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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FRED VAN VALKENBURG, in his
official capacity as County Attorney for
Missoula County, Montana, and
COUNTY ATTORNEY'S OFFICE FOR
MISSOULA COUNTY, MONTANA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE; ERIC H. HOLDER, Jr., in
his official capacity as Attorney
General, United States Department of
Justice; MICHAEL W. COTTER, in his
official capacity as United States
Attorney for the District of Montana,
United States Department of Justice;
JOCELYN SAMUELS, in her official
capacity as Acting Deputy Assistant
Attorney General for the Civil Rights
Division, United States Department of
Justice; JONATHAN M. SMITH, in his
official capacity as Chief, Special
Litigation Section, Civil Rights

Cause No. _____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Division, United States Department of Justice; and JOHN DOES 1–10, in their official capacities as officials with the United States Department of Justice,

Defendants.

Missoula County Attorney Fred Van Valkenburg and the County Attorney's Office for Missoula County, Montana, seek a judgment declaring that the defendants do not have the authority to investigate or sue the Missoula County Attorney or his office under 42 U.S.C. § 3789d and 42 U.S.C. § 14141.

The defendants allege the County Attorney's Office has discriminated in its prosecution of sexual assault crimes. Those allegations are false, unfounded, and the defendants have exceeded their statutory and constitutional authority. Nevertheless, the defendants continue to impose costly and unnecessary demands on the County Attorney and the citizens of Missoula County.

PARTIES

1. Fred Van Valkenburg is the County Attorney for Missoula County, Montana ("County Attorney"). The County Attorney serves as the publicly-elected legal advisor for the County and is responsible for prosecuting

criminal matters within the County. The County Attorney's specific duties are codified at Montana Code Annotated §§ 7-4-2701 to 7-4-2717.

2. The County Attorney's Office for Missoula County, Montana, ("County Attorney's Office") is a political subdivision of Missoula County, Montana. The County Attorney's Office assists the County Attorney in carrying out his statutory duties.

3. The U.S. Department of Justice is the United States federal executive department responsible for the enforcement of law and administration of justice. Eric H. Holder, Jr., named here in his official capacity, is Attorney General of the United States. Michael W. Cotter, named here in his official capacity, is the United States Attorney for the District of Montana. Jocelyn Samuels, named here in her official capacity, is Acting Deputy Assistant Attorney General for the United States Department of Justice's Civil Rights Division. Jonathan M. Smith, named here in his official capacity, is Chief of the Special Litigation Section for the United States Department of Justice's Civil Rights Division; and John Does 1-10, in their official capacities are officials with the United States Department of Justice whose identities are currently unknown to the plaintiffs.

JURISDICTION

4. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 because the plaintiffs' claims arise under federal law.

5. The Court has jurisdiction to issue a declaratory judgment under 28 U.S.C. § 2201 because this case involves an “actual controversy” within the Court’s jurisdiction.

6. Sovereign immunity does not bar this lawsuit against the United States Department of Justice because the plaintiffs are seeking nonmonetary relief. *See* 5 U.S.C. § 702; *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989); *but see EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070 (9th Cir. 2010).

7. Sovereign immunity does not bar this lawsuit against the individually-named defendants because, among other reasons, the individual defendants have exceeded and are threatening to further exceed their statutory authority by investigating and threatening to sue the plaintiffs. *See Dugan v. Rank*, 372 U.S. 609 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

BACKGROUND

8. In an undated letter delivered to the Missoula County Attorney and Missoula Board of County Commissioners on April 30, 2012, then-Assistant Attorney General Thomas Perez¹ and United States Attorney Michael Cotter announced that their offices would be commencing an investigation of the Missoula County Attorney’s Office under the Violent

¹ Assistant Attorney General Perez was succeeded by Acting Assistant Attorney General Samuels, who is named as a defendant in this case.

Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, *see* 42 U.S.C. § 14141, and the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, *see* 42 U.S.C. § 3789d.

9. Assistant Attorney General Perez and United States Attorney Cotter made a public announcement of the investigation to the press on May 2, 2012.

10. Assistant Attorney General Perez and United States Attorney Cotter alleged that the investigation was the result of the County Attorney's Office's "fail[ure] to investigate or prosecute sexual assaults against women because of their gender or in a manner that has a disparate impact on women."

11. The County Attorney's Office does not and has not discriminated in its prosecution of sexual assault cases, whether allegations of sexual assault are made by men or women.

12. Over the past year-and-a-half, the County Attorney's Office has corresponded with the defendants on numerous occasions, asking them to identify what evidence they have that shows the County Attorney's Office has discriminated in its prosecution of sexual assault cases or otherwise violated any person's civil rights. They have provided no evidence.

13. In this same correspondence, the County Attorney's Office repeatedly asked the defendants to articulate the basis for their authority to investigate the County Attorney's Office under 42 U.S.C. § 3789d or 42 U.S.C. § 14141. They have provided no justifiable response.

14. The defendants' investigation of the County Attorney's Office is the first time officials within the Department of Justice have ever investigated a local prosecuting attorney's office for an alleged violation of 42 U.S.C. § 14141. In addition, the plaintiffs are unaware of any investigation by officials within the Department of Justice of a local prosecuting attorney's office for an alleged violation of 42 U.S.C. § 3789d.

15. The defendants have repeatedly demanded that the County Attorney provide them with confidential criminal justice information regarding sexual assault cases, as well as numerous other documents and records. The defendants have also demanded that the County Attorney restructure his office by hiring additional staff and by adopting a variety of costly and unnecessary protocols and policies.

16. On December 11, 2013, the defendants hand-delivered a proposed settlement agreement demanding compliance with more than 20 requirements that would impose significant costs on Missoula County taxpayers. The agreement's requirements would cost Missoula County hundreds of thousands of dollars annually.

17. The defendants informed the County Attorney that if he did not comply with their investigation and demands, they would file a lawsuit against him and seek a court order compelling compliance.

18. The County Attorney responded to the defendants' proposed settlement agreement by indicating he would be willing to assist the Missoula Police Department and the University of Montana Office of Public Safety in meeting their obligations under their respective agreements with the Department of Justice, but he would not otherwise comply with the defendants' unlawful and unsupported demands.

STANDING

19. In order for a plaintiff to have standing under the Declaratory Judgment Act, the plaintiff must show there exists "a case of actual controversy." 28 U.S.C. § 2201. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citations and footnote omitted); accord *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2115 n.3 (2013). "[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to

liability before bringing suit to challenge the basis for the threat”

MedImmune, 549 U.S. at 128–29 (emphasis original).

20. Missoula County Attorney Fred Van Valkenburg and the County Attorney’s Office for Missoula County, Montana, have standing to bring this action under the Declaratory Judgment Act. There exists a “substantial controversy” because the defendants have made repeated, intrusive demands on the County Attorney and his office and continue to threaten a lawsuit if he and his office do not fully cooperate with the defendants’ unlawful investigation and demands. The defendants have provided no evidence to support their discrimination allegations and have failed to provide any support for their purported authority for the investigation and threatened lawsuit.

21. The controversy is of “sufficient immediacy” because the defendants demanded, as recently as December 2013, that the plaintiffs comply with more than 20 conditions in order to avoid litigation. The defendants have repeatedly threatened to sue the plaintiffs if they do not comply with the defendants’ demands.

22. The County Attorney is not required “to expose himself to liability before bringing suit to challenge the basis for [that] threat.” *MedImmune*, 549 U.S. at 128–29. “[P]utting the challenger to the choice between abandoning his rights or risking prosecution—is ‘a dilemma that it was the very purpose of

the Declaratory Judgment Act to ameliorate.” *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)); *see also Steffel v. Thompson*, 415 U.S. 452 (1974) (holding that a plaintiff need not risk prosecution under a statute before seeking a declaratory judgment regarding the enforceability of that statute).

23. The defendants’ unsupported actions have resulted in a significant drain on the resources of the County Attorney’s Office—resources that were already stretched thin—and have diverted precious time and money from the important duties the County Attorney’s Office is tasked to perform by Missoula County’s citizens.

COUNT I: DECLARATORY RELIEF

A. ABSOLUTE PROSECUTORIAL IMMUNITY

24. The defendants have repeatedly asserted that they have authority to investigate and sue the plaintiffs for alleged civil rights violations under 42 U.S.C. § 14141 and 42 U.S.C. § 3789d.

25. There is an actual controversy as to whether the defendants may investigate or sue the plaintiffs under the doctrine of absolute prosecutorial immunity.

26. The doctrine of absolute prosecutorial immunity bars the defendants from investigating or suing the plaintiffs under 42 U.S.C. § 14141 or 42 U.S.C. § 3789d.

27. The federal common-law doctrine of “absolute prosecutorial immunity” is based on “the same purpose that underlies the immunity of judges and grand jurors acting with the scope of their duties: to protect the judicial process.” *Milstein v. Cooley*, 257 F.3d 1004, 1007 (9th Cir. 2001) (citing *Burns v. Reed*, 500 U.S. 478, 485 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976)).

28. The doctrine of absolute prosecutorial immunity immunizes a prosecuting attorney from claims that arise out of the prosecuting attorney’s role as an advocate for the State. *Milstein*, 257 F.3d at 1008.

29. When Congress passes statutes—such as 42 U.S.C. § 14141 or 42 U.S.C. § 3789d—that might facially apply to conduct of prosecuting attorneys, Congress does so with “knowledge of then-existing common law immunities” *Id.* at 1007 (citing *Burns*, 500 U.S. at 484; *Imbler*, 424 U.S. at 418; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). “[T]he lack of an explicit abrogation of these immunities has been interpreted as preserving them.” *Id.* (citing *Burns*, 500 U.S. at 484; *Imbler*, 424 U.S. at 418; *Tenney*, 341 U.S. at 376).

30. Congress did not abrogate absolute prosecutorial immunity in passing either 42 U.S.C. § 14141 or 42 U.S.C. § 3789d.

31. The United States Supreme Court and the United States Court of Appeals for the Ninth Circuit have both held “a prosecutor has absolute

immunity for the decision to prosecute a particular case and for the decision *not to prosecute* a particular group of cases.” *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005) (citations omitted, citing *Burns*, 500 U.S. at 486); *see also Van de Kamp v. Goldstein*, 555 U.S. 335, 344–48 (2009) (holding that absolute prosecutorial immunity also applies to administrative functions that are directly connected to the prosecution of a criminal case).

32. The Department of Justice itself frequently and successfully relies on the doctrine of absolute prosecutorial immunity. When its prosecutors are sued for alleged civil rights violations in their prosecutions of criminal cases, courts universally conclude that the prosecutors are shielded by absolute prosecutorial immunity. *See e.g. Jones v. Yanta*, 610 F. Supp. 2d 34, 42 (D.D.C. 2009) (citing cases); *Moore v. Motz*, 437 F. Supp. 2d 88, 92 (D.D.C. 2006); *Darwich v. U.S. Dep't of Justice*, 13–CV–10757–DT, 2013 WL 5775392, at *4 (E.D. Mich. Oct. 25, 2013); *Deleston v. U.S. Dep't of Justice*, 6:10–444–DCN–WMC, 2010 WL 6872294, at *3 (D.S.C. Mar. 15, 2010). The Department successfully asserts this defense even when its prosecutors are alleged to have unconstitutionally concealed exculpatory evidence or manipulated evidence. *Id.*

33. The County Attorney’s Office does not prosecute sexual assault cases in a discriminatory manner. Regardless, the doctrine of absolute

prosecutorial immunity bars the defendants from investigating or suing the plaintiffs for how they prosecute a particular group of cases. *See id.*

34. The plaintiffs are therefore entitled to a declaration that the doctrine of absolute prosecutorial immunity bars the defendants from investigating or suing the plaintiffs under 42 U.S.C. § 14141 or 42 U.S.C. § 3789d.

B. 42 U.S.C. § 14141

35. Even in the absence of absolute prosecutorial immunity, 42 U.S.C. § 14141 does not permit investigation of or a lawsuit against the plaintiffs.

36. There is an actual controversy as to whether the defendants may investigate or sue the plaintiffs under 42 U.S.C. § 14141.

37. 42 U.S.C. § 14141 provides:

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

38. The defendants have argued that 42 U.S.C. § 14141 applies to the plaintiffs because they are “law enforcement officers.”

39. Prosecutors are not “law enforcement officers” within the meaning of 42 U.S.C. § 14141.

40. Indeed, when its own prosecutors are sued for alleged improper conduct, the Department successfully argues that its prosecutors are not “investigative or law enforcement officers,” thereby shielding them from potential liability under the Federal Tort Claims Act. *See e.g. Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 98 (D.D.C. 2001), *reversed on other grounds*, 341 F.3d 571 (D.C. Cir. 2003); *see also Trupei v. United States*, 304 Fed. Appx. 776 (11th Cir. 2008); *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000).

41. The defendants have never investigated or sued a prosecuting attorney’s office under 42 U.S.C. § 14141.

42. The legislative history of 42 U.S.C. § 14141 shows that it was intended to apply to police departments or sheriff’s departments but not a prosecuting attorney’s office.

43. The United States Department of Justice has consistently interpreted 42 U.S.C. § 14141 as applying only to police departments or sheriff’s departments.

44. Since the plaintiffs are not “law enforcement officers” in the context of 42 U.S.C. § 14141, the defendants do not have the authority to

investigate or sue the plaintiffs, or any local prosecutor, under 42 U.S.C. § 14141.

45. The plaintiffs are therefore entitled to a declaration that 42 U.S.C. § 14141 does not provide the defendants with authority to investigate or sue the plaintiffs.

C. 42 U.S.C. § 3789d

46. Even in the absence of absolute prosecutorial immunity, 42 U.S.C. § 3789d does not permit investigation of or a lawsuit against the plaintiffs.

47. There is an actual controversy as to whether the defendants may investigate or sue the plaintiffs under 42 U.S.C. § 3789d.

48. 42 U.S.C. § 3789d prohibits “discrimination . . . in connection with any programs or activity funded in whole or in part with funds made available under [Title 42, Chapter 46].” 42 U.S.C. § 3789d(c)(1).

49. 42 U.S.C. § 3789d further states: “Nothing in this chapter or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof.” 42 U.S.C. § 3789d(a).

50. The defendants nevertheless allege they have authority to investigate, sue, and impose requirements on the County Attorney and his

office under 42 U.S.C. § 3789d because the County Attorney's Office has received federal funds.

51. The plaintiffs have not received any funds under Title 42, Chapter 46 for prosecution of sexual assault cases. During the time period relevant to this complaint, Missoula County received federal funding from a \$200,000 grant related to veteran mental health and substance abuse concerns. The plaintiffs did not receive any of the funds made available from this grant. The plaintiffs were awarded a federal grant of \$7,000 aimed at juvenile delinquency titled "JDAI (Juvenile Detention Alternatives Initiative) & Juvenile System Improvement." The plaintiffs did not receive any of the funds made available from this grant but only administered the grant. Finally, the plaintiffs received \$19,757 of federal funding as a sub-grantee of a larger grant awarded to the Missoula County Sheriff, which was used to fund a drug-crimes paralegal position. None of the funds made available from this sub-grant were spent in any manner for the prosecution of sexual assault cases.

52. The defendants have not shown whether any federal grant was awarded to the County Attorney's Office under Title 42, Chapter 46, which is a prerequisite for the enforcement of 42 U.S.C. § 3789d.

53. Even assuming the grants were awarded under Title 42, Chapter 46, the defendants do not have the authority to investigate or sue the plaintiffs under 42 U.S.C. § 3789d because that statute applies only to

“discrimination . . . *in connection with* any programs or activity funded in whole or in part with funds made available under [Title 42, Chapter 46].” (emphasis added).

54. There is no connection with the discrimination alleged by the defendants and any federal funds the plaintiffs have received. The alleged discrimination involves the prosecution of sexual assault cases, but the alleged federal funding relates to veteran mental health and substance abuse, juvenile delinquency, and drug crimes.

55. Since the alleged discrimination has no connection with federal funds that the plaintiffs have received, the defendants do not have the authority to investigate or sue the plaintiffs under 42 U.S.C. § 3789d.

56. The defendants’ actions are unlawful attempts to “exercise . . . direction, supervision, or control over” the County Attorney and his office. *See* 42 U.S.C. § 3789d(a).

57. Further, the defendants have failed to comply with the notice and procedural requirements of 28 C.F.R. Part 42, Subpart D.

58. The plaintiffs are therefore entitled to a declaration that 42 U.S.C. § 3789d does not provide the defendants with authority to investigate or sue the plaintiffs.

D. UNITED STATES CONSTITUTION

59. The Constitution “divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.” *New York v. United States*, 505 U.S. 144, 187 (1992). “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.” *Printz v. United States*, 521 U.S. 898, 935 (1997).

60. There is an actual controversy as to whether the defendants may investigate or sue the plaintiffs under the United States Constitution.

61. The defendants have levied unsupported allegations of unconstitutional conduct and have exceeded their own jurisdiction in an attempt to unconstitutionally commandeer an elected local official, the County Attorney, into implementing a federal program for handling sexual assault cases.

62. As applied to the plaintiffs, the defendants’ invocation of 42 U.S.C. § 14141 and 42 U.S.C. § 3789d violates the Tenth Amendment.

63. The plaintiffs are therefore entitled to a declaration that the defendants are barred from investigating or suing the plaintiffs under the United States Constitution.

COUNT II: ATTORNEY'S FEES

64. 28 U.S.C. § 2202 provides the Court with discretion to award attorney's fees, costs, and expenses to the prevailing party in a declaratory judgment action. The plaintiffs respectfully request that the Court award the plaintiffs their attorney's fees, costs, and expense.

DEMAND FOR RELIEF

For the reasons above, Fred Van Valkenburg, County Attorney for the County of Missoula, Montana, and the County Attorney's Office for Missoula County, Montana, respectfully request the Court declare that the defendants have no authority to investigate, issue findings, or sue the Missoula County Attorney or his office, under 42 U.S.C. § 14141 or 42 U.S.C. § 3789d for alleged discrimination in how the County Attorney or his office handle and prosecute criminal cases because:

- a. the doctrine of absolute prosecutorial immunity bars the defendants from investigating or suing the County Attorney or his office,
- b. 42 U.S.C. § 14141 does not provide the defendants with authority to investigate or sue the County Attorney or his office,
- c. 42 U.S.C. § 3789d does not provide the defendants with authority to investigate or sue the County Attorney or his office, and

- d. the United States Constitution bars the defendants from investigating or suing the County Attorney or his office.

The plaintiffs also request that the Court award the plaintiffs their reasonable attorney's fees and any other equitable relief that the Court deems just.

Dated this 11th day of February 2014.

/s/

Natasha Prinzing Jones
Natasha Prinzing Jones
Thomas J. Leonard
Randy J. Tanner
BOONE KARLBERG P.C.
Attorneys for Plaintiffs