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.	)	Civ. No.: 1:10-CV-00561-JDB **REPLY IN SUPPORT OF APPLICATION FOR <u>THREE-JUDGE COURT</u>**

The Government's opposition to Plaintiffs' application for a three-judge court ("US Opp.") makes two fundamental errors. *First*, it misconstrues the Supreme Court's binding interpretation of Section 5's mandatory three-judge-court provision in *Allen v. State Bd. of Elections*, 393 U.S. 544, 561-63 (1968). *Second*, it mistakenly contends that this Court lacks the power to convene voluntarily as a three-judge court, even though it is *undisputed* that doing so would further judicial efficiency and that the failure to do so might well require complete *relitigation* of this extraordinarily important case. For those reasons, explained further below, Plaintiffs respectfully renew their request that this action be adjudicated by a three-judge court.[1]

[1] Because Local Civil Rule 9.1 expressly governs Plaintiffs' filing of an "application for three-judge court," that "application" is not, contrary to the Government's claim, US Opp. at 2 n.1, a "motion" subject to the duty to confer with opposing counsel imposed by Local Civil Rule 7(m). And that makes perfect sense, since Local Civil Rule 9.1 requires

1. The holding and rationale of the Supreme Court's seminal *Allen* decision plainly dictates the use of a three-judge court in the far more compelling circumstances presented here. This is vividly demonstrated by the fact that the Justice Department simply ignores both the holding and analysis of *Allen*, and rests its opposition on a complete distortion of the opinion's plain language.

The *Allen* Court interpreted Section 5's mandatory three-judge-court provision to encompass "*disputes involving the coverage of § 5*," not just those literally arising "under" that section. 393 U.S. at 563 (emphasis added). It applied that interpretation to mandate three-judge courts in cases brought by *voters* to *require* that a covered jurisdiction's law or policy be subjected to Section 5 preclearance, which obviously is not an action literally "*under*" Section 5, because it is not a declaratory-judgment action by a covered jurisdiction seeking preclearance of a voting change. *See id.* at 561-63; 42 U.S.C. § 1973c(a). Thus, both *Allen's* square holding and its interpretation of Section 5's language refutes the Government's literalistic view that three-judge courts apply only to actions seeking preclearance *under* Section 5.

Moreover, the *rationale* of *Allen* is wholly irreconcilable with the Justice Department's literalistic interpretation. Specifically, *Allen* reasoned that "Congress apparently concluded that . . . it is inappropriate" to have "a single district judge" resolve

(..continued)
that the "application" be filed contemporaneously with the complaint, at which time plaintiffs generally will not even know who defendants' counsel is. (Indeed, the combination of the two rules would, on the Government's interpretation, essentially require providing defendants with advance notice that they were going to be sued.) In any event, given that the Government had sufficient time to respond and opposes Plaintiffs' application, neither the Government nor this Court has been prejudiced in any way by the lack of pre-filing consultation.

"[t]he clash between federal and state power and the potential disruption of state government" that occurs "when [a] disagreement concerns whether a state enactment is subject to § 5." 393 U.S. at 562. Needless to say, compared to the relatively minor disputes over whether particular state laws fall within the statutory scope of Section 5, the "clash between federal and state power and the potential disruption of state government" is far more significant and divisive where, as here, the "disagreement … whether a state enactment is subject to § 5" goes to the basic *constitutional validity* of Section 5's coverage of *any* state law in *any* jurisdiction. Moreover, Plaintiffs' effort here to end Section 5's coverage of Kinston's local laws is far more akin to the declaratory-judgment action explicitly authorized by Section 5—which likewise seeks to allow the *operation* of local laws—than are *Allen* enforcement actions, which seek instead to *expand* the *coverage* of Section 5 and thus to *interfere* with *more* local laws.

Furthermore, as the Justice Department correctly notes, the *Allen* Court also opined that enforcement suits by the Attorney General, like those of the private citizens in that case, should be resolved by three-judge courts. US Opp. at 4. Since, however, such Government enforcement actions are brought "under" *Section 12(d)* of the Voting Rights Act, *see* 42 U.S.C. § 1973j(d), they are no more "under" Section 5 than is Plaintiffs' request for injunctive relief under Section 14(b), *see* 42 U.S.C. § 1973l(b). And, again, like the private enforcement actions in *Allen*, enforcement actions by the Attorney General are less akin to the expressly authorized preclearance actions and do not implicate federalism concerns to nearly the same degree as the present constitutional challenge. Accordingly, *Allen's* express recognition of three-judge courts for private and government enforcement

actions establishes *a fortiori* that such courts are mandatory here.

In response, the Government in no way disputes that the action here directly implicates the federalism concerns that led *Allen* to require a three-judge court or that the action here is more analogous to the preclearance action that is expressly "under" Section 5 than the enforcement actions blessed by *Allen*. Instead, the Government's sole argument is that the Supreme Court has allegedly "observed [that] there are *only* three types of cases" involving Section 5 which require a three-judge court—the three categories of cases expressly discussed in *Allen*. *See* US Opp. at 4. But this argument is contrary to the plain language of *Allen*, which states that, "[a]s we have interpreted § 5, suits involving the section may be brought in *at least* three ways." *Allen*, 393 U.S. at 561 (emphasis added). This case confirms that a constitutional challenge to the validity of Section 5's coverage is plainly a "fourth way," since this "dispute[ ] involving the coverage of § 5," *id.* at 563, implicates the very concerns that led the *Allen* Court to hold that enforcement actions are encompassed by Section 5's three-judge-court provision, even though those enforcement actions are not, viewed literally, expressly created "under" Section 5. *See id.* at 561-63.

Similarly, while the Government invokes the interpretive principle, cited in *Allen*, that three-judge-court statutes "must be strictly construed," US Opp. at 2-3, it ignores how the *Allen* Court actually applied that general principle in the specific context of Section 5. In particular, the Court found that its broad interpretation of Section 5 was consistent with the strict-construction principle because "[t]he Voting Rights Act of 1965 [provided] an example" of "the legitimate reasons that prompted Congress to enact three-judge-court

legislation." *See Allen*, 393 U.S. at 561-62. And four years later, the Court emphasized that "[t]he broad[ ] language of" the VRA's three-judge-court provisions, in contrast to such provisions in other statutes, reflected "Congress' concern about hastening the resolution of suits involving voting rights." *NAACP v. New York*, 413 U.S. 345, 355 (1973). Thus, there is no inconsistency between the general interpretive principle governing traditional three-judge-court provisions and holding, as *Allen* did, that the specific provision in Section 5 encompasses important "disputes involving the coverage of § 5," 393 U.S. at 563.

Finally, the Government seems to argue that subsequent congressional action somehow *precludes* honest application of *Allen* to this case. Specifically, the Government emphasizes that Congress in 1976 generally eliminated three-judge-court jurisdiction for constitutional challenges to federal laws. *See* US Opp. at 2, 5. But, although the 1976 amendments repealed *some* of the statutory provisions mandating the use of three-judge courts, they did not generally *foreclose* the use of such courts, let alone did they specifically repeal or amend the three-judge-court provision in Section 5 or express any disagreement with its interpretation in *Allen*. *See* Pub. L. No. 94-381, 90 Stat. 1119 (1976); *see also infra* at pp. 9-10. Consequently, the Government's invocation of the 1976 amendments overlooks the fact that "Congress expects its statutes to be read in conformity with [the Supreme] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Congress must have expected that Section 5 itself would authorize three-judge-court adjudication of constitutional challenges to Section 5, due to the unambiguous import of the Supreme Court's landmark decision in *Allen* only seven years prior. This is particularly true since Congress *re-enacted* Section 5 and its three-judge-court provision

two times (in 1970 and 1975) between *Allen* and the 1976 amendments. *See Nw. Austin Municipal Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2510 (2009).

The Government, on the other hand, would have this Court believe that Congress in 1976 mandated three-judge-court resolution with direct appeal to the Supreme Court for every picayune challenge to the *statutory scope* of Section 5, but left a single district judge with the power *to facially invalidate* Section 5 on constitutional grounds, subject only to the normal appellate process. But just as Congress "does not … hide elephants in mouseholes," *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001), it does not set mousetraps while ignoring stampeding elephants. The only inference that is even remotely reasonable is that Congress in 1976 assumed that constitutional disputes involving Section 5's coverage, just like statutory disputes, would be adjudicated by three-judge courts under the Supreme Court's then-recent holding in *Allen*.

In sum, the Government fails to take seriously the Supreme Court's controlling interpretation of Section 5 in *Allen*, which dictates the conclusion that Plaintiffs' constitutional challenge to Section 5 is subject to mandatory three-judge-court resolution.

2. Similarly, the Government does not dispute Plaintiffs' assertion that it would plainly further judicial efficiency in this case for this Court to convene *voluntarily* as a three-judge court should it have any doubts at all about whether Section 5 *mandates* three-judge-court resolution. Specifically, the Government does not dispute that improper resolution of the case by "a single judge" will lead to a void judgment that "erroneously invaded the province of a three-judge court." *See Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16 (1962); *see also Goosby v. Osser*, 409 U.S. 512, 522-23

(1973); *Flemming v. Nestor*, 363 U.S. 603, 606-07 (1960). In contrast, non-mandatory resolution of the case by three judges "d[oes] not of itself invalidate the District Court's judgment," but merely means that an appeal lies in the D.C. Circuit rather than in the Supreme Court. *See Pub. Serv. Comm'n of Miss. v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 626 (1941); *see also Phillips v. United States*, 312 U.S. 246, 254 (1941). The Justice Department nevertheless takes the position that, *regardless* of whether it constitutes sound judicial administration, "no statute authorizes a district court to convene a three-judge-court 'voluntarily,'" and so this Court *lacks the power* to do so. US Opp. at 2; *see also id.* at 6-7. This is demonstrably wrong.

The Government claims that, "absent a specific federal statute to the contrary, a single federal district court judge hears and decides cases[,] 28 U.S.C. § 132(c)." US Opp. at 2. Again, however, the Justice Department invokes an authority that directly *refutes* its own argument. The cited statute, which the Government conspicuously fails to quote, actually provides that, "[e]xcept as otherwise provided by law, or rule *or order of court*, the judicial power of a district court with respect to any action, suit or proceeding *may* be exercised by a single judge." 28 U.S.C. § 132(c) (emphases added). Thus, § 132(c) simply *permits* district courts to sit as single-member panels; it does not *forbid* them from sitting as multi-member panels if they so desire. Indeed, it expressly contemplates that they "may" *choose* to do so merely by "order of court," *not* just by "law[ ] or rule." *Id.* Notably, this is in stark contrast to the statutes governing the Court of Federal Claims and the Court of International Trade, both of which *mandate* that the "judicial power" of those courts "shall be exercised by a single judge." *Id.* §§ 174(a), 254; *see also id.* § 46

(prohibiting the use of circuit-court panels greater than three judges absent formal *en banc* review). Consequently, it is crystal clear that 28 U.S.C. § 132(c) vests district courts with the discretion to sit as multi-member panels should they think it a sound use of judicial resources (which, to repeat, it is undisputed to be in this case).

Thus, the Government's assertion that 28 U.S.C. *§ 291(b)* "does not empower district courts to empanel three-judge courts 'voluntarily' for public interest or any other reasons" is completely besides the point. *See* US Opp. at 6-7. As discussed above, it is *§ 132(c)* that empowers district courts to convene voluntarily as three-judge courts. What § 291(b) does is allow one of those judges to be a *circuit* judge, which enables a district court, in cases where it is uncertain whether a statutory three-judge court is required, to mimic the statutorily mandated three-judge court convened under 28 U.S.C. § 2284, thereby mooting the question at the district-court level and avoiding any risk that the ultimate judgment is void.

And that is precisely what the three-judge district court did in *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). "Due to the substantial likelihood that [the case was] beyond the purview of § 2284, [a circuit judge], originally designated as a member of the statutory three-judge court, [was also] designated pursuant to [§ 291(b)] to sit in the alternative as a district judge with the other members of th[e] court, with the court constituting in that mode a regular district court consisting of a panel of three district judges." *Id.* at 180 n.3; *see also Query v. United States*, 316 U.S. 486, 488 (1942) (district court was of the view that only a single judge was legally required, but "three judges signed the decree 'so that in the event that it should hereafter be determined that the case

was one for three judges under the statute, an appropriate decree will have been entered'"). Consequently, notwithstanding the Government's incomprehensible assertion to the contrary, *see* US Opp. at 7, *Cavanagh* is squarely on point here. Most obviously, it directly supports the voluntary convocation of a three-judge court in cases, such as this one, where the necessity of a three-judge court is the subject of some doubt or dispute. More fundamentally, it entirely forecloses the Government's assertion that a district court lacks the power to convene voluntarily as a three-judge court. If district courts lacked the *legal authority* to do so, then the *Cavanagh* three-judge court would have been duty-bound to definitively resolve whether three-judge-court adjudication was *required*, and, if it was not required, to dissolve itself and transfer the matter to a single district judge. Thus, while existence of doubt as to whether three-judge-court resolution is required obviously cannot *create* authority to convene voluntarily where—according to the Government—no such authority exists, it certainly can *inform a court's discretion* whether to exercise authority that does exist, as the *Cavanagh* court correctly held.

Nor is *Cavanagh* a jurisprudential outlier. "On occasion a district court may *choose* to have three of its judges, or some other number greater than one, sit in a particular case, but such a court has the same powers and procedure as a single judge would in any other district court case and review is in the court of appeals as in any other case." 17A Wright et al., *Federal Practice & Procedure* § 4234, 189 (3d ed. 2007) ("*FPP*") (emphasis added); *see also id.* at 189 n.2 (citing cases). The Government's only response to this line of authority is that the cases other than *Cavanagh* "were decided before Congress abolished the use of three-judge courts to hear most constitutional claims in 1976." US Opp. at 7.

But, contrary to the Government's misleading suggestion, Congress in 1976 did not pass a statute *banning* the use of three-judge courts unless expressly required. Rather, because its only concern with three-judge courts was their *mandatory* nature, it repealed several statutes *requiring* their use. *See FPP* § 4234-35 at 189-90, 195-200. It did not, however, amend 28 U.S.C. § 132(c) to *mandate* the use of single-judge courts in all cases not governed by the few remaining statutes (such as Section 5 of the VRA) that expressly require the use of three-judge courts. And, of course, Congress' decision in 1976 to repeal statutes that *required* three-judge courts in various circumstances could not possibly have abrogated pre-1976 cases that permitted *voluntary* convocation of three-judge courts. After all, the *only* reason those cases even had to address voluntary three-judge courts was *precisely because* such courts were *not* required by the statutes Congress repealed in 1976. That said, the 1976 repeal of most mandatory three-judge-court statutes does explain the relative *dearth* of post-1976 cases involving voluntary three-judge courts: with fewer such statutes on the books, there are correspondingly fewer cases in which district courts are in doubt as to the propriety of single-judge resolution.

At bottom, it is telling that the Government does not cite a *single* statute or case, pre- or post-1976, that even remotely suggests that district courts lack the legal power to convene voluntarily in three-judge panels. That is because the power plainly does exist, and this Court should exercise it here if it has any doubt as to whether *Allen* controls.

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For the foregoing reasons, Plaintiffs respectfully renew their request that this action be adjudicated by a three-judge court.

April 29, 2010

Respectfully submitted,

/s/ Michael A. Carvin

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 Ave., NW
Washington, DC 20001-2113
(202) 879-3939

/s/ Michael E. Rosman

Michael E. Rosman
D.C. Bar No. 454002
Michelle A. Scott
D.C. Bar No. 489097
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on April 29, 2010, I served a true and correct copy of the foregoing via the Court's ECF system, to the following counsel of record:

Richard Dellheim (lead counsel)
Attorney, 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

/s/ Michelle A. Scott

Michelle A. Scott
D.C. Bar No. 489097
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

Attorney for Plaintiffs