U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

April 10, 2019

The Honorable Jerrold Nadler
Chairman Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: *United States* v. *Jumana Nagarwala et al.*, No. 17-cr-20274 (E.D. Mich. Nov. 20, 2018)

Dear Mr. Chairman:

Consistent with 28 U.S.C. 530D, I write to call your attention to the above-referenced decision of the United States District Court for the Eastern District of Michigan. A copy of the decision is attached.

This case is the first federal prosecution under 18 U.S.C. 116(a), which prohibits female genital mutilation (FGM). Section 116(a) makes it a criminal offense to "knowingly circumcise[], excise[], or infibulate[] the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years." *Ibid.* The district court dismissed the FGM charges, holding that Section 116(a) is beyond Congress's power. First, the court concluded that Section 116(a) is not necessary and proper to effectuate an international treaty under *Missouri* v. *Holland*, 252 U.S. 416 (1920). The court rejected the government's argument that the provision was rationally related to implementing the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR), *done*, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Second, the court relied on *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), to hold that Section 116(a) was beyond Congress's power under the Commerce Clause. The court found that FGM was not an economic activity but was instead a form of physical assault, and that the statute adding Section 116(a) to the U.S. Code was unaccompanied by detailed, record-based findings from which a court could determine that FGM substantially affects interstate commerce. The court further emphasized that, unlike many federal criminal statutes, Section 116(a) does not include any jurisdictional elements, such as a requirement that the charged offense have an explicit connection with, or effect on, interstate commerce.

Section 116(a) targets an especially heinous practice—permanently mutilating young girls—that should be universally condemned. FGM is a form of gender-based violence and child

abuse that harms victims not only when they are girls, suffering the immediate trauma of the act, but also throughout their lives as women, when it often results in a range of physical and psychological harms. See Act of Sept. 30, 1996, Pub. L. 104-208, Div. C., Tit. VI, § 644(a), 110 Stat. 3009-708 (18 U.S.C. 116 note). The Centers for Disease Control and Prevention estimates that half a million women and girls in the United States have already suffered FGM or are at risk for being subjected to FGM in the future. See Howard Goldberg et al., Centers for Disease Control and Prevention, *Female Genital Mutilation/Cutting in the United States*, 131 Public Health Reports 340 (2016). The Department therefore condemns this practice in the strongest possible terms.

That said, the Department has reluctantly determined that—particularly in light of the Supreme Court's decision in *Morrison*, which was decided after Section 116(a)'s enactment—it lacks a reasonable defense of the provision, as currently worded, and will not pursue an appeal of the district court's decision. Instead, we urge that Congress act forthwith to address the constitutional problem, by promptly enacting the attached legislative proposal, which, in our view, would clearly establish Congress's authority to criminalize FGM of minors and ensure that this practice is prohibited by federal law.

First, the Department has determined that it lacks an adequate argument that Section 116(a), as it is currently written, is necessary and proper to the regulation of interstate commerce. Pursuant to the Commerce Clause, Congress can regulate and protect the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that "substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). Unlike many federal criminal statutes, however, Section 116(a) does not require proof of any nexus between the conduct at issue (performing FGM on minors) and interstate commerce—the critical defect found by the Supreme Court in *Morrison* and *Lopez*. Furthermore, although FGM can be performed in circumstances with commercial characteristics, FGM itself does not appear to be inherently an economic activity, and when performed purely locally, FGM does not appear to be "part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Ibid.*

Second, the Department has determined that it does not have an adequate argument that Section 116(a) is within Congress's authority to enact legislation to implement the ICCPR, which does not address FGM. None of the ICCPR's provisions references FGM at all. Nor do they provide a basis for the federal government itself (rather than the individual States) to criminalize FGM of minors by private parties. This case is therefore not analogous to *Holland*, which involved a treaty that more directly addressed the parties' obligation to protect certain migratory birds and to propose legislation to do so. See 252 U.S. at 431. Thus, even maintaining the full continuing validity of *Holland*, the Department does not believe it can defend Section 116(a) on this ground.

Although the Department has determined not to appeal the district court's decision, it recognizes the severity of the charged conduct, its lifelong impact on victims, and the importance of a federal prohibition on FGM committed on minors. Accordingly, the Department urges Congress to amend Section 116(a) to address the constitutional issue that formed the basis of the district court's opinion in this case. Specifically, concurrently with submitting this letter, the Department is submitting to Congress a legislative proposal that would amend Section 116(a) to provide that FGM is a federal crime when (1) the defendant or victim travels in or uses a channel or instrumentality of interstate or foreign commerce in furtherance of the FGM; (2) the defendant uses a means, channel, facility, or instrumentality of interstate commerce in connection with the

FGM; (3) a payment is made in or affecting interstate or foreign commerce in furtherance of the FGM; (4) an offer or other communication is made in or affecting interstate or foreign commerce in furtherance of the FGM; (5) the conduct occurs within the United States' special maritime and territorial jurisdiction, or within the District of Columbia or a U.S. territory; or (6) the FGM otherwise occurs in or affects interstate or foreign commerce. In our view, adding these provisions would ensure that, in every prosecution under the statute, there is a nexus to interstate commerce.

Please let me know if we can be of further assistance in this matter.

Sincerely,

Noel J. Francisco
Solicitor General

Enclosure