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January 26, 2015

VIA ELECTRONIC FILING
John Ley, Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

Re: *United States* v. *State of Georgia, et al.*, No. 13-14065-EE

Dear Mr. Ley:

This Court has requested that the parties file supplemental letter briefs "addressing whether the January 2014 enactment of H.B. 310 in Georgia moots all or part of this case." 12/22/2014 Order. We conclude that this case is not moot for the reasons discussed below.

STATEMENT

Before January 21, 2014, Georgia law required a federal runoff election to be held either 21 or 28 days after the initial federal election that occasioned it, depending on whether it is a primary election runoff or a general election runoff. See Ga. Code Ann. § 21-2-501(a) (West 2013) (superseded 2014). The United States successfully argued before the district court that this state law prevented compliance with the requirement in the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that States transmit absentee ballots to

UOCAVA voters no later than 45 days before "an election for Federal office." See 52 U.S.C. 20302(a)(8)(A). After the district court ruled that Georgia's law violated UOCAVA, it gave Georgia an opportunity to correct the violation. Doc. 35/App. 15. Georgia, however, proposed an election calendar that did not extend the time between its primary and general federal elections and any federal runoff elections, or otherwise permit ballot transmittal to UOCAVA voters at least 45 days in advance of federal runoff elections, as UOCAVA requires. Doc. 35/App. 15. The district court then entered a permanent injunction establishing a new UOCAVA-compliant election calendar for federal offices in Georgia. Doc. 38, at 8-9/App. 17.

Because UOCAVA applies only to federal elections, the injunction did not affect Georgia's calendar for elections for state offices. Doc. 38 at 9/App. 17; Doc. 58 at 2 n.2. Thus, some state elections that would previously have been held on the same days as the federal elections were now scheduled to be held on different days. While this appeal was pending, Georgia enacted a law, H.B. 310, that "aligns state office primaries with the date of the primary for federal offices, which was set by" the district court in this case. Georgia Governor's Message, 1/21/2014. This revised state law set dates for the federal election calendar that would ensure that absentee ballots can be transmitted at least 45 days prior to federal runoff elections, and accordingly complies with UOCAVA. See H.B. 310 Section 7(a)(3)-(6),

codified at Ga. Code Ann. § 21-2-501(a) (West 2014).[1] The Governor explained that "[g]iven the federal mandate that we move up our primary date for federal elections, this is the best move for voters' time and taxpayers' money." Georgia Governor's Message.[2]

Georgia's counsel filed a Rule 28j letter to apprise this Court of the new election law. Counsel explained that, for most elections, "House Bill 310 amends Georgia law so that Georgia's state elections will be held on the same date as the dates of the federal elections ordered by the district judge." 1/31/2014 Letter. In that letter, Georgia took the position that the new law has "no affect on" this appeal. 1/31/2014 Letter.

Georgia's counsel took the same position during the oral argument held on July 13, 2014. Georgia's counsel was asked whether Georgia's new election calendar mooted the appeal. 7/13/14 Oral Argument (OA) 19:12-15. Counsel responded that she did not think it did. OA 19:16-20. Judge Jordan then asked

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[1] As the United States explained in its opening brief, U.S. Br. 34-36, after consideration of extensive testimony and other evidence evaluating the concerns of disenfranchisement of UOCAVA voters, Congress concluded that at least 45 days of ballot transit time before the election is necessary to ensure such voters sufficient time to receive, mark, and return their ballots in time to be counted. Based on that evidence, Congress amended UOCAVA in 2009 to require that States transmit absentee ballots to UOCAVA voters no later than 45 days before an election for federal office, if the ballot requests were received by that time. U.S. Br. 5-6, 35 n.10.

[2] While the revised state law adopted the calendar ordered by the court for any federal general election runoff, the legislature chose not to conform the date of a state general election runoff to the date of a federal general election runoff. See Ga. Code Ann. § 21-2-501(a)(4) (West 2014).

counsel what meaningful relief Georgia could obtain in this appeal since the new Georgia law would remain in place even if this Court were to set aside the district court's injunction. OA 20:00-29. Counsel responded that setting aside the injunction would be meaningful relief because Georgia would then "be free to go back to * * * our previous law." OA 20:52-56.

ARGUMENT

I

THE JANUARY 2014 ENACTMENT OF H.B. 310 IN GEORGIA DOES NOT MOOT ALL OR PART OF THIS CASE

A. Legal Standard

The Supreme Court has explained that "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citing *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 1074 (1982)). The Supreme Court has applied this rule to public as well as private defendants. For example, in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 719, 127 S. Ct. 2738, 2751 (2007), the defendant school district argued that the case was moot because it had stopped using the challenged school-assignment policy. The Supreme Court rejected that argument because "the district vigorously defend[ed] the constitutionality of its race-based program, and nowhere suggest[ed] that if this

litigation is resolved in its favor it will not resume using race to assign students." *Ibid.* The Court explained that "[v]oluntary cessation does not moot a case or controversy unless 'subsequent events *ma[ke]* it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Ibid.* (alteration in original) (citations omitted); see also *Doe* v. *Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014) (citing this standard and noting that the Supreme Court has applied it "in cases involving government actors").

City of Mesquite was, like this case, a case involving a public defendant. There, the Supreme Court concluded that the case was not moot despite the City's repeal of the challenged statutory language because that repeal "would not preclude [the City] from reenacting precisely the same provision if the District Court's judgment were vacated." 455 U.S. at 289, 102 S. Ct. at 1074-1075.

In yet another case involving a government actor defendant, *Adarand Constructors, Inc.* v. *Slater*, the Supreme Court ruled that the defendant had not borne "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." 528 U.S. 216, 222, 120 S. Ct. 722, 725 (2000) (alteration, citation, and internal quotation marks omitted). The Supreme Court cautioned that a holding that a case is moot is "justified only if it [is] absolutely clear that the litigant no longer [has] any need of the judicial protection that it sought." *Id.* at 224, 120 S. Ct. at 726.

It is also true, as this Court has explained, that the Supreme Court has sometimes concluded that repeal of a challenged statute does moot a case. See *Atheists of Fla.* v. *City of Lakeland*, 713 F.3d 577, 594 (2013). But mootness through repeal occurs only when repeal of a challenged law does in fact make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." See *Parents Involved*, 551 U.S. at 719, 127 S. Ct. at 275 (citation omitted). Thus, where a law is repealed and there is no "reasonable basis to believe" that it, or a similar law, will be reenacted, a case challenging the repealed law is moot. See *Troiano* v. *Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1285 (11th Cir. 2004); see also, *e.g.*, *National Adver. Co*. v. *City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005) (determining that a challenge to a repealed zoning ordinance was moot because there was "no evidence * * * suggesting any risk that the City of Miami has any intention" of re-enacting the prior ordinance), cert. denied, 546 U.S. 1170, 126 S. Ct. 1318 (2006).

On the other hand, where "there is some reason to believe that the [challenged] law may be reenacted after dismissal of the suit," *Coral Springs Street Systems, Inc.* v. *City of Sunrise*, 371 F.3d 1320, 1330 (11th Cir. 2004), or that the challenged law would be replaced by another similar law, the case is not moot. Thus, in *National Advertising Co.* v. *City of Fort Lauderdale*, this Court refused to hold that a case challenging a repealed ordinance was moot because the Court concluded that "[i]t remains uncertain whether the City would return the

[ordinance] to its original form if it managed to defeat jurisdiction in this case." 934 F.2d 283, 286 (1991). Similarly, in *City of Mesquite*, the Supreme Court declined to hold that a case challenging a repealed ordinance was moot because several factors revealed that there was "no certainty" that the City would not reenact the challenged ordinance. 455 U.S. at 289, 102 S. Ct. at 1075.

This Court has also explained that a "party alleging mootness," whether that party is a private entity or government actor, "bears the burden of demonstrating that the wrongful activity is not likely to recur." *Christian Coal. of Fla., Inc.* v. *United States*, 662 F.3d 1182, 1196 (2011). This burden is a "formidable" one. *Doe*, 747 F.3d at 1322 (citation omitted). In some cases involving government-actor defendants, however, the burden is reduced because "this Court often gives government actors more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Doe*, 747 F.3d at 1322 (citation and internal quotation marks omitted).

B. This Case Is Not Moot

In this case, it is very far from "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." See *Parents Involved*, 551 U.S. at 719, 127 S. Ct. at 2751. To the contrary, there is "some reason to believe" that Georgia may reenact its old law or another law that violates UOCAVA if the district court's permanent injunction is vacated. See *City of Sunrise*, 371 F.3d at 1330. Moreover, this Court's favorable presumption for government actors applies

only when a government actor is the "party alleging mootness." Georgia is not a "party alleging mootness," *Christian Coal. of Florida*, 662 F.3d at 1196, and instead has consistently taken the position that this case is not moot.

Several factors should convince this Court that there is "some reason to believe" – indeed, in our view, very significant reason to believe – Georgia may again violate UOCAVA's 45-day rule were it free to do so. These factors include:

- Georgia has declined every opportunity to disavow an intention to return to its previous law, or to a similar law that violates UOCAVA's 45-day rule, if the district court's injunction were no longer in force; instead, Georgia has explicitly left that possibility open.

- Georgia enacted the new law purely in response to a situation created by the federal injunction it is challenging here: that under the court-ordered election calendar, federal and state elections would be held on separate days.

- Georgia has vigorously defended the previous law in this appeal.

- Georgia has consistently taken the position that the new law does not moot this case, a position that constructively asserts that it is likely that it will reenact the old law or a similar one if free to do so.

- Georgia has maintained this appeal despite the fact that the relief it seeks would be worthless unless Georgia was planning to reenact its prior law or a similar one.

1. Georgia has never given any indication that it would not return, if possible, to its previous law, or to a similar law. Indeed, its representations have been to the contrary. In several instances where this Court has held that repeal of a statute or policy moots a case, it relied significantly on the defendant's representation that it had no intent to return to the prior challenged law or policy.

For example, in *Seay Outdoor Advertising, Inc.* v. *City of Mary Esther*, this Court ruled that a challenge to a city ordinance was moot partly because the City's counsel "expressly disavowed at oral argument any intention of re-enacting the Repealed Sign Ordinance." 397 F.3d 943, 947-948 (11th Cir. 2005); see also, *e.g.*, *City of Sunrise*, 371 F.3d at 1330.

On the other hand, where the defendant declines to make that sort of representation, this Court and the Supreme Court have concluded that the case is not moot. For example, in *Rich* v. *Florida Department of Corrections*, this Court concluded that an inmate's challenge to the prison's failure to provide kosher food was not mooted by the institution of a kosher food program while the appeal was pending. 716 F.3d 525, 532 (2013). This Court explained that Florida "never promised not to resume the prior practice" and, accordingly, "[t]here is nothing to suggest that Florida will not simply end the new kosher meal program at some point in the future." *Id.* at 532 (citation omitted); see also *Parents Involved*, 551 U.S. at 719, 127 S. Ct. at 2751 (determining that the case was not moot partly because the defendant "nowhere suggest[ed] that if this litigation is resolved in its favor it will not resume using race to assign students"); *Jager* v. *Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 833-834 (11th Cir.) (concluding that a case was not moot where "the defendants never promised not to resume the prior [challenged] practice"), cert. denied, 490 U.S. 1090, 109 S. Ct. 2431 (1989).

This makes perfect sense. It is difficult to imagine how a court could reasonably conclude that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," see *Parents Involved*, 551 U.S. at 719, 127 S. Ct. at 2751 (citation omitted), if the defendant has failed to represent that the allegedly wrongful behavior will not recur.

During oral argument in this case, counsel for Georgia indicated that reenactment of the prior statute, or a similar one, was a likely possibility – or even a probability – if the district court's injunction were vacated. Specifically, counsel argued that setting aside the district court's injunction would provide meaningful relief to Georgia because Georgia would then "be free to go back to * * * our previous law." OA 20:52-56. Later, Judge Jordan suggested that the case would not be moot "if the legislature is going to go back to the old system," and he then said to counsel, "You have a gut feeling that that's exactly what might happen, right?" OA 21:29-39. Georgia's counsel did not disagree with that statement. Nor, at any point during the argument, did counsel indicate that Georgia planned to stick with the new UOCAVA-compliant law irrespective of the outcome of this appeal. OA 21:39-23:45.

2. Georgia's new election calendar was adopted purely in response to this litigation. This Court has explained that the fact that changes to challenged policies or practices were made "solely in response to the current litigation" is a factor counseling against a determination that a case is moot. See *National Ass'n*

of Bds. of Pharmacy v. *Board of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1312 (2011); see also, *e.g.*, *Doe*, 747 F.3d at 1325 (citing the fact that the defendant "suddenly changed its position days before [the] trial was set to begin" as a factor counseling against determining that the change mooted the case); *Rich*, 716 F.3d at 532 (similar).

Here, it is plain that the change in Georgia election law was made in direct response to this litigation. The legislation hardly indicates the State's acceptance of the idea that there should be a significant time period between an initial election and a runoff. Rather, the law was passed because the legislature wanted to align most of its state election calendar with the federal calendar set by the court. Indeed, the Governor, in signing the law, did not indicate that he accepted the district court's ruling as correct, but only that *"[g]iven the federal mandate* that we move up our primary date for federal elections, this is the best move for voters' time and taxpayers' money." Georgia Governor's Message, 1/21/2014 (emphasis added).

That explanation is consistent with Georgia's counsel's description of the legislature's motivation. See 1/31/2014 Letter (explaining that the legislature changed the law "so that Georgia's state elections will be held on the same date as the dates of the federal elections ordered by the district judge"); OA 21:39-22:38 (stating that the legislature changed the law because otherwise Georgia would have had to hold three elections in less than a month, which was not "doable"). The

facts surrounding enactment of the new law accordingly make plain that it does not evince either Georgia's acceptance of the district court's ruling or intent to maintain the present UOCAVA-compliant election calendar absent legal compulsion to do so.

3. Georgia vigorously defends the challenged voting law in this appeal. This Court has cited a defendant's vigorous defense of a prior challenged policy or practice as a factor indicating that it is not "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Harrell* v. *Florida Bar*, 608 F.3d 1241, 1268 (2010) (citation omitted). In *Rich*, for example, this Court cited the fact that "Florida continues to press on appeal that the voluntarily ceased conduct should be declared constitutional" as reason to apply the voluntary cessation exception. 716 F.3d at 532 (citation omitted); see also *Parents Involved*, 551 U.S. at 719, 127 S. Ct. at 2751; *Jager*, 862 F.2d at 834. It simply does not make sense (absent a claim for damages) for a defendant to spend time, money, and effort to vigorously defend a repealed law that the defendant has decided to abandon permanently.

4. Georgia has consistently taken the position that this case is not moot. That consistent position should lead this court to two conclusions. First, the favorable "presumption" that this Court has applied when the "party alleging mootness" is a government actor is inapplicable here since Georgia is not a "party alleging mootness." See *Christian Coal. of Fla.*, 662 F.3d at 1196. Moreover, this

Court and the Supreme Court have made clear that, in order for voluntary compliance to moot a case, the "defendant [must] * * * bear[] the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Doe*, 747 F.3d at 1322 (citation omitted); *Adarand Constructors*, 528 U.S. at 222, 120 S. Ct. at 726 (same). Since Georgia has taken the position that this case is not moot, it has not borne – or even attempted to bear – this burden.

Second, Georgia's repeated statements that this case is not moot should operate as a tacit admission that it is likely to return to its old election calendar, or a similar one, if the district court's order is set aside. That probability appears to be the basis for Georgia's position concerning mootness, and indeed it is the most reasonable explanation for Georgia's position.

5. Georgia's continued prosecution of this appeal reveals plainly that the case is not moot. If Georgia intended to maintain its current UOCAVA-compliant election calendar regardless of the outcome of this case, it could simply dismiss this appeal. At present, the district court's injunction has no practical effect because it requires nothing that is not already required by the revised Georgia law. The only impact of the injunction is that it prevents Georgia from going back to its old election calendar, or to another election calendar that violates UOCAVA's 45-day advance transmission rule. In our view, that means that the only reason for Georgia to maintain this appeal is to acquire the freedom to change its election

calendar in a way that would violate the district court's injunction. Thus, the fact that Georgia has maintained this appeal reveals that it is far from "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." See *Parents Involved*, 551 U.S. at 719, 127 S. Ct. at 2751. Instead, what is absolutely clear is that Georgia wants to be able to return to its previous election calendar, or a similar one, and that that is why it has decided to spend its resources on this appeal.

Finally, given Georgia's consistent position that this case is not moot, if it were to change course in its letter brief, this Court should treat that about-face as an attempt to manipulate this court's jurisdiction, and should reject that tact. See, *e.g.*, *Jacksonville Prop. Rights Ass'n, Inc.* v. *City of Jacksonville*, 635 F.3d 1266, 1275 (11th Cir.) (weighing, as a factor bearing on mootness, whether the defendant's actions were intended to "manipulate [the Court's] jurisdiction"), reh'g denied, 435 F. App'x 914 (2011).

When this Court concludes that a case is moot, it vacates any equitable relief, such as an injunction, and instructs the district court to dismiss the case. See, *e.g.*, *BankWest, Inc.* v. *Baker*, 446 F.3d 1358, 1368 (2006). That makes sense because a determination that a case is moot entails a conclusion that any injunction is completely inert. A mootness ruling means the defendant has taken independent action to eliminate the injury to the plaintiff and there is no danger that the injury

will recur. Thus, the injunction no longer benefits the plaintiff or, in any functional way, binds the defendant.

But here, elimination of the district court's injunction is precisely the relief – indeed the only relief – Georgia seeks. If Georgia ends up getting that same relief via a mootness ruling, it is very likely that it will return to some version of the prior law. Then, the United States would be forced again to file suit, and this case would, in essence, be repeated. Avoiding that situation is the very reason the voluntary cessation exception to mootness exists.

CONCLUSION

This Court has jurisdiction over this appeal, and should affirm the judgment of the district court.

Respectfully submitted,

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Case No. 13-14065-EE

United States v. *State of Georgia, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the United States certifies that in addition to the persons listed in appellants' Certificate of Interested Persons and Corporate Disclosure Statement filed on October 23, 2014, within its reply brief, the following persons have an interest in the outcome of this case:

Gupta, Vanita, Acting Assistant Attorney General for the United States Department of Justice, Civil Rights Division; and

Pollock, Nathaniel S., Attorney, United States Department of Justice, Civil Rights Division, Appellate Section, counsel for the United States.

In addition, Thomas E. Perez, former Assistant Attorney General, United States Department of Justice, Civil Rights Division no longer has an interest in this case.

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney

Date: January 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015, I electronically filed a true and correct copy of the foregoing supplemental letter brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system, and that seven paper copies of the electronically-filed supplemental letter brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

I also certify that participants in this case that are registered CM/ECF users will be served by the appellate CM/ECF system. The following counsel record who is not a registered CM/ECF user will be served by certified First Class mail, postage prepaid:

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