UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRIMILDA PEREZ-SANTIAGO, VOLUSIA COUNTY HISPANIC ASSOCIATION, JOEL ROBLES, CARMEN FORTIS, EDWIN FORTIS, MADELYN PEREZ

Plaintiffs,

vs.

Case No.: 6:08-cv-1868-Orl-28KRS

VOLUSIA COUNTY, VOLUSIA COUNTY DEPARTMENT OF ELECTIONS; ANN McFALL, Volusia County Supervisor of Elections

Defendants.

BRIEF FOR THE UNITED STATES OF AMERICA
AS *AMICUS CURIAE*

The United States of America ("United States") submits this brief as *amicus curiae* to address the requirements for stating a claim under Section 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e) ("Section 4(e)"). For the reasons discussed herein, the United States believes that Plaintiffs' Amended Complaint alleges facts sufficient to state a Section 4(e) claim.

I. PROCEDURAL BACKGROUND

Plaintiffs' Amended Complaint alleges that Defendants Volusia County, Volusia County Department of Elections, and Ann McFall, Volusia County Supervisor of Elections violated Section 4(e) of the Voting Rights Act. (Doc. No. 21). Plaintiffs include five registered voters who were educated in American-flag schools in Puerto Rico in which the predominant classroom language was Spanish. (Doc. No. 21 at paras. 7-11). These individual Plaintiffs are joined by an

organizational Plaintiff, the Volusia County Hispanic Association ("VCHA"), a not-for-profit organization whose mission includes assuring that its members, many of whom are registered voters, have full access to the political process and the right to vote. (Doc. No. 21 at para. 12). Plaintiffs' allegations include census data showing that there is a large and growing Puerto Rican population in Volusia County, and that a significant number of those persons were educated in American-flag schools in which the predominant classroom language was Spanish. (Doc. No. 21 at paras. 16-19). Plaintiffs allege that the Volusia County election process includes the ballot and other election materials that are not translated into Spanish. (Doc. No. 21 at para. 21). The individual Plaintiffs allege that they were unable fully to exercise their voting rights during the November 2008 general election because they were unable fully to comprehend the ballot in English. (Doc. No. 21 at paras. 22-26). Plaintiffs allege that VCHA members had difficulty comprehending their votes in the November 2008 election because they were not in Spanish and that VCHA members have had difficulty fully participating in the Volusia County election process. (Doc. No. 21 at para. 27). Plaintiffs allege that due to the Defendants' elections practices, they were unable to fully exercise their voting rights. (Doc. No. 21 at para. 28). Plaintiffs allege that they fear that they will not be able to vote in a manner consistent with their intent because of their inability to understand English when they cast their ballot in the future. (Doc. No. 21 at para. 29).

Defendants have moved to dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), contending that Plaintiffs have failed to state a claim under Section 4(e) of the Voting Rights Act. (Doc. No. 23 at 12-21; Doc. No. 30 at 12-21 [collectively hereinafter

"Motions to Dismiss"]).[1]

The Attorney General is charged with the enforcement of the Voting Rights Act, including Section 4(e), on behalf of the United States. See 42 U.S.C. § 1973j(d).

II. ARGUMENT

In ruling on a motion to dismiss, the court construes the complaint in the light most favorable to the plaintiff and accepts as true all facts alleged by the plaintiff. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2006); Powell v. Barrett, 496 F.3d 1288, 1304 (11th Cir. 2007); Saint Joseph's Hosp., Inc. v. Hospital Corp. of America, 795 F.2d 948, 954 (11th Cir. 1986); Reynolds v. Gables Residential Serv., Inc., 428 F. Supp. 2d 1260, 1263 (M.D. Fla. 2006). To survive a motion to dismiss, a complaint does not need detailed factual allegations. Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008). Rather, the factual allegations must merely be enough to raise a right to relief above the speculative level. Id. The complaint, however, must provide more than broad labels, conclusions, or formulaic recitation of the elements of a cause of action. Id.

A. The Amended Complaint Alleges Sufficient Facts to State a Claim Under Section 4(e)

At its core, Section 4(e) prohibits jurisdictions from conditioning the rights of Puerto Ricans to cast an "informed" or "effective" vote on their ability to understand English. Arroyo v. Tucker, 372 F. Supp. 764, 767 (E.D. Pa. 1974)[hereinafter "Arroyo]"; Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575, 580 (7th Cir. 1973)[hereinafter "PROPA

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[1] Defendants also argue that Plaintiffs improperly named parties, (Doc. No. 23 at 4-7), failed to establish standing, (Doc. No. 23 at 7-12; Doc. No. 30 at 6-12) and did not properly serve process. (Doc. No. 30 at 5-6). The United States takes no position regarding these contentions.

II"](upholding the grant of a preliminary injunction by holding that "a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or understand").

Section 4(e) reads as follows:

> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English,[2] it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
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> (2) No person who demonstrates that he has successfully completed the sixth primary grade[3] in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

42 U.S.C. § 1973(b)(e).

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[2] The Supreme Court found that "persons educated in American-flag schools in which the predominant language was other than English" referred to persons from the Commonwealth of Puerto Rico. Katzenbach v. Morgan, 384 U.S. 641, 647 n. 3, & 652 (1966) [hereinafter "Katzenbach"] (upholding the constitutionality of 4(e)); see also PROPA II, 490 F. 2d at 578 (finding a 4(e) violation because "United States policy towards persons born in Puerto Rico is to make them U.S. Citizens, to allow them to conduct their schools in Spanish, and to permit them unrestricted migration to the mainland. As a result, thousands of Puerto Ricans have come to live in New York, Chicago, and other urban areas; they are eligible, as residents and U.S. citizens to vote in elections conducted in a language many of them do not understand. Puerto Ricans are not required, as are immigrants from foreign countries, to learn English before they have the right to vote as U.S. citizens" (internal citations and footnotes omitted)).

[3] The sixth-grade education requirement in Section 4(e) was eliminated by the 1970 amendment to the Voting Rights Act prohibiting all states from using any literacy tests, 42 U.S.C. § 1973a(a); see United States v. Berks County, 250 F. Supp. 2d 525, 532 n. 5 (E.D. Pa. 2003) [hereinafter "Berks I"].

Section 4(e) is violated if: (1) the jurisdiction has "persons educated in American-flag schools in which the predominant classroom language was other than English[;]"[4] (2) defendants are "conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language[;]" and (3) such persons are "denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language." 42 U.S.C. § 1973(b)(e); see also, Arroyo, 372 F. Supp. at 766-67; Torres v. Sachs, 381 F. Supp. 309, 311-12 (S.D.N.Y. 1974) [hereinafter "Torres"]; Berks II, 277 F. Supp. 2d at 579. To establish a violation of Section 4(e), proof that a jurisdiction has engaged in openly hostile or unequal treatment regarding the persons whose right to vote is protected by Section 4(e) is not required. 42 U.S.C. § 1973(b)(e).

The Amended Complaint alleges facts sufficient to state a claim under Section 4(e). First, the Amended Complaint alleges that each of the individual Plaintiffs were educated in American-flag schools in which the predominant language was Spanish. (Doc. No. 21 at paras. 7-11). More generally, the Amended Complaint alleges that roughly 24,600 citizens of Puerto Rican descent currently reside in the County, according to the 2007 American Community Service ("ACS") estimates published by the U.S. Census Bureau. (Doc. No. 21 at para. 17). Further, the Amended Complaint alleges that the County's Puerto Rican community has grown between the 2000 Census and 2007 ACS estimates. (Doc. No. 21 at paras. 16-17). The

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[4] There is no federal census data regarding place of education. There is, however, census data regarding place of birth. In United States v. Berks County, 277 F. Supp. 2d 570 (E.D. Pa. 2003) [hereinafter "Berks II"] the court found according to the 2000 Census, the City of Reading had 19,054 persons of Puerto Rican descent, approximately half of whom were born in Puerto Rico, and that, by stipulation of the parties," some of the 19,054 persons of Puerto Rican descent...were educated in American-flag schools in which the predominant classroom language was other than English." Berks II, 277 F. Supp. 2d at 574.

Amended Complaint also alleges that a significant number of persons in Volusia County are of Puerto Rican descent and were educated in American-flag schools in which the predominant language was Spanish. (Doc. No. 21 at para. 18). Accordingly, Plaintiffs have alleged sufficient facts, which must be accepted as true, to satisfy the first element of a Section 4(e) claim.[5]

Second, the Amended Complaint alleges that Puerto Ricans in Volusia County are

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[5] Unlike Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a, which requires only certain jurisdictions to provide election information and other voting assistance in specified minority languages, Section 4(e) is not, by its terms, limited in its geographic reach. To trigger the protections of Section 4(e), there is, for example, no explicit requirement that the population whose rights are protected be of a specified size or proportion of the total population of the jurisdiction. Nor have courts interpreting Section 4(e) imposed such a requirement.

In Berks I, the United States brought a Section 4(e) claim against a jurisdiction that had an estimated Puerto Rican population of 19,054. Berks I, 250 F. Supp. 2d at 528. In rejecting defendant's assertion that 4(e) eventually could lead to providing "bilingual ballots and materials in every voting precinct in the country with even a single limited-English proficient voter of Puerto Rican descent," the Berks I court found that the relief sought by the United States belied defendant's assertion, and that the United States' claim was not "frivolous or *de minimus*." Id. at 538. The Amended Complaint alleges that in 2007, the estimated Puerto Rican population in Volusia County was over 24,000 (Doc. No. 21 at para. 17) and that a "significant number" of those persons "were educated in American flag schools in which the language of instruction was Spanish." (Doc. No. 21 at para. 18). Like the United States' allegations in the Berks litigation, the Amended Complaint's allegations are not frivolous or *de minimus*.

Moreover, the relief framed for a Section 4(e) violation has been tied to the proportion of Puerto Rican residents or registered voters at a polling place or a showing of need for Spanish-language materials or assistance at a polling place. See Torres, 381 F. Supp. at 313 (ordering translation of all election materials and a sufficient number of bilingual election officials in "polling places falling in whole or in part of an election district situated within a census tract containing 5% or more persons of Puerto Rican birth extraction."); Arroyo, 372 F. Supp. at 765 (ordering defendants to "prepare all written election materials in both English and Spanish and to provide bilingual personnel at all polling places falling within a 1970 census tract containing 5% or more persons of Puerto Rican birth or parentage"); Berks I, 250 F. Supp. 2d at 543 (ordering the translation of all written election-related materials, including ballots, and bilingual interpreters "in every precinct where the registered Hispanic voter population constitute more than 5% of the registered voters"); Puerto Rican Organization for Political Action v. Kusper, 350 F. Supp. 606, 611 (N.D. Ill. 1972) (requiring Spanish-language election materials and bilingual poll workers "to the polling places at which the evidence shows those materials are needed").

required to understand English as a condition to voting. Specifically, Plaintiffs allege that the County provides an English-only ballot and does not translate into Spanish constitutional amendments and/or city referenda. (Doc. No. 21 at para. 21). The Amended Complaint also alleges that the Defendants do not provide "appropriate forms of Spanish language assistance." (Doc. No. 21 at para. 5). These allegations, which must be accepted as true, satisfy the second element of a Section 4(e) claim.

Lastly, Plaintiffs' Amended Complaint alleges that each of the individual Plaintiffs do not read or understand the English language sufficiently to understand and cast a ballot in English only (Doc. No. 21 at paras. 22-26), and that "VCHA's members have had difficulty fully comprehending their votes in the November 2008 election because they were not in Spanish[.]" (Doc. No. 21 at para. 27). In addition, the Amended Complaint alleges that "thousands of Puerto Ricans in Volusia County continue to be disenfranchised because they are unable to understand their vote and are discouraged from exercising their voting rights in a language they do not understand." (Doc. No. 21 at para. 4). Accordingly, Plaintiffs have alleged sufficient facts, which must be accepted as true, to satisfy the third element of a Section 4(e) claim.

B. <u>A Complaint Need Not Allege Openly Hostile or Unequal Treatment in Order to State a Claim under Section 4(e)</u>

In their Motions to Dismiss, Defendants assert that a plaintiff alleging a Section 4(e) violation must show that the persons protected by Section 4(e) were subjected to "openly hostile or unequal treatment." (Doc. No. 23 at page 17; Doc. No. 30 at page 17). Defendants cite no statutory language to support this claim. Instead, Defendants rely on a single case for the proposition that Section 4(e) contains an implied element of openly hostile or unequal treatment.

(Doc. No. 23 at pages 16-17; Doc. No. 30 at page 17-18). This assertion is neither supported by traditional rules of statutory interpretation nor by the single case relied upon by Defendants.

It is a "basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992). Accordingly, in construing statutes, federal courts first determine "whether the language at issue has a plain and unambiguous meaning[.]" Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002). Statutory language is plain and unambiguous where the language is not susceptible to more than one reasonable interpretation. Medical Transp. Management Corp. v. Comm'r of I.R.S., 506 F.3d 1364, 1368 (11th Cir. 2007); AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d. 995, 1000 (11th Cir. 2007). If a court finds that the statutory language is plain and unambiguous, then the "sole function of the court [will be] to enforce it according to its terms." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). By doing so, the court gives "effect to Congress' unambiguously expressed intent[.]" K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 282 (1988).

In applying the plain-language canon of statutory construction, courts may only infer an implied element when such an inference is "essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole." United States v. Rutherford, 442 U.S. 544, 551-52 (1979); United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001); One Nat'l Bank v. Antonellis, 80 F. 3d 606, 615 (1st Cir. 1996). An absurd result does not occur by concluding that Section 4(e) does not require proof of openly hostile or unequal treatment. The lack of an openly hostile or unequal treatment element will not lead to consequences obviously at variance with the policy of the enactment of Section 4(e).

Congress passed Section 4(e) for two purposes: to protect the voting rights of Puerto Rican citizens and to enhance the Puerto Rican community's political power, which "will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." Katzenbach, 394 U.S. at 653. The lack of an implied openly hostile or unequal treatment element is not obviously at variance with the policy of the enactment as a whole.

Defendants cite the Section 4(e) claim brought by the United States against Berks County, Pennsylvania for the proposition that proof of discrimination is necessary to demonstrate a violation of 4(e). (Doc. No. 23 at pages 16-17; Doc. No. 30 at pages 17-18). Neither Berks I nor Berks II support Defendants' argument. The United States alleged violations of both Section 4(e) and Section 2 of the Voting Rights Act. Berks I, 250 F. Supp. 2d at 532-33. In granting a preliminary injunction, the district court found that the United States would most likely prevail in proving a violation of Section 2 because the defendant jurisdiction had exhibited hostile and unfair treatment toward Puerto Rican voters. Id. at 539-540. The district court did not find the evidence of hostile and unfair treatment to be essential to establishing a likely violation of Section 4(e). Id. at 535-38. Similarly, in Berks II, the court's finding of liability under Section 4(e) was not predicated on a finding of hostile or unfair treatment. Berks II, 277 F.Supp. 2d at 579-80.

Accordingly, neither the text of Section 4(e), nor the Berks court's interpretation of Section 4(e) provide any support for Defendants' argument that a plaintiff alleging a Section 4(e) violation must allege "openly hostile or unequal treatment" of the voters whose rights are protected by Section 4(e).

VII. CONCLUSION

For the foregoing reasons, the United States recommends that this Court deny Defendants' Motions to Dismiss to the extent that they are predicated upon Plaintiffs' alleged failure to allege facts sufficient to state a claim under Section 4(e).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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