IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING, Plaintiffs, v. ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, Defendant.	CIVIL NO. 1:10-CV-00561-JDB

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR THREE-JUDGE COURT

Defendant, Attorney General of the United States ("United States"), respectfully opposes the Plaintiffs' Application for a Three-Judge Court. Because Congress has not authorized three-judge courts to hear the constitutional claims in this case, the Plaintiffs' application should be denied.

I. BACKGROUND

Plaintiffs, who are private parties in Kinston, North Carolina, filed their Complaint challenging the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c ("Section 5") on April 7, 2010. They claim that Section 5 exceeds Congress' power because it "is not appropriate legislation to enforce either the Fourteenth Amendment or the Fifteenth Amendment." Compl. ¶ 33. They also claim that Section 5 violates the "nondiscrimination requirements" of the Fifth, Fourteenth, and Fifteenth Amendments. Compl. ¶ 36. Plaintiffs raise no other claims.

Along with their Complaint, and without conferring with counsel for the United States, the Plaintiffs filed an application seeking appointment of a three-judge court.[1] They claim their constitutional challenge to Section 5 "must" be heard by a three-judge court; alternatively, they ask this Court "voluntarily" to convene a three-judge panel. Application for Three-Judge Court ¶¶ 2, 3.

II. ARGUMENT

A three-judge court is not appropriate here. No statute authorizes a three-judge district court to hear stand-alone constitutional challenges to Section 5. Moreover, no statute authorizes a district court to convene a three-judge court "voluntarily." The Plaintiffs' application should be denied.

Single Judge Courts Decide Constitutional Cases, Unless A Specific Federal Statute Requires Otherwise.

Single judge courts are the rule, and not the exception. Thus, absent a specific federal statute to the contrary, a single federal district court judge hears and decides cases. 28 U.S.C. 132(c). Three-judge courts are convened only when specifically "required by Act of Congress." 28 U.S.C. 2284(a).[2] Since its 1976 revision, the federal three-judge court statute has not required that constitutional challenges to federal laws be heard by three-judge courts. See Public Law 94-381, 90 Stat. 1119 (1976). Congressional acts providing for three-judge courts "must be strictly construed." Allen v. Board of Elections, 393 U.S. 544, 561 (1969); see Gonzalez v. Automatic

[1] Counsel for Plaintiffs did not comply with Local Civil Rule 7(m)'s requirement to confer with counsel for the United States prior to filing Plaintiffs' application seeking a three-judge court. Accordingly, this Court has the discretion to strike, or deny without prejudice, Plaintiffs' application. Aboudaram v. De Groote, 2004 WL 1242530 (D.D.C. 2004) (Bates, J.).

[2] 28 U.S.C. 2284 also authorizes three-judge courts for actions challenging "the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." This provision is inapplicable here, as no such congressional or statewide apportionment plan is at issue.

Emp. Credit Union, 419 U.S. 90, 97 (1974) ("we have stressed that the three-judge-court procedure is not a measure of broad social policy to be construed with great liberality") (internal quotation omitted). A single judge determines whether a three-judge court is legally required. See 28 U.S.C. 2284(b)(1) ("Upon the filing of a request for three judges, the judge to whom the request is presented shall, *unless he determines that three judges are not required,* immediately notify the chief judge of the circuit.…") (emphasis added); see generally C. Wright, A. Miller & E. Cooper, 17A Fed. Prac. & Proc. Juris.3d 4234-35 (3d ed. 2010).

No Statute Authorizes a Three-Judge Court to Determine a Stand-Alone Challenge to Section 5's Constitutionality.

Neither the Voting Rights Act nor any other federal statute authorizes a three-judge court to hear a stand-alone challenge to Section 5's constitutionality. Indeed, the Plaintiffs' constitutional claims are before this Court pursuant to Section 14(b) of the Voting Rights Act, 42 U.S.C. 1973*l*(b), which provides that "[n]o court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision" of the Voting Rights Act. See Allen, 393 U.S. at 558. Section 14(b)'s plain terms neither contemplate nor require the convening of a three-judge court. Accordingly, Section 14(b) confers no statutory authority on this Court to convene a three-judge court. See 28 U.S.C. 2284(a).

While Congress did require three-judge courts for certain types of cases arising under Sections 4 and 5 of the Voting Rights Act, those circumstances are inapplicable here. Section 4 specifically requires this Court to convene a three-judge court to hear "[a]n action pursuant to this subsection" brought by a covered jurisdiction seeking to bail out from Section 5's

preclearance requirement. 42 U.S.C. 1973b(a)(5).[3] This case, however, is not a bailout action brought by a covered jurisdiction "pursuant to" Section 4, and thus Section 4 does not require a three-judge court here.

Section 5 requires that "[a]ny action under this section" be heard by a three-judge court. 42 U.S.C. 1973c (emphasis added). However, the Supreme Court and this Court have observed there are only three types of cases that arise "under" Section 5.[4] The first type are declaratory judgment actions seeking judicial preclearance of voting changes, brought only by covered jurisdictions and only in this Court.[5] The second and third types of cases are enforcement actions brought by the United States, and by private parties, against covered jurisdictions in local federal courts to determine whether particular voting changes are covered by Section 5.[6] Plaintiffs' complaint does not fall within any of these categories – it is clearly not brought "under" Section 5 since it is neither an action brought by a covered jurisdiction seeking a

[3] Examples of bailout actions bought in this court by covered jurisdictions under Section 4 of the Voting Rights Act include Commonwealth of Virginia v. United States, 386 F. Supp. 1319, 1321 (D.D.C. 1974), aff'd, 420 U.S. 901 (1975) and Northwest Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008), rev'd and remanded, 129 S. Ct. 2504 (2009). See also NAACP v. New York, 413 U.S. 435 (1973) (attempted intervention in bailout action).

[4] Allen, 393 U.S. at 560-63 ("As we have interpreted § 5, suits involving the section may be brought in at least three ways."); Reaves v. U.S. Dep't of Justice, 355 F.Supp.2d 510, 514 (D.D.C. 2005) ("In addition to the declaratory judgment action explicitly authorized by the statute, the Supreme Court has recognized two causes of action implied by Section 5.").

[5] Examples of Section 5 judicial preclearance actions brought by covered jurisdictions in this Court include City of Pleasant Grove v. United States, 623 F. Supp. 782 (D.D.C. 1985), aff'd, 479 U.S. 462 (1987) and Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

[6] Examples of Section 5 enforcement actions brought against covered jurisdictions in local federal courts include Lopez v. Monterey County, 519 U.S. 9 (1996), United States v. Board of Supervisors of Warren County, 429 U.S. 642 (1977) and Allen, 393 U.S. at 560-63.

determination that a voting change should be precleared by this Court, nor an action brought against a covered jurisdiction seeking a determination that a specific voting change is covered by Section 5. There is no question in this case of the "coverage" of state enactments by Section 5. Accordingly, no three-judge court is required here by Section 5.

While three-judge panels of this Court have heard constitutional challenges to certain provisions of the Voting Rights Act, those situations are inapposite either because such courts were convened pursuant to the pre-1976 version of the three-judge court act,[7] or because three-judge courts were otherwise properly convened to hear declaratory judgment claims pursuant to Sections 4 and/or 5 of the Voting Rights Act. For example, most recently in Northwest Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 230 (D.D.C. 2008), rev'd and remanded, 129 S. Ct. 2504 (2009), a three-judge court was properly convened to consider a bailout claim brought by a covered jurisdiction under Section 4 of the Act; it also considered the jurisdiction's alternative claim challenging Section 5's constitutionality. In County Council of Sumter County v. United States, 555 F. Supp. 694, 707-708 (D.D.C. 1983), a properly convened three-judge court considered a covered jurisdiction's claims for judicial preclearance of voting changes under Section 5, and also took jurisdiction over alternative claims challenging Section 5's constitutionality. Moreover, in City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), aff'd, 446 U.S. 156 (1980), this Court properly convened a three-judge court to consider claims brought by a covered jurisdiction seeking judicial preclearance of voting changes under Section 5 and seeking bailout under Section 4; it also considered alternative constitutional challenges to Section 5. In City of Rome, this Court "sua sponte" raised the question of whether

[7] Examples of such pre-1976 constitutional challenges to the Act include Morgan v. Katzenbach, 247 F. Supp. 196, 198 (D.D.C. 1965), rev'd, 384 U.S. 641 (1966) and Christopher v. Mitchell, 318 F. Supp. 994, 997 (D.D.C. 1970), vacated, 401 U.S. 902 (1971).

it had jurisdiction over the constitutional claims. There, this Court said:

> The jurisdiction of this 3-judge District Court is established, for present purposes, in section 5 of the Act. The cause of action over which jurisdiction is in terms conferred by section 5 is restricted to preclearance actions, and the only parties explicitly authorized to bring such actions are covered jurisdictions. The claims we consider in the present section are, however, constitutional challenges to the Act, some of them brought by private parties rather than the City. We are doubtful that this Court has statutory jurisdiction over such claims. Section 4(a) also grants this Court jurisdiction to hear bail-out actions such as that brought by the City as part of this lawsuit. Section 4(a), however, obviously does not grant jurisdiction over challenges to the constitutionality of § 5. It may be, of course, that a single-judge federal District Court would have jurisdiction to consider these claims under some other provision, such as 28 U.S.C. § 1331. Despite these doubts, we find we can take jurisdiction over the claims on a pendent jurisdiction theory.

472 F. Supp. at 226 (footnotes omitted). This Court's statement in City of Rome thus supports the view that a three-judge court would not have jurisdiction over a stand-alone constitutional challenge.

In a similar previous stand-alone challenge to the constitutionality of Section 5 in this Court, the United States likewise averred, based on the principles set forth above, that convening a three-judge court was not proper. In Giles v. Ashcroft, 193 F. Supp.2d 258 (D.D.C. 2002) (Bates, J.), a congressional candidate challenged Section 5's constitutionality as a stand-alone claim and also sought a three-judge court. This Court, sitting as a single judge, dismissed the case based on standing and issue preclusion grounds and found the plaintiff's three-judge court application to be unwarranted. Id. at 262-63.

Hence, the Voting Rights Act neither contemplates nor requires three-judge courts to decide stand-alone challenges to Section 5's constitutionality. Accordingly, 28 U.S.C. 2284 does not apply here.

28 U.S.C. 291(b) Does Not Provide A Basis To Convene A Three-Judge Court.

Moreover, the Plaintiffs' request for this Court "voluntarily" to convene a three-judge panel based on the "public interest" standard in 28 U.S.C. 291(b) is untenable. That statute

authorizes the "chief judge of a circuit or the circuit justice" to assign temporarily circuit judges to hold a district court when doing so would further the "public interest." By its plain terms, that "sit by designation" statute does not empower district courts to empanel three-judge courts "voluntarily" for public interest or any other reasons.

The cases cited by the Plaintiffs to support their argument for a voluntarily-convened three-judge court are wholly inapposite. First, all but one were decided before Congress abolished the use of three-judge courts to hear most constitutional claims in 1976. Second, Plaintiffs appear to misapprehend the one case they cite that was decided after 1976. In Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983), a statutory three-judge court had been convened to consider a removed state law challenge to a statewide legislative reapportionment plan, where the plan had been precleared under Section 5 and where certain underlying state apportionment provisions had been objected to under Section 5. Because of substantial doubts as to whether jurisdiction for a three-judge court existed, the panel's circuit judge was also designated as a district court judge to sit with the other panel members as a district court, thus preserving the court's jurisdiction if in fact no authority existed for the three-judge court. Cavanagh in no way supports the Plaintiffs' view that 28 U.S.C. 291(b) is an appropriate mechanism for district courts "voluntarily" to empanel three-judge courts and thus override the explicit limits on three-judge courts Congress mandated in 28 U.S.C. 2284.

In short, the United States is aware of no provision of the Voting Rights Act or any other federal statute that would require a three-judge court to hear Plaintiffs' constitutional claims or permit such a court to be convened voluntarily. Accordingly, the Plaintiffs' three-judge court application should be denied.

Alternative Request

The United States asserts the Plaintiffs' three-judge court application should be denied outright. However, should this Court have any doubt as to the propriety of denying the three-judge court application, the United States avers that serious and substantial questions as to subject matter jurisdiction exist in this case, which the United States will address in its first responsive pleading, due by June 14, 2010. Accordingly, in case of any such doubt, the United States would respectfully request in the interests of justice and judicial economy that this Court defer further consideration of the Plaintiffs' three-judge court application until after the United States has filed its first responsive pleading. See Gonzalez, 419 U.S. at 97 n.14, 99-100 (reaffirming single judge's power to dismiss a case without convening three-judge court where no subject-matter jurisdiction exists); Wertheimer v. Federal Election Comm'n, 268 F.3d 1070, 1072 (D.C. Cir. 2001) ("an individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel"); Reuss v. Balles, 584 F.2d 461, 464 n.8 (D.C. Cir. 1978) ("a single judge may first determine whether the court has jurisdiction to hear the case before requesting a three-judge court"); see also Giles, 193 F. Supp.2d at 262 ("an individual district court judge may consider threshold jurisdictional challenges before convening a three-judge panel").

III. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Application for a Three-Judge Court or, alternatively, defer further consideration of that Application until after the United States has filed its first responsive pleading in this case.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/
_____
T. CHRISTIAN HERREN JR.
RICHARD DELLHEIM (lead counsel)
ERNEST A. MCFARLAND
JARED M. SLADE
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-1734
Facsimile: (202) 307-3961

Date: April 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2010, I served a true and correct copy of the foregoing via the Court's ECF system, to the following counsel of record:

Michael A. Carvin
D.C. Bar No. 366784
Noel J. Francisco
D.C. Bar No. 464752
Hashim M. Mooppan
D.C. Bar No. 981758
David J. Strandness
D.C. Bar No. 987194
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

Michael E. Rosman
D.C. Bar No. 454002
Michelle A. Scott
D.C. Bar No. 489097
Center for Individual Rights
1233 20th Street, N.W., Suite 300
Washington, D.C. 20036

/s/

Richard Dellheim
Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-1734

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ORDER

Upon consideration of Plaintiffs' Application to Convene a Three-Judge Court, and the memoranda provided by the parties in response, the Court is of the opinion that a three-judge court is not required to hear Plaintiffs' complaint, and that Plaintiffs' application should be and is DENIED.

SIGNED and ENTERED this _____ day of _____, 2010.

_____
United States District Judge