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

JOSE MORALES; 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**
Plaintiffs,	)	
V	)	
KAREN HANDEL, in her official capacity as Georgia Secretary of State,	)	
Defendant.	)	

PLAINTIFFS' REPLY BRIEF

Plaintiffs respectfully submit the following Reply to Defendant's Brief in Opposition to Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief ("Def. Opp. Brief") (Dckt. 91).

Plaintiffs' Motion for Summary Judgment is predicated upon the following: 1) Defendant's citizenship verification program is a change affecting voting for which preclearance is required pursuant to Section 5 of the Voting Rights Act, 42

U.S.C. 1973c ("Section 5"); 2) Section 5 prohibits the implementation of covered voting changes unless and until Section 5 preclearance is obtained; and 3) Defendant has implemented the citizenship verification program without Section 5 preclearance. On May 29, 2009, the United States Attorney General denied Section 5 preclearance to Defendant's citizenship verification program.[1]

Defendant's Opposition Brief contests none of these facts or conclusions of law. Defendant instead argues that the Court should dismiss the complaint and/or stay the action because Defendant's request for reconsideration of the Attorney General's May 29, 2009 Section 5 objection somehow renders Plaintiffs' Section 5 claim unripe. For the following reasons the authorities cited by Defendant fail to support either Defendant's ripeness arguments or her request that the Court should "stay" or otherwise defer entry of final judgment based upon that reconsideration request.[2]

---

[1] In her response to Plaintiffs' Statement of Undisputed Facts, Defendant denies that she began implementation of the program in 2007, averring that the implementation "did not begin until much later." Defendant's Response to Plaintiffs' Statement of Undisputed Facts, at 4 (Dckt. 91, Attach. 1). Be that as it may, there is no dispute that Defendant began implementation of the program *prior to* seeking Section 5 preclearance in October 2008. See Exhibit 2 to Plaintiffs' Statement of Undisputed Facts (State of Georgia's Section 5 Submission Letter, Oct. 14, 2008, at 12) (Dckt. 89, Exh. 2) ("As you know, the process is currently in effect. Expedited preclearance is requested to permit its continued usage.")

[2] As Plaintiffs previously have noted, there is little to Defendant's argument as a practical matter since the Attorney General is due to respond to Defendant's

Ripeness is a jurisdictional requirement for all federal court adjudication that includes both prudential and Article III considerations. In the Section 5 context a claim may fail for lack of ripeness if it is brought so far in advance of the potential application of the voting change at issue that the claim "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). *See also Virginia v. Reno*, 117 F. Supp. 2d 46 (2000), *aff'd mem.*, 531 U.S. 1062 (2001).

In this case, the only contingency that Defendant attempts to identify is the possibility that the Attorney General will withdraw the outstanding Section 5 objection to the citizenship verification program. *See* Def. Opp. Brief at 3, 7-8. This type of contingency was not at issue in any case cited by Defendant, including the three Section 5 decisions Defendant cites: *Virginia v. Reno*, *supra*, *Texas v. United States*, *supra*, *and Myers v. City of McComb*, No. 3:05-CV-481BN, 2006 U.S. Dist. LEXIS 37929 (S.D. Miss. Feb. 7, 2006).

Virginia v. Reno involved a law of the Commonwealth of Virginia that required the use of unadjusted decennial census data for redistricting. The contingency in that case hinged entirely upon whether the Bureau of the Census

---

reconsideration request within the next two and a half weeks, on or by October 13, 2009. And, as discussed previously and again *infra*, Defendant has not presented any colorable basis for believing that the Attorney General might withdraw the Section 5 objection.

would adjust the 2000 Decennial Census data to account for a "differential undercount" of the population. The District Court for the District of Columbia held that neither Virginia's demand for a declaratory judgment that the law was not subject to Section 5 preclearance, nor the state's alternative demand for a Section 5 declaratory judgment that the law was entitled to preclearance on the merits, was sufficiently ripe for adjudication. The D.C. Court concluded that because no decision had yet been made as to as to whether "adjusted" data would ever be released, it could not be known at the time whether the proposed law would result in a change affecting voting, or what effect that change would have in practice. *Virginia v. Reno*, 117 F. Supp. 2d at 50, 52-53. The law at issue in *Virginia v. Reno* therefore not only had never been implemented, but there was material uncertainty as to whether the law ever could be implemented in a meaningful way, or what the effect would be if the law were to be implemented. It was that uncertainty which deprived the *Virginia v. Reno* court of jurisdiction for lack of ripeness.[3]

[3] Plaintiffs previously distinguished *Texas v. United States* in Plaintiffs' Opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, at 9 (Dckt. 92). As in *Virginia v. Reno*, the contingency in that case did not involve the Attorney General's merits decision on a Section 5 submission but rather the circumstances in which the state law in question might be implemented. Specifically, the law authorized state authorities to impose administrative sanctions on a local school district, which in turn might implicate Section 5 if elected school officials were removed or supplanted from their official duties. Texas sought a

Here, by contrast, Defendant's citizenship verification program unquestionably has been put into practice. Plaintiffs' Section 5 claim therefore was ripe at the time the program was illegally implemented and remains so notwithstanding Defendant's recent request for reconsideration.

Defendant cites an unreported order in *Myers v. City of McComb* for the unremarkable proposition that a Section 5 court may grant a stay in appropriate circumstances. *Myers v. City of McComb*, *supra.* The stay in that case, however, was not premised upon a request for reconsideration of an objection, such as Defendant is seeking here. Nor did it involve awaiting a determination by the Attorney General before awarding final relief. *See Berry v. Doles*, 438 U.S. 190, 192 (1978). This Court already has properly stayed its hand as provided in *Berry* by awaiting the Attorney General's decision on the citizenship verification program. Instead, the stay in *Myers* came after a three-judge court already had enjoined the enforcement of a Mississippi circuit court order on Section 5 grounds. The *Myers* court subsequently stayed the consideration of all claims, which included non-Section 5 claims, pending the appeal of the challenged circuit court order to the Mississippi Supreme Court. The three-judge court already had determined that preclearance was required in the event that the circuit court order

---

blanket Section 5 determination that no such action could ever require Section 5 preclearance. Because no administrative action was proposed at the time, Texas' Section 5 declaratory judgment lawsuit was not ripe.

was upheld. The stay simply allowed the state's judicial process to determine whether the circuit court order would be affirmed or reversed by that specific appeal.

A bare request for reconsideration of the Attorney General's objection, which is what Defendant's request amounts to here, cannot be permitted to automatically prevent a Court's restoration of the *status quo ante* for a violation of Section 5. Defendant has made no commitment to limit the number of occasions upon which she will seek reconsideration, and the relevant provisions of the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. 51.45, place no limit upon serial reconsideration requests. Were a request for reconsideration sufficient to deprive a court of its obligation to enjoin an objected-to voting change, a jurisdiction could submit an endless series of requests for reconsideration and prevent, or substantially delay, a court from granting permanent injunctive relief. Such a result would be contrary to the basic purpose of Section 5.[4]

[4] Defendant's extreme position is that "[s]o 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." Def. Opp. Brief at 3. Defendant's position would encourage evasion and gamesmanship at odds with Congress' purpose in structuring Section 5 in order to place the burdens of litigation and delay on the perpetrators rather than the victims of discrimination. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

In addition, this particular request for reconsideration is unsupported and unlikely to succeed.[5] Defendant does not aver in her request to the Attorney General that there has been any intervening change in controlling law or alteration of material facts, or that the Attorney General otherwise misapplied the governing law or misconstrued the material facts. [6]

Thus, because Defendant has raised no objection to the merits of Plaintiffs' Section 5 claim, there is no need for the Court to defer entry of final judgment and permanent relief pending the Attorney General's reconsideration decision. For the

[5] *See also*, Plaintiffs' Opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, at 8 (Dckt. 92).

[6] Defendant's discussion of *Blanding v. DuBose*, 454 U.S. 493 (1982), Def. Opp. Brief at 6-7, merely reinforces Plaintiffs' position that the Section 5 claim cannot be moot, as Defendant attempted to argue in her Motion to Dismiss or in the Alternative Motion for Summary Judgment (Dckt. 88). The fact that Defendant is seeking preclearance of a proposed new voting change while also requesting withdrawal of the Section 5 objection does not negate the latter in favor of the former. Defendant, in other words, clearly continues to press forward seeking to implement the objected-to verification program.

same reasons, the Court should enter final judgment and permanent relief on Plaintiffs' Section 5 claim in the event that the Attorney General denies the reconsideration request before the Court's decision.[7]

Respectfully submitted,

/s/Elise Sandra Shore
Elise Sandra Shore
Counsel for Plaintiffs

Jon Greenbaum
Robert A. Kengle
Mark A. Posner
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, NW
Suite 400
Washington DC 20005
jgreenbaum@lawyerscommittee.org
bkengle@lawyerscommittee.org
mposner@lawyerscommittee.org

Elise Sandra Shore
Mexican American Legal Defense and
Educational Fund
34 Peachtree St. NW, Suite # 2500
Atlanta, GA 30303
eshore@MALDEF.org

[7] On the other hand, should the Attorney General withdraw the objection prior to this Court's ruling, then the Plaintiffs' HAVA and NVRA claims in turn would be justiciable and should not be dismissed.

Laughlin McDonald
Meredith Bell-Platts
ACLU VOTING RIGHTS PROJECT
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303
lmcdonald@aclu.org
nbradley@aclu.org
mbell@aclu.org

Brian Spears
Law Office of Brian Spears
1126 Ponce de Leon Ave., NE
Atlanta, GA 30306
bspears@mindspring.com

Jason S. Pielemeier
Young K. Lee
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
pielemeier@debevoise.com
yklee@debevoise.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this, the 25th day of September, 2009, I electronically filed the within and foregoing **PLAINTIFFS' REPLY BRIEF** 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, including the following:

Julia B. Anderson
Dennis R. Dunn
Stefan Ritter
Attorney General
State Law Department
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
ddunn@law.state.ga.us
sritter@law.ga.gov
janderson@law.ga.gov

/s/ Elise Sandra Shore
Elise Sandra Shore
Counsel for Plaintiffs
Georgia Bar No. 557131

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

Undersigned counsel hereby certifies that the foregoing was prepared in Times New Roman, 14-point, in compliance with Local Rule 5.1B.

This 25th day of September 2009.

/s/ Elise Sandra Shore
Elise Sandra Shore
Georgia Bar No. 557131