigration was within that authority.

Decision did not violate the APA because immigration enforcement was reasonably related to community policing.

In short – Congress provided DOJ sufficient authority within this program for DOJ to implement more specific compliance conditions.

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2. Challenges to Funding Opportunity Announcement Terms

CHALLENGES TO FOA TERMS

Planned Parenthood of Wisconsin, Inc. v. Azar, 316 F. Supp. 3d 291 (D.D.C. 2018):

- In February 2018, HHS issued a Title X Funding Opportunity Announcement ("FOA").
- In recent years, Title X FOAs have been evaluated on four statutory criteria reflected by seven regulatory criteria. The 2018 FOA added an eighth criterion.
- Plaintiff challenged the added criterion under the APA.
- HHS countered that the FOA's terms were not reviewable under the APA because (i) committed to unreviewable agency discretion, and (ii) not a "final agency action."
- The Court held that the terms were not, in fact, committed to unreviewable agency discretion because there exist the Title X statute and regulations against which the Court could evaluate the FOAs terms.
- However, it held that the FOA was merely the embodiment of a procedural rule designed to reach final agency action, and not itself final agency action. As such, the terms of the FOA were not subject to review under the APA.
- Plaintiffs have appealed.

Note: Consider this case in comparison to City of Chicago above. It seems the key difference is that in the Sanctuary City cases, the FOA term was not merely an evaluation factor, but a fundamental eligibility requirement.

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CHALLENGES TO FOA TERMS

Multnomah County v. U.S. Dept. of HHS, 340 F. Supp. 3d 1046 (D. Or. 2018):

- The Teen Pregnancy Prevention Program ("TPPP") provides for discretionary grant awards with the purpose of decreasing incidents of teen pregnancy. The TPPP statute contemplates Tier 1 projects (which "replicate" proven models of delivery) and Tier 2 project (which reflect an innovative approach).
- This case involves an FOA for Tier 1 projects.
- The FOA called for use of a "SMARTool" (a particular approach to implementation of projects) and "TAC" (an approach to evaluation of curricula to be used in programs).
- Plaintiff challenged this requirement under the APA (as contrary to law) on the grounds that it was allegedly inconsistent with the TPPP statute's requirement that Tier 1 projects replicate proven delivery models, arguing that neither the SMARTool nor TAC would necessarily lead to replication of proven models. The Court concurred with plaintiff (without clearly explaining why the SMARTool and TAC violated the proven model requirement), holding these requirements contrary to law under the APA and *ultra vires (i.e.*, beyond the authority granted the agency by Congress).
- More important, however than the Court's holding on these specific programmatic components were certain conclusions it reached along the way.

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CHALLENGES TO FOA TERMS

Multnomah County v. U.S. Dept. of HHS:

- *Key Conclusion 1*: Agency action in setting the terms of the FOA was sufficiently "final" to be challenged under the APA because the requirement was a threshold eligibility requirement. If the applicant did not comply with this requirement, its application would not be considered.
- *Key Conclusion 2*: Where the authorizing statute for a program lays out its basic parameters, there is a sufficient legal standard established for courts to evaluate, under the APA, whether an agency action (in this case the terms of the FOA) was consistent with that standard. In other words, agency discretion in setting the terms of the FOA was limited by the statute and therefore subject to challenge.
- *Key Conclusion 3*: Plaintiff had suffered sufficient harm from increased competition caused by the new FOA terms to have standing to bring suit.
- *Key Conclusion 4*: The Court had the authority to suspend the lapse provision in the federal appropriation to enable the case to proceed, rejecting the government's argument that the challenge was moot because award would not be made within the current fiscal year.

Note: No appeal pending.

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CHALLENGES TO FOA TERMS

Planned Parenthood of Greater Washington and North Idaho v. U.S. Dept. of HHS, 337 F. Supp. 3d 976 (E.D. Wash. 2018):

- Also a case involving the FOA for TPPP Tier 1 projects.
- Similar arguments were made by plaintiff as made in *Multnomah County* above.
- Reached same result on reviewability of the FOA's terms as a "final agency action" under the APA.
- However, key differences in "standing" holdings. Note that standing generally requires a showing of:
    - Harm,
    - Causation, and
    - Redressability
- Court held differently from *Multnomah County Court* in two key respects:
    - Plaintiff not harmed by the changed FOA terms because Plaintiff could still compete for the award.
    - Plaintiff's claim lacked redressability – and therefore Plaintiff lacked standing – because the appropriation was soon to lapse and the Court's authority to suspend lapse of the appropriation did not extend to the current circumstances. (contrary to the view of the Eastern District of Washington).
- Case dismissed. Appeal pending.

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CHALLENGES TO FOA TERMS

Planned Parenthood of New York City v. U.S. Dept. of HHS, 337 F. Supp. 3d 308 (S.D.N.Y. 2018):

- Also a case involving the FOA for TPPP Tier 1 projects.
- Similar arguments were made by plaintiff as made in *Multnomah County* and *Planned Parenthood of Greater Washington* above.
- Yet a third differing result.
- Court held :
    - TPPP statutory framework (again) sufficient to provide standard against which the FOA terms could be evaluated.
    - Plaintiff was harmed by the changed FOA terms because Plaintiff could not compete on equal terms with other offerors.
    - Plaintiff's claim was redressable, but not because the Court need suspend the lapse of the appropriation. Rather the claim was partially redressable (which was sufficient for standing) because the holding would have prospective effect for future funding opportunities.
- Construing the SMARTool and TAC requirements as themselves "programs" under the FOA, the Court concluded neither was a program previously proven effective by rigorous testing as required by the TPPP statute for Tier 1 projects. As such, it permanently enjoined HHS from awarding funds under the FOA. Appeal pending (filed by Planned Parenthood).

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KEY TAKEAWAYS – CHALLENGES TO FOAS

- If the FOA challenges is fundamentally an "eligibility" issue, there probably exists a "final agency action" for purposes of an APA challenge. Otherwise, there may not.
- Redressability remains murky – perhaps the appeal in Planned Parenthood of Greater Washington will shed additional light.
- Courts seem quite willing to look to authorizing acts to evaluate agency programmatic parameters.

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3. Award Timing and Applicability of Terms Incorporated by Reference

KEY IMPACT

- If the parties do not settle, the court will have to determine whether knowledge (or constructive knowledge) of an upcoming regulatory requirement is sufficient for it to attach to the expenditure of federal funds.

ELDER CARE SERVICES V. CNCS

***Elder Care Services, Inc. v. Corporation for National and Community Service*, No. 17-1634 (RMC), 2018 WL 4681002 (D.D.C. Sept. 28, 2018):**

- On October 5, 2012, the Corporation for National and Community Service ("CNCS") promulgated regulations establishing new background check procedures for grantee staff members and volunteers working with seniors, with an effective date of January 1, 2013.
- In August 2015, it promulgated a "disallowance matrix" that set forth various "per-violation fines" for failing to conduct required checks in various circumstances.
- CNCS awarded plaintiff Elder Care three separate grants totaling $2,859,646:
  - One prior to October 5, 2012 with a three-year performance period commencing on April 1, 2012.
  - Two after October 5 but before January 1, 2013 with three-year performance periods commencing on January 1, 2013.
- In 2015, the CNCS OIG found plaintiff failed to conduct adequate background checks and recommending disallowing $29,500. After a broader review, CNCS levied a $400,000 "disallowance" based upon the matrix.
- Plaintiff challenged the disallowance, asserting the regulation setting forth background check requirements was not applicable to its award. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985) and *Bennett v. New Jersey*, 470 U.S. 632 (1985) (limiting an agency's evaluation of past expenditures to the statutes, regulations, and guidance documents available at the time of the expenditure).
- The Court acknowledged the *Bennett v. Ky.* argument, but instructed both parties to prepare further briefing on the issue of the regulation's Jan 1, 2013 effective date falling after the award of all three grants – "the regulation and related enforcement scheme evolved after the relevant grants were awarded."
- The parties are currently in settlement negotiations.

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4. False Claims, Recent Events

FEDERAL CIVIL FALSE CLAIMS ACT
31 U.S.C. § 3729-3733

The FCA forbids knowingly:

- Presenting or causing the presentation of, a false claim for reimbursement by a Federal program;
- Making, using or causing to be made or used, a false record or statement material to a false or fraudulent claim;
- Repaying less than what is owed to the Government;
- Making, using or causing to be made or used, a false record or statement material to reducing or avoiding repayment to the Government; and/or
- Conspiring to defraud the Federal Government through one of the actions listed above.

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FEDERAL CIVIL FALSE CLAIMS ACT
31 U.S.C. § 3729-3733

Key Definitions:

- Claim = request or demand for money or property if the government provides money or reimburses a person or entity
- Knowingly = actual knowledge of the information; deliberate ignorance of the truth or falsity of the information; or reckless disregard of the truth or falsity of the information
- Material = having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property

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RECENT MAJOR FCA CASES IN GRANTS

- **Duke University (Mar. 25, 2019)**
  - Settlement for $112.5 million.
  - Allegation was intentional inclusion of false scientific data in NIH and EPA grant applications and progress reports, ongoing from 2006 through 2018. This was a former employee relator case.
  - https://www.justice.gov/opa/pr/duke-university-agrees-pay-us-1125-million-settle-false-claims-act-allegations-related.

- **University of Wisconsin (Mar. 21, 2019)**
  - Settlement for $1.5 million.
  - Allegation was failure to account for applicable credits (*i.e.*, rebates and credits earned on items funded with federal funds). The offending practice by U. Wisconsin violated its own CAS disclosure statement (DS-2).
  - https://www.justice.gov/usao-wdwi/pr/university-pay-15-million-settle-false-claims-act-allegations.
  - Somewhat surprising this was processed as a false claims matter.

- **University of North Texas Health Science Center (Feb. 16, 2018)**
  - Settlement for $13 million.
  - Allegation was failure to accurately report and certify time and effort on NIH awards from 2011 through early 2016.
  - https://www.justice.gov/usao-ndtx/pr/university-north-texas-health-science-center-pay-13-million-settle-claims-related.

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HOWARD UNIVERSITY CASE WHISTLEBLOWER PROTECTION

***Sylvia Singletary v. Howard University*, No. 18-7158 (D.C. Cir. 2019) (2019 WL 4554535):**

- Ms. Singletary alleged the Howard University retaliated against her for her efforts to stop False Claims Act violations. Specifically, as the Veterinarian assigned to oversee research involving animal subjects, she repeatedly reported that room temperatures were too high in certain spaces. When the temperatures led to the deaths of about twenty (20) mice, she reported the occurrence to NIH.
- Ms. Singletary's efforts to remedy the high temperature conditions included statements to various levels of University management that the conditions violated federal regulations and the terms and conditions of the University's funding agreements.
- Upon directly contacting NIH, Ms. Singletary was publicly criticized in a staff meeting, and shortly thereafter informed that her appointment to her position would be cut short. She resigned in response.
- The District Court concluded that Ms. Singletary's actions were not sufficiently tied to a "false claim" to constitute an activity protected by the FCA's whistleblower protections, reasoning that those protections extend only to efforts to stop the submission of false claims, not all reports of regulatory violations. Based upon its conclusion, the District Court dismissed her case.
- Ms. Singletary appealed. The D.C. Circuit concluded that her actions did constitute efforts to stop the submission of false claims, relying upon: (1) the fact that she linked the offending activity to funding conditions, and (2) that her reporting to NIH and complaints to management appeared to be directly related to reporting obligations necessary to continued funding – including certifications of compliance the University was to submit at year end.

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5. Passthrough Entity Matters

OHIO RESTRICTIONS ON SUBGRANTEE ELIGIBILITY

Planned Parenthood of Greater Ohio, Planned Parenthood of Southwest Ohio v. Hodges (as Dir. of Ohio Dept. of Public Health) v. Azar, 917 F. 3d 908 (6th Cir. 2019):

- Background:
  - Plaintiffs challenged a 2016 Ohio law prohibiting the Ohio Department of Health from contracting with any organization that "performs or promotes nontherapeutic abortions." Suit is brought under 42 U.S.C. § 1983 (interference with a right under color of state law).
  - Plaintiffs allege violations of both 1st Amendment (speech right to promote abortions) and 14th Amendment (interference with property right of access to federal funds) rights.
- Key Conclusions (Unconstitutional Conditions Doctrine):
  - The Majority examines only the issue of whether the providers have any right to perform abortions, reasoning that if either condition (perform or promote) is valid, plaintiff is ineligible for funding.
  - In focusing on the "perform" prohibition, the Majority distinguishes the issue from the right of an individual woman to obtain an abortion. Based upon this emphasis, it finds no constitutional violation.
  - The Dissent discusses the First Amendment aspect at length, highlighting *Agency for Int'l Dev. v. Alliance for Open Society Int'l*, 570 U.S. 205 (2013). In that case, the Supreme Court held that restrictions/mandates on intra-project messaging may be permissible, but such restrictions/mandates could not extend beyond the confines of the project to an organization as a whole.
  - Remanded to District Court – Still pending resolution.

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MAINE DEPARTMENT OF LABOR (§ 200.331)

Coastal Counties Workforce, Inc. v. Paul R. LePage, 284 F. Supp. 3d 32 (D. Me. 2018):

- Maine's Governor asked DOL to permit him to abolish three workforce investment boards ("WIBs") in favor of one. DOL denied this request.
- In response, the Governor refused to allocate Workforce Innovation and Opportunity Act ("WIOA") funds in compliance with the statute.
- After the WIBs petitioned for the funds, the Governor stated that it would require the WIBs to spend at least 60% of the funds on training, which was not specifically required by the State Plan, statute, or DOL regulation.
- The WIBs sued pursuant to 42 U.S.C. § 1983
- The Court granted injunctive relief finding that:
  - The WIB had an enforceable right and standing under § 1983 because named in the statute with a specific payment right.
  - 2 C.F.R. § 200.331 allowed prime grantees to impose additional conditions on subawards, but such additional conditions are limited to financial and accounting measures. The regulation does not allow a pass-through entity to include substantive conditions absent a finding of noncompliance with the grant.

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6. Court of Federal Claims Jurisdiction

ST. BERNARD PARISH (FROM DAMICH AT COFC – NO JURISDICTION)

St. Bernard Parish Gov't v. United States, 916 F. 3d 987 (Fed. Cir. 2019):

- Background / COFC Holding:
  - St. Bernard Parish disputed an amount the Dept. of Agriculture refused to pay under a cooperative agreement. Brought the case in the Court of Federal Claims ("COFC") under its Tucker Act jurisdiction (claims for money based upon contract, statute, or regulation)
  - Judge Damich dismissed the case on the basis that the cooperative agreement was not a "contract" subject to Tucker Act jurisdiction. By his reasoning, it was not so because the government "received no consideration [under the agreement] in the form of a direct benefit to the United States."
  - St. Bernard Parish appealed to the Court of Appeals for the Federal Circuit.
- Federal Circuit's Holding on Appeal:
  - Affirmed Judge Damich's dismissal – but did so on different grounds. The Federal Circuit held that a specific, separate statutory appeals regime had been established by Congress for appeals under this Dept. of Agriculture program, displacing COFC's jurisdiction. In particular, the Court noted that the competing statutory appeal regime (7 U.S.C. §§ 6991-7002) (i) required exhaustion of administrative remedies and (ii) specifically directed that review of a final agency action be in District Court.
- Note:
  - The COFC holding seems inconsistent with the weight of precedent on this issue. See next case.

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SAN ANTONIO HOUSING AUTHORITY (HORN – YES THERE IS JURISDICTION)

San Antonio Housing Authority v. United States, 143 Fed. Cl. 425 (2019)

- Background:
  - Plaintiff challenged a decision by HUD to reduce funding to certain housing authorities in a manner that was inconsistent with (i) an express 2009 agreement between plaintiff and HUD regarding the manner in which funding amounts would be calculated and (ii) the statutory authorizing language for the demonstration project at issue.
  - It brought suit in COFC under its Tucker Act jurisdiction.
- Key Conclusions (Unconstitutional Conditions Doctrine):
  - Judge Horn found jurisdiction.
    - She explained that Tucker Act jurisdiction exists for (i) claims "founded on express or implied contracts with the United States", (ii) claims "seeking a refund from a prior payment made to the government," and (iii) claims "based on constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained."
    - She provided a lengthy (treatise-like) discussion of prior COFC and Federal Circuit precedent on the issue of Tucker Act jurisdiction over federal grant and cooperative agreement-based claims, highlighting that (i) the money mandating aspect of a contractual claim may generally be satisfied by the presumption under the law that the proper remedy for breach of contract is money damages, and (ii) the authorizing act and implementing program regs (which called for the payment of money to the recipient) were "money-mandating" for purpose of Tucker Act jurisdiction because the could be "fairly interpreted" as calling for the payment of money.
  - Clear Disagreement with Damich and any Contrary Precedent (next page).

CHANGING Maryland FOR THE BETTER

SAN ANTONIO HOUSING AUTHORITY (HORN – YES THERE IS JURISDICTION)

San Antonio Housing Authority v. United States, 143 Fed. Cl. 425 (2019):

- Clear Disagreement with Damich and any Contrary Precedent:
  - Judge Horn relied upon *Trauma Service Group, Inc. v. United States*, 104 F.3d 1321 (Fed. Cir. 1997) and *Thermalon Industries, Ltd.*, 34 Fed.Cl. 411 (1995) in reaching her conclusions. These cases are early examples of COFC and the Federal Circuit acknowledging Tucker Act jurisdiction over financial assistance agreements.
  - Judge Horn specifically disagreed with Judge Damich's holdings in *St. Bernard Parish* (above) and *Anchorage v. United States*, 119 Fed. Cl. 709 (2015) in which he found jurisdiction to be lacking. In doing so, she described the cases as "two cases issued by the same Judge of this court" and noted that COFC judges are not required to follow precedent set by other COFC judges.
  - Judge Horn expressly noted that the Federal Circuit's affirmation of Judge Damich's dismissal in *St. Bernard Parish* was on grounds other than his reasoning on Tucker Act jurisdiction.

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QUESTIONS??

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