Case No. 08-35045

Dist. Ct. Case No. 07-5080-BHS (W. Dist. Wash.)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROSEMERE NEIGHBORHOOD ASSOCIATION, a Washington non-profit corporation,

Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States Department of the Interior; STEPHEN L. JOHNSON, Administrator, in his official capacity as Administrator of the Environmental Protection Agency,

Appellees.

ANSWERING BRIEF OF APPELLEES

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III. STATEMENT OF ISSUE PRESENTED FOR REVIEW

A. Did the district court err in dismissing the claims in Appellant's Amended Complaint, where all such claims were rendered moot when the agency action Appellant originally sought to compel was completed, and where the voluntary cessation exception to the mootness doctrine did not apply because there is no reasonable likelihood that the conduct will recur with respect to Appellant?

IV. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court granted the Government's Motion to Dismiss on December 17, 2007 and entered a Judgment in the Government's favor on December 18, 2007. Plaintiff-Appellant Rosemere Neighborhood Association timely filed a notice of appeal on January 16, 2008, pursuant to Fed. R. App. P. 4(a)(1). ER 1-7; SER 70-72; CR 38-40.[1]

V. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Pursuant to 42 U.S.C. § 2000d-1:

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[1] In this brief, ER refers to Appellant's Excerpts of Record, SER refers to Appellees' Supplemental Excerpts of Record, and CR refers by docket number to the United States District Court Clerk's record of the docket below.

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

The EPA has enacted regulations, codified at 40 C.F.R. Part 7 ("Part 7"), which implement these provisions. This program is carried out by EPA's Office of Civil Rights ("OCR"). ER 191-192 at ¶ 12; CR 8. Under the EPA regulations, persons who believe that they have suffered discrimination in a covered activity may file a complaint with OCR. 40 C.F.R. § 7.120(a). When a complaint is filed, OCR is required to acknowledge receipt of the complaint and then immediately initiate complaint processing procedures. 40 C.F.R. § 7.120(c), (d). The regulations further contemplate that, within 20 calendar days of acknowledgment of receipt, OCR "will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency." 40 C.F.R. § 7.120(d)(1)(i). If the complaint is accepted, notice of that fact is to be given to, among others, the complainant. 40 C.F.R. § 7.120(d)(1)(ii).

When complaints are accepted for investigation, the regulations specify that "[w]ithin 180 calendar days from the start of the compliance review or complaint

investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested" of (i) preliminary findings; (ii) recommendations, if any, for achieving voluntary compliance; and (iii) the recipient's right to engage in voluntary compliance negotiations where appropriate. 40 C.F.R. § 7.115(c)(1). "If OCR's investigation reveals no violation of [Part 7], the Director, OCR, will dismiss the complaint and notify the complainant and recipient." 40 C.F.R. § 7.120(g). In such cases, the regulations do not provide the complaining party with any appeal rights or the ability to request reconsideration. ER 193, at ¶ 6; CR 8.

VI. STATEMENT OF THE CASE

A. Statement of Background Facts.

Appellant Rosemere Neighborhood Association ("Rosemere" or "RNA") is a small non-profit organization located in Clark County, Washington. SER 19. In February of 2003, Rosemere filed a complaint with OCR alleging discrimination by the City of Vancouver in violation of Part 7. OCR subsequently rejected the complaint because Rosemere failed to establish a funding nexus between EPA and the City of Vancouver. SER 23, at ¶ 28. In early 2003, as a result of issues accumulating since 2001, the City of Vancouver began an investigation into the operations of Rosemere and eventually revoked Rosemere's recognition as a neighborhood association. SER 20, at ¶ 16.

On December 13, 2003, and January 15, 2004, Rosemere filed two letters with OCR forming the basis of a second administrative complaint alleging retaliation by the City of Vancouver. OCR administratively docketed this complaint as OCR File No. 01R-03-10R (the "Retaliation Complaint"). ER 192, at ¶ 3; CR 8.

OCR failed to accept, reject, or refer the Retaliation Complaint within twenty days, as contemplated by 40 C.F.R. § 7.120(d)(1)(i). However, on June 9, 2005, an OCR staff member made the decision to accept the Retaliation Complaint for investigation and drafted an acceptance letter for review by his supervisor, Yasmin Yorker, OCR's Assistant Director for External Compliance. SER 11, at ¶ 5. After Ms. Yorker completed her review, and in compliance with office policy, she transmitted the draft letter to EPA's Office of General Counsel ("OGC") for legal review. SER 11, at ¶ 6. While that review was pending, on July 1, 2005, Rosemere instituted an action in the United States District Court for the Western District of Washington under the Administrative Procedure Act ("APA") against the EPA, alleging that OCR had unreasonably delayed acceptance of the Retaliation Complaint ("*Rosemere I*"). SER 1-9; *Rosemere Neighborhood Association v. EPA, et al.*, U.S.D.C. West. D. Wash., Case No. C05-5443-FDB. On August 16, 2005, OCR accepted Rosemere's complaint for investigation. ER 192, at ¶ 3; CR 8. The district court subsequently granted the government's

motion to dismiss in *Rosemere I*, finding that Rosemere's claims had become moot. ER 201-204.

Subsequent to the acceptance of the Retaliation Complaint in August of 2005, OCR worked to complete the investigation and investigative report, as required by the regulations. The issuance of the report was delayed because the initial case manager in charge of the investigation was replaced, due to the fact that he had demonstrated a lack of impartiality towards Rosemere. The new case manager was instructed to initiate a new investigation, without reliance on any information generated by the former case manager. Thereafter, in May of 2006, OCR officials traveled to Vancouver to interview numerous individuals in connection with the investigation. OCR then reviewed the information gathered, including prior submissions by all parties, and drafted an investigative report. The report underwent numerous revisions to ensure clarity, factual accuracy, and legal validity. ER 192-193, at ¶ 5; CR 8.

B. Statement of the Case Below.

On February 20, 2007, before OCR was able to complete its investigative report, Rosemere filed a second district court action ("*Rosemere II*") seeking, inter alia, a declaration that "Defendants failure to comply with the deadlines set forth in 40 C.F.R. § 7.115, requiring EPA to issue preliminary findings and recommendations for voluntary compliance to the recipient within 180 days of

initiating the investigation, constitutes agency action unlawfully withheld and/or unreasonably delayed under the APA." SER 28; CR 1. In its Complaint, Rosemere asked the district court to "[i]ssue an injunction compelling EPA to complete the investigation procedures set forth in 40 C.F.R. § 7.120 and 40 C.F.R. § 7.115 in response to Rosemere's Claim for retaliation within thirty (30) days of this Court's order." SER 28; CR 1.

On April 30, 2007, OCR issued the final investigative report and decision letter in response to the Retaliation Complaint, concluding that the City of Vancouver did not unlawfully retaliate against Rosemere. ER 192, 196-200; CR 8. OCR's decision letter suggested ways that the City of Vancouver could encourage meaningful communication with neighborhood associations like Rosemere, and enhance public involvement. ER 196-200; CR 8. The investigative report and decision letter concluded the investigation procedures set forth in 40 C.F.R. § 7.120 and 40 C.F.R. § 7.115. The relevant regulations do not provide complainants, including Rosemere, with a right to appeal or request reconsideration. ER 193, 196-200; CR 8. Because Rosemere's claims in *Rosemere II* were rendered moot by the issuance of the final investigative report, the government filed a Motion to Dismiss on April 30, 2007, arguing that the district court lacked subject matter jurisdiction over Rosemere's claims. CR 7. After the government filed the Motion to Dismiss, the parties engaged in limited

discovery into the jurisdictional issues at play in the government's Motion.[2]

On November 12, 2007, after the completion of briefing on the government's Motion to Dismiss, Rosemere filed an Amended Complaint in *Rosemere II.* SER 55-69; CR 33. Although substantially identical to the original Complaint, the Amended Complaint added a claim for prospective relief. Specifically, in its Request for Relief, Rosemere asked the district court to "issue an injunction compelling the EPA [sic] process any future Title VI complaints filed by Rosemere in the next five (5) years within the time deadlines set forth at 40 C.F.R. §§ 7.115 and 7.120." SER 69; CR 33. The Amended Complaint also included new language stating that Rosemere "may re-file its initial Title VI complaint in the near future . . ." and "may also file future Title VI complaint [sic] with respect to other recipients of EPA funding." SER 60; CR 33.

On November 16, 2007, the district court issued a minute order noting that the "parties have not yet been heard regarding the impact of the First Amended Complaint on the issues raised in Defendants' Motion to Dismiss. Therefore, Defendants' Motion to Dismiss (Dkt. 7) is hereby RENOTED for consideration on November 30, 2007, and the parties may supplement their briefing . . . ." CR 34. No. 34. Accordingly, the parties filed supplemental briefs describing what impact,

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[2] The scope of discovery was limited by the district court's order dated August 1, 2007, granting in part and denying in part the government's motion for a protective order. ER 183-190; CR 18.

if any, the Amended Complaint had on the government's pending Motion. CR 35, 36.

On December 17, 2007, the Honorable Benjamin H. Settle granted the government's Motion to Dismiss in *Rosemere II.* ER 2-7; CR 38. When addressing Rosemere's argument that the voluntary cessation exception to the mootness doctrine applied, such that Rosemere's claims were not moot, Judge Settle stated that, "the Court cannot conclude that there is a likelihood that the alleged violation will recur with respect to Rosemere." ER 7; CR 38. The Order further explained as follows:

> Rosemere offers evidence suggesting that the EPA's handling of Rosemere's complaint is not unique to Rosemere and suggests that the EPA is likely to handle future claims from other parties in an untimely manner. While the Court may be sympathetic to Rosemere's concerns, to allow Rosemere to proceed on this theory would put Rosemere in the position of representing unidentified people and entities who are not parties to this lawsuit.

ER 7; CR 38.

Accordingly, the district court denied Rosemere's claims as moot. ER 7; CR 38. This appeal timely followed.

VII. SUMMARY OF ARGUMENT

The parties are in agreement that Rosemere's claims must be dismissed as moot unless the so-called "voluntary cessation" exception to the mootness

doctrine applies. In order for the exception to apply, the Court must find that the allegedly wrongful behavior is reasonably likely to recur with respect to the same objecting litigant. This is not the case here, as there is no evidence – other than pure speculation – that the alleged violation is likely to recur with respect to Rosemere especially in light of the fact that Rosemere has no complaints pending before the EPA.

Moreover, the district court could not have granted Rosemere's request for prospective relief because (1) sovereign immunity and the APA preclude courts from awarding any relief other than to "compel agency action unlawfully withheld or unreasonably delayed," and in this case there was nothing left to compel because the EPA had already issued the investigative report and decision letter that Rosemere originally sought to obtain when it filed the case; and (2) similarly, Rosemere's request for prospective relief was not ripe because, at the time the request was made, there was no unlawfully withheld or unreasonably delayed agency action to compel. Accordingly, the district court correctly dismissed Rosemere's claims in the underlying action.

VIII. ARGUMENT

A. Standard of Review.

The district court's dismissal of a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(1) is reviewed de novo. *McGraw v.*

United States, 281 F.3d 997, 1001 (9th Cir. 2002), *amended by* 298 F.3d 754 (9th Cir. 2002). Mootness is also a question of law reviewed de novo. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1116 (9th Cir. 2003).

B. The Mootness Doctrine.

"Judicial review of administrative action, like all exercises of federal judicial power, is limited by the requirement that there be an actual, live controversy to adjudicate." *Campesinos Unidos, Inc. v. United States Dept. Of Labor*, 803 F.2d 1063, 1067 (9th Cir. 1986). The "case or controversy" requirement of Article III demands dismissal "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). A case becomes moot when it "loses its character as a present, live controversy of the kind that must exist" in order to avoid "advisory opinions on abstract questions of law." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001); *see also Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1098-99 (9th Cir. 2001) ("[a] case or controversy exists justifying declaratory relief only when 'the challenged . . . activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the . . . parties.") (citations omitted); *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir. 1984) ("Exercise of our power to adjudicate the instant case depends upon the

existence of a case or controversy; we lack jurisdiction to hear moot cases.").

C. The District Court Properly Dismissed Rosemere's Claims As Moot.

Rosemere's initial Complaint in *Rosemere II* asked the district court to (1) "[d]eclare that Defendants' failure to comply with the deadlines set forth in 40 C.F.R. § 7.115, requiring EPA to issue preliminary findings and recommendations for voluntary compliance to the recipient within 180 days of initiating the investigation, constitutes agency action unlawfully withheld and/or unreasonably delayed under the APA;" and (2) "[i]ssue an injunction compelling EPA to complete the investigation procedures set forth in 40 C.F.R. § 7.120 and 40 C.F.R. § 7.115 in response to RNA's Claim for retaliation within thirty (30) days of this Court's order." SER 28; CR 1.

Subsequent to the filing of the Complaint, on April 30, 2007, OCR issued the investigative report and decision letter sought by Rosemere, which mooted Rosemere's claims because there was no longer a present, live controversy. *See, e.g., Pit River Tribe v. Bureau of Land Management*, 306 F. Supp. 2d 929, 945-46 (E.D. Cal. 2004) ("A plaintiff's effort to compel agency compliance with the statutory procedures is mooted when the agency later completes those very same procedures because that is the only relief to which plaintiff is entitled."); *Strahan v. Linnon*, 967 F. Supp. 581, 590-591 (D. Mass. 1997) ("Even if I found that the

defendants did not previously comply with the statute's time restrictions, [footnote omitted] however, plaintiff's claim would still be moot because there would be no available relief."); *Johnson v. Philadelphia Housing Authority*, 1995 WL 395950, *2 (E.D. Pa. 1995) ("Since the action the plaintiff sought to be compelled – the issuance of regulations – has in fact been accomplished, any claim brought pursuant to [5 U.S.C. §] 706(1) is now moot.").

This conclusion is not changed by Rosemere's inclusion of a claim for declaratory relief. It is well-settled that "[a] federal court cannot issue a declaratory judgment if a claim has become moot." *Public Utilities Commission of the State of California v. Federal Energy Regulatory Commission*, 100 F.3d 1451, 1459 (9th Cir. 1996) (citing *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947) and *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir.1994)). Essentially, Rosemere seeks a declaration that by withholding agency action EPA has acted wrongfully. However, because OCR has now acted, the wrongful conduct alleged by Rosemere is no longer present and, consequently, there is no longer any dispute between Rosemere and EPA. *See Headwaters, Inc. v. Bureau of Land Management, Medford District*, 893 F.2d 1012, 1015-1016 (9th Cir. 1990). Because there is no longer any live dispute between EPA and Rosemere, a grant of the declaratory relief Rosemere seeks would constitute the issuance of an extra-jurisdictional advisory opinion. *Lone*

Rock Timber Co. v. United States Department of the Interior, 842 F. Supp. 433, 438 (D. Or. 1994).

D. The Voluntary Cessation Exception To The Mootness Doctrine.

Under certain circumstances, however, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 189 (2000) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). When deciding whether the voluntary cessation doctrine applies, the Supreme Court has noted that a "case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*

The doctrine of voluntary cessation of illegal activities is "treated with more solicitude by the Courts than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990); *see also Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("courts are 'more apt to trust public officials than private defendants to desist from future violations'"); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) ("We note additionally that cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by

private parties."). As the Eleventh Circuit Court of Appeals recently explained, "government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur . . . ." *Sheely v. MRI Radiology Network*, 505 F. 3d 1173, 1184 (11th Cir. 2007).

E. The Challenged Action Cannot Reasonably Be Expected To Recur With Respect To Rosemere.

Rosemere cannot defeat mootness by arguing that the alleged wrongful conduct "could reasonably be expected to recur" with respect to other individuals or groups not party to the underlying action. As this Court explained in *Luckie v. EPA*, 752 F.2d 454 (9th Cir. 1985), "[s]ome circuits, including this one, have said that where the government's actions are those questioned, 'the mere probability of recurrence must be coupled with a certainty that the impact will fall on the **same** objecting litigants.'" *Luckie*, 752 F.2d at 459 n.7 (9th Cir. 1985) (emphasis added) (citations omitted); *see also Halvonik v. Reagan*, 457 F.2d 311, 313 n.3 (9th Cir. 1972) (holding that in order to show a likelihood of recurrence, the plaintiff "must also show that recurrence would precipitate a dispute between the same parties").

Courts in other jurisdictions follow this same approach. *See State Highway Comm. Of Missouri v. Volpe*, 479 F.2d 1099, 1106 (8th Cir. 1973) ("However, when the actions questioned are those of the government, the mere probability of recurrence must be coupled with a certainty that the impact will fall on the same

objecting litigants."); *Fort Dix 38 v. Collins*, 429 F.2d 807, 812 (3d Cir. 1970) ("the 'mere possibility' standard of recurrent alleged action . . . is not applicable when the actions questioned are those of the government. Rather, two probabilities – recurrence of the objectionable action and impact on the same objecting litigants – must exist.") (internal citations omitted); *Gengler v. United States*, 2007 WL 1080520, at *1 (E.D. Cal. 2007) ("where the government is the defendant, to satisfy the voluntary cessation doctrine, 'the mere probability of recurrence must be coupled with a certainty that the impact will fall on the *same objecting litigants*'") (citing *Luckie*, 752 F.2d at 459 N. 7) (emphasis in original).

In an attempt to defeat the government's mootness argument, Rosemere filed an Amended Complaint on November 12, 2007, asking the district court to "[i]ssue an injunction compelling the EPA [sic] process any future Title VI complaints filed by RNA within the next five (5) years in compliance with the timelines set forth at 40 C.F.R. §§ 7.115 and 7.120." SER 69; CR 33. This additional request for relief does nothing, however, to change the mootness analysis argument. Despite the new request for relief, the district court properly granted the government's Motion to Dismiss because there has been no showing that the alleged wrongful behavior is reasonably likely to recur with respect to Rosemere.

When arguing voluntary cessation to the district court, Rosemere asserted

that "[t]he question is not whether the wrongful conduct can recur with respect to that particular plaintiff and the particular discrete set of facts that gave rise to the complaint." SER 50, at lines 2-3; CR 20. Despite this prior argument, Rosemere now appears to concede that in order to meet the voluntary cessation exception, there must be a reasonable likelihood that the challenged conduct will recur with respect to the same objecting litigant.[3] This concession is demonstrated, for example, by Rosemere's repeated assertion that "a reasonable possibility exists that RNA will again request similar assistance from EPA in the future." Rosemere's Opening Brief, at 41.

Despite Rosemere's reliance on its own speculation that "the organization intends to avail itself of the Title VI process in the future," Rosemere's Opening Brief, at 33, there has been no showing that the alleged wrongful conduct is likely to recur with respect to Rosemere. Speculation alone cannot satisfy the "same objecting litigants" standard. "While mere voluntary cessation of allegedly illegal conduct does not moot a case, a case does cease to be a live controversy if the possibility of recurrence of the challenged conduct is only a 'speculative contingency.'" *Burbank v. Twomey*, 520 F.2d 744, 747-48 (7th Cir. 1975)

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[3] Nowhere in its Opening Brief does Rosemere explicitly argue that this standard does not apply. Instead, Rosemere attempts to distinguish this case factually from *Luckie* and argues generally that the party asserting mootness bears a "heavy burden" of establishing that the voluntary cessation exception does not apply. *See* Rosemere's Opening Brief, at 37 and n. 26.

(quoting *Hall v. Beals*, 396 U.S. 45, 49 (1969)); *see also F.E.R. v. Valdez*, 58 F.3d 1530 (10th Cir. 1995) ("The doctrine of voluntary cessation does not save the [plaintiffs'] claim for injunctive relief because the [plaintiffs'] 'lack of standing does not rest on the termination of the [unlawful] practice but on the speculative nature of [their] claim that [they] will again experience injury as the result of that practice even if continued.'") (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)).

Applying these principles to the case at hand, it is clear that there is no reasonable likelihood that the challenged conduct will recur with respect to Rosemere. The processing of the Retaliation Complaint is now complete, Rosemere has no other complaints pending with OCR, and Rosemere's own speculation that it may file additional complaints with OCR in the future is not enough to change this result.

Furthermore, and due to the "same objecting litigant" standard, all of the language in Rosemere's Opening Brief relating to OCR's timeliness in responding to Title VI complaints filed by *other* groups has no relevance to the issue at hand. Similarly irrelevant is the language in the proposed amicus brief submitted by the Center for Race, Poverty, and the Environment ("CRPE"). CRPE's brief raises factual issues concerning complaints it has filed with OCR. Because all such complaints are in no way related to the complaint filed by Rosemere at issue in

this case, or any hypothetical complaints that Rosemere might file in the future, they have no relevance to the voluntary cessation analysis that the Court must perform with respect to Rosemere, the "same objecting litigant."

F. Rosemere's Request For Prospective Relief, In Addition To Being Moot, Fails For Two Additional And Related Reasons.

As previously noted, a district court can take no action (declaratory, injunctive, or otherwise) if the claims before it are moot, unless the voluntary cessation exception to the mootness doctrine applies. Because the voluntary cessation exception does not apply in this case, the dismissal of Rosemere's claims is compelled by the mootness doctrine. In addition, Rosemere's request for prospective relief fails for two separate but related reasons, each of which demonstrates that the district court properly dismissed the Amended Complaint.

1. Rosemere's Request For Prospective Relief Cannot Be Granted Due To Sovereign Immunity And The APA.

First, sovereign immunity and the plain language of the APA preclude the prospective relief sought by Rosemere. A congressional waiver of sovereign immunity is a prerequisite to any suit brought against the federal government. *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974). Indeed, any action against the United States begins with the "assumption that no relief is available." *Tucson Airport Authority v. General*

Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1988). It is the burden of any party advancing a claim against the United States to plead and prove that the Court has jurisdiction to entertain the claim. *See Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990).

Further, where a waiver of sovereign immunity exists, the United States can only be sued to the extent it has waived its immunity. *See, e.g., Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). For this reason, waivers of sovereign immunity cannot be enlarged beyond the boundaries that the statutory language plainly requires. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *see also Lane v. Pena*, 518 U.S. 187, 191-92 (1996).

The APA "provides for judicial review of agency action and a waiver of sovereign immunity in an action for relief other than money damages that states a claim that a federal agency or officer failed to act as required in an official capacity." *Rowe, et al. v. United States*, 633 F.2d 799, 801 (9th Cir. 1980). The APA's waiver, however, must be strictly construed in favor of the government. *Nordic Village*, 503 U.S. at 504 ("the Government's consent to be sued 'must be construed strictly in favor of the sovereign'") (quoting *Ruckelshaus v. Sierra Club*,

463 U.S. 680, 685 (1983)); *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991) ("[a]ny such waiver must be strictly construed in favor of the United States").

The relevant language at issue here, found at 5 U.S.C. § 706(1), could not be more clear. It explicitly provides that a court may "compel agency action unlawfully withheld or unreasonably delayed." The Court's power to grant relief under 5 U.S.C. § 706(1) is limited by this language, such that the Court can do no more than "compel agency action unlawfully withheld or unreasonably delayed." As a district court in the District of New Jersey noted when addressing an APA claim of unreasonable delay in *American Littoral Society v. EPA*, 199 F. Supp. 2d 217, 240 (D.N.J. 2002), "the Court must be mindful of the remedies available to plaintiffs should they be successful in proving their claim. The Court's power in this context is limited to compelling agency action that has been unreasonably delayed." The Fifth Circuit has similarly explained that, "Section 706 *limits* judicial review of agency action and, in the absence of some other limitations provision, empowers federal courts only to 'compel agency action unlawfully withheld or unreasonably delayed.'" *U.S. v. Popovich*, 820 F.2d 134, 137 (5th Cir. 1987) (citing *Chromcraft Corp. v. EEOC*, 465 F.2d 745 (5th Cir. 1972)) (emphasis in original); *see also Jackson v. Lynn*, 506 F.2d 233 (D.C. Cir. 1974) ("The court may only hold unlawful and set aside wrongful agency action . . . and compel action unlawfully withheld or delayed . . ."); *Raymond Proffitt Foundation v. U.S.*

Army Corps of Engineers, 128 F. Supp. 2d 762 (E.D. Pa. 2000) ("Under Section 706(1), the court's power is limited to compelling agency action unlawfully withheld or unreasonably delayed.").

Rosemere's claims are based solely on Section 706(1), and the district court's power to grant relief was thus limited to compelling agency action unlawfully withheld or unreasonably delayed. Because the EPA has already issued the Investigation Report and Decision Letter, there was no such action to compel, and the district court therefore lacked jurisdiction to grant the prospective relief sought in Rosemere's Amended Complaint.

2. Rosemere's Request For Prospective Relief Is Not Ripe.

Second, for many of the same reasons discussed previously, Rosemere's claims for prospective relief were (and are) not ripe. By requesting prospective relief of the type sought in its Amended Complaint, Rosemere essentially asked the district court to impose a remedy for unlawful action that it presumed would occur in the future. Rosemere made this request despite the fact that it has no Title VI discrimination complaints currently pending before the EPA. The district court therefore lacked jurisdiction over Rosemere's request for prospective relief because any such request was not ripe, as "the existence of the dispute itself hangs on future contingencies that may or may not occur." *Texas v. United States*, 523

U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985)).

Where plaintiffs seek "prospective injunctive relief to enjoin future conduct which they have been subjected to in the past, plaintiffs must show that their claims are 'ripe' for such relief; in other words, they must demonstrate the possibility of 'real and immediate future injury.'" *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 367 (C.D. Cal. 1982) (citing *Rizzo v. Goode*, 423 U.S. 362, 372 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). Here, Rosemere's request for prospective relief was (and is) not ripe because it addresses only speculative future complaints that may (or may not) be filed by Rosemere. Rosemere has not demonstrated the possibility of any real and immediate future injury.[4]

The ripeness analysis is especially pertinent in this case because Rosemere's underlying claims are based solely on 5 U.S.C. § 706(1), which allows the Court to "compel agency action unlawfully withheld or unreasonably delayed." Based

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[4] It is appropriate for the Court to conduct a ripeness analysis with respect to a particular request for relief. The Supreme Court conducted this type of analysis in *Rizzo v. Goode*, 423 U.S. 362 (1976), a case in which the plaintiffs sought prospective injunctive relief to remedy past acts of mistreatment by Philadelphia police officers. Although there was no dispute that past mistreatment had occurred, the Court analyzed whether there was a "requisite Art. III case or controversy" to confer jurisdiction for the prospective relief sought by the plaintiffs. *Id.* at 371-373.

on this language, the defendant agency must already have "unlawfully withheld or unreasonably delayed" agency action in order for a plaintiff's claims to ripen. *See, e.g.*, *New York Statewide Senior Action Council v. Leavitt*, 409 F. Supp. 2d 325, 330 (S.D.N.Y. 2005) (finding that the court lacked jurisdiction over the plaintiff's unreasonable delay claim due to lack of ripeness and noting that "plaintiffs have pointed to no legal precedent that would support judicial intervention under § 706(1) prior to an agency's deadline to take action."). In this case, Rosemere seeks prospective relief with respect to Title VI complaints that have not been filed, so it cannot possibly be the case that the EPA has unlawfully withheld or unreasonably delayed agency action with respect to those complaints.

IX. CONCLUSION

For the foregoing reasons, the government respectfully submits that the district court correctly dismissed Rosemere's claims in the underlying action and asks this Court to affirm the judgment below.

Respectfully submitted on May 29, 2008.

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X. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5696 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Version 12 in Times New Roman 14-point type style.

Dated May 29, 2008.

Rebecca S Cohen

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XI. STATEMENT OF RELATED CASES

To the best knowledge of Appellees' counsel, there are no other cases presently pending that are related to this case.

Dated: May 29, 2008.

Rebecca S Cohen

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Assistant United States Attorney
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Counsel for Appellees

XII. CERTIFICATE OF SERVICE

I CERTIFY that on this date I caused to be mailed two copies of this brief to Chris Winter, counsel for Appellant:

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Dated May 29, 2008.

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