**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| **JOSE MORALES, on behalf of himself and those similarly situated, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), as an organization; GEORGIA ASSOCIATION OF LATINO ELECTED OFFICIALS (GALEO), as an organization; and THE CENTER FOR PAN ASIAN COMMUNITY SERVICES (CPACS), as an organization,** | ) | **CIVIL ACTION NO. 1:08-CV-3172 JTC-WSD-SFB** |
| **Plaintiffs,** | ) | **THREE JUDGE PANEL** |
| **V** | ) | |
| **KAREN HANDEL, in her official capacity as Georgia Secretary of State,** | ) | |
| **Defendant.** | ) | |

**DEFENDANT'S REPLY BRIEF**
**IN SUPPORT OF ITS MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT**

Plaintiffs seek permanent injunctive relief based on the United States Department of Justice's ("DOJ") May 29, 2009, letter in which it interposed an objection to the Defendant's current citizenship verification process. Because Defendant has requested reconsideration of that decision, Plaintiffs' Section 5 claim is not ripe for review by this Court. Defendant's

Exhibit 9. *See also* U.S. Department of Justice, Notices of Preclearance Activity, August 24, 2009, available at http://www.usdoj.gov/crt/voting/notices/vnote082409.php (Last visited September 25, 2009).

At the time Defendant filed her motion to dismiss, Defendant did not know whether Plaintiffs intended to limit their briefing to a discussion of their claims under Section 5 of the Voting Rights Act or whether Plaintiffs intended to address their claims under the Help America Vote Act and the National Voter Registration Act as well. Thus, Defendant included a discussion of all three laws as they related to Plaintiffs' claims in this case.

However, as Plaintiffs acknowledged in their opening brief: "[t]he role of the three-judge court entertaining an action under section 5 of the Voting Rights Act is limited. The three-judge court determines '(1) whether a change [is] covered by § 5, (ii) if the change [is] covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate.'" *Brooks v. State Board of Elections*, 775 F. Supp. 1470, 1475 (S.D. Ga. 1989) (quoting *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983)).

As to the first issue, the Three-Judge Panel ruled in its October 27, 2008, Order that the citizenship verification process is covered by Section 5

and therefore required preclearance. [Doc. 36 at 21-22]. The second issue, whether § 5's approval requirements were satisfied, is not yet ripe for this Court's consideration. Although DOJ issued a letter on May 25, 2009 objecting to the Defendant's citizenship verification process, the Defendant has requested reconsideration of that decision.[1] As long as Defendant's citizenship verification process is under review by DOJ, it would be premature for this Court to attempt to fashion any judicial remedy.

"A claim is not ripe for adjudication if it rests upon 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)(citations and quotations omitted). *See also Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1308 (11th Cir. 2009); *Myers v. City of McComb*, 2006 U.S.Dist. LEXIS 37929 at *3 (S.D. Miss. 2006).

The ripeness doctrine "is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs*., 509 U.S. 43, 57 n.18 (1993).

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[1] In its letter, the DOJ raised concerns about the State of Georgia's voter verification process as it relates to the verification of other voter information, including first name, last name, date of birth, drivers' license number, and last four digits of the social security number. However, the only portion of the verification process at issue before this Court is the verification of citizenship status.

Article III of the United States Constitution requires that federal courts limit their jurisdiction to actual cases and controversies. U.S. Const., art. III., § 2, cl. 1. *See also Virginia v. Reno*, 117 F. Supp. 2d 46, 51 (2000)(citing *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477 (1990)). "Prudential" ripeness reflects the "court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Grand Canyon Air Tour Coalition v. Fed. Aviation Admin.*, 154 F.3d 455, 472 (D.C. Cir. 1998).

In *Virginia v. Reno*, the State of Virginia filed a declaratory judgment action seeking a declaration that the state was not required to obtain preclerance of a recently enacted state law, which mandates the use of unadjusted figures when reapportioning electoral districts. *See* Va. Code Ann. § 24.2-301 (2000). The Department of Justice filed a motion to dismiss based on the fact that the State of Virginia had a Section 5 submission still pending and also based on the fact that the 2000 census figures had not yet been released.

The three-judge panel in the *Virginia* case agreed with DOJ that these two contingencies made it improvident for the court to consider plaintiffs' claims. 117 F. Supp. 2d at 51. In considering whether any of plaintiffs' claims were ripe for judicial decision, the court said it evaluates: "whether

the issue is '(a) essentially legal, and (b) sufficiently final.'" *Id*. (*quoting Consol Rail Corp*., 896 F.2d 574, 577 (D.C. Cir. 1990)).

In the case at hand, the present issue before the Court is: "whether § 5's approval requirements were satisfied." *Brooks,* 775 F. Supp. at 1475. That issue is neither "essentially legal" nor "sufficiently final" for this Court to reach a determination at this time. *Virginia*, 117 F. Supp. 2d at 51. The determination of whether Defendant's citizenship verification process meets Section 5's approval requirements is not a purely legal issue, but depends on the particular facts of the case. As such, this Court should await the final determination by DOJ. As the court did in the *Virginia* case, this Court should dismiss Plaintiffs' claims without prejudice. 117 F. Supp. 2d at 54.[2]

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[2] Plaintiffs noted that Defendant referred only to Fed.R.Civ.P. 12(b)(6) and not to Fed.R.Civ.P. 12(b)(1) in her Motion to Dismiss. *See* Plaintiffs' Response Brief at 2, n. 1. [Doc. 92]. However, Defendant presented the legal argument that supports her motion to dismiss under Fed.R.Civ.P. 12(b)(1)(lack of subject matter jurisdiction) in her brief. *See* Defendant's Brief in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment at 2, 11-12. [Doc. 88]. Furthermore, the Court has an obligation to *sua sponte* inquire into whether it has subject matter jurisdiction. *University of S. Alabama v. American Tobacco Co*., 168 F.3d 405, 410 (11th Cir. 1999)("courts must constantly examine the basis of their jurisdiction before proceeding to the merits"). Defendant further notes that the court may consider matters outside of the pleadings in considering a motion to dismiss under Fed.R.Civ.P. 12(b)(1). *Goodman v. Sipos*, 259 F.3d 1327, 1331-32, n. 6 (11th Cir. 2001).

Plaintiffs argue that Defendant's request for reconsideration should be treated as a "new" voting change, rather than a "request for reconsideration," citing *Blanding v. Dubose*, 454 U.S. 393, 399 (1982), which would make DOJ's May 29, 2009 letter a final decision. The Court in the *Blanding* case concluded that the second submission in that case should be treated as a "request for reconsideration," rather than as a "new" submission. 454 U.S. at 399 ("Indeed, the June letter fell squarely within the definition of a reconsideration request.") Applying the longstanding principle that courts should give deference to agency interpretations of statutes and regulations, the Court gave deference to the Attorney General's determination that the second Section 5 submission in that case was a "request for reconsideration." *Id*. at 401.

Plaintiffs in this case argue that the Defendant has attempted to submit a "new" voter verification process as part of its "request for reconsideration." However, Defendant's August 12, 2009, letter shows that Defendant in fact requested reconsideration of DOJ's May 29, 2009, decision. Defendant's Exhibit 9. Included in that request for reconsideration is a proposed revised voter verification process. *Id*. at 2. Nevertheless, DOJ has classified Defendant's request for reconsideration as

a "request for reconsideration" rather than as a "new" submission. http://www.usdoj.gov/crt/voting/notices/vnote082409.php (Last visited on September 25, 2009). DOJ's determination of whether the Defendant's request is a "request for reconsideration" or a "new" submission is entitled to deference by this Court. *Blanding*, 454 U.S. at 401. Therefore, unless and until DOJ issues a final determination on Defendant's request for reconsideration, the issue of "whether § 5's approval requirements were satisfied," remains pending before DOJ.

In their response to Defendant's motion to dismiss, Plaintiffs said: "it is hornbook law that a Section 5 enforcement court may not determine the merits of a Section 5 change." Plaintiffs' Opposition Brief at 5. "[T]he jurisdiction for that question is reserved exclusively for the Attorney General and the United States District Court for the District of Columbia." *Id*. Defendant agrees.

This is all the more reason, however, that this Court should defer any decision regarding what legal remedy may be appropriate in this case until DOJ issues its final decision regarding the Defendant's request for reconsideration on the Section 5 submission.

It makes no sense for this Court to attempt to fashion some judicial remedy when DOJ has not yet made its final determination regarding the

Section 5 preclearance issue. "Article III courts should not make decisions unless they have to." *Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996). This is "the usually unspoken element of the rationale underlying the ripeness doctrine: *If we do not decide it now*, we may never need to." *Id*. (emphasis added). At the present time, there is no issue that is ripe for the Court's consideration. Unless and until DOJ issues a final decision on Defendant's request for reconsideration, this Court should dismiss all of Plaintiffs' claims without prejudice.[3]

## CONCLUSION

For the reasons set forth herein above, Defendant respectfully submits that the Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment.

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[3] Defendant submits that in this case, as in the *Virginia* case, a dismissal without prejudice is more appropriate than a stay of the proceedings pending DOJ's final decision since the effective date of Senate Bill 86 is now only a few months away. *See* 117 F. Supp. 2d at 51. Effective January 1, 2010, Georgia law will be amended to require any voter applicant to present satisfactory evidence of U.S. citizenship. O.C.G.A. § 21-2-216(g). *See also* 2009 Ga. Laws 712. This will substantially change the facts as currently presented in this case. Although that law is subject to preclearance, its imminent effective date still impacts on the uncertainty of the future of this litigation.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise:

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This 25th day of September 2009.

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