No. 08-35045

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMERE NEIGHBORHOOD ASSOCIATION,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and STEPHEN L. JOHNSON, in his official capacity as Administrator of the Environmental Protection Agency,

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Washington
Case No. C07-5080BHS
Hon. Benjamin H. Settle

OPENING BRIEF OF APPELLANT ROSEMERE NEIGHBORHOOD ASSOCIATION

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April 29, 2009

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Petitioner hereby states that it does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

I. Statutory Basis of Subject Matter Jurisdiction of the District Court 1

II. Jurisdiction of the Court of Appeals and Timeliness of Petition for Review 1

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

I. Nature of the Case 2

II. Background on Title VI of the Civil Rights Act 3

III. Statement of Facts and Procedural History 4

A. RNA's Initial Title VI Complaint 4

B. RNA's Complaint of Retaliation and Proceedings Below 6

C. EPA's Pattern and Practice of Illegal Delay in Administering the Title VI Program 12

SUMMARY OF THE ARGUMENT 18

ARGUMENT 20

I. Standard of Review 20

II. Legal Background on Mootness and the Voluntary Cessation Doctrine 20

III. RNA's Claims for Declaratory and Prospective Injunctive Relief are Not Moot. 22

A. EPA changed its conduct in response to the threat of judicial security 23

B. EPA has not carried its heavy burden of demonstrating that the wrongful conduct cannot reasonably be expected to recur. 25

1. EPA's increase in staff size has not resolved the backlog. 26

2. Staff training has not corrected the problems in processing Title VI complaints..... 28

3. EPA's Standard Operating Procedures have not corrected the problems in processing Title VI complaints. 29

C. The District Court Erred as a Matter of Law by Applying the Wrong Legal Standard for the Voluntary Cessation Doctrine. 32

1. The record demonstrates that the wrongful conduct could reasonably be expected to recur with respect to RNA and that the court can still grant effective relief 33

2. This Court has never required more than RNA has offered to defeat a motion to dismiss based on the voluntary cessation doctrine. 37

CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Armster et al. v. U.S. Dist Ct. for the Dist. of Alaska et al.
806 F.2d 1347 (9th Cir. 1986) 22, 23, 33

Barnes et al. v. Healy et al.,
980 F.2d 572 (9th Cir. 1992) 35

Biodiversity Legal Foundation et al. v. Badgley et al.,
309 F.3d 1166 (9th Cir. 202) 36

Buono et al. v. Norton et al.,
371 F.3d 543 (9th Cir. 2004) 22

Coral Constr. Co. v. King County,
941 F.2d 910 (9th Cir. 1991) 21

Forest Guardians v. Johanns et al.,
450 F.3d 455 (9th Cir. 2006) 36

Friends of the Earth, Inc. v. Laidlaw Envtl. Services,
528 U.S. 167 (2000) 21, 40

Halvonik v. Reagan,
457 F.2d 311 (9th Cir. 1972) 40

Knievel v. ESPN,
393 F.3d 1068, (9th Cir. 2005) 20

La Reunion Francaise SA v. Barnes,
247 F.3d 1022 (9th Cir. 2001) 20

Liner et al. v. Jafco, Inc. et al.,
375 U.S. 301 (1964) 20

Los Angeles County et al. v. Davis et al.,
440 U.S. 625 (1979) 21-22

Luckie v. E.P.A.,
752 F.2d 454 (9th Cir. 1985) 32, 33, 39-40, 41

Northwest Envt'l Defense Ctr. et al. v. Gordon et al.,
849 F.2d 1241 (9th Cir. 1988) 36

Oregon Advocacy Ctr. et al. v. Mink et al.,
322 F.3d 1101 (9th Cir. 2003) 20

Outdoor Media Group, Inc. v. City of Beaumont,
506 F.3d 895 (9th Cir. 2007) 20

Parents Involved in Cmty. Sch.s v. Seattle Sch. Dist. No. 1 et al.,
127 S. Ct. 2738 (2007) 22

Porter et al. v. Bowen et al.,
496 F.3d 1009 (9th Cir. 2007) 21, 22, 33, 37, 38-39, 41

Rosemere Neighborhood Association v. U.S. Envt'l Protection Agency,
Civil No. 05-5443-FDB (W.D. Wa.) 7

Southern Oregon Barter Fair v. Jackson County, Oregon et al.,
372 F.3d 1128 (9th Cir. 2004) 20

State Highway Comm'n of Missouri v. Volpe,
479 F.2d 1099 (8th Cir. 1973) 40

Swift & Co. v United States,
276 U.S. 311 (1928) 35

United States v. Peninsula Communications, Inc.,
287 F.3d 832 (9th Cir. 2002) 20

United States v. W.T. Grant Co. et al.,
345 U.S. 629 (1953) 21, 23, 35, 41

Vu Luong v. Circuit City Stores, Inc.,
368 F.3d 1109 (9th Cir. 2004) 20

FEDERAL STATUTES

Administrative Procedure Act

5 U.S.C. §§ 704 *et seq.* 1

5. U.S.C. § 706 (1) 2-3

28 U.S.C. § 1331 1

28 U.S.C. § 1346 1

28 U.S.C. § 1391(e) 1

29 U.S.C. § 1291 1

Title VI of the Civil Rights Act

42 U.S.C. § 2000d 2, 3

42 U.S.C. § 2000d-1 35

REGULATIONS

40 C.F.R. § 1.115(c) 27

40 C.F.R. Part 7 ..... 2, 3

40 C.F.R. § 7.100 4

40 C.F.R. § 7.115(c) 7

40 C.F.R. § 7.115(c)(1) 4

40 C.F.R. § 7.120 6

40 C.F.R. § 7.120(a) 4

40 C.F.R. § 7.120(c) 4

40 C.F.R. § 7.120(d)(1)(i) 4, 14

40 C.F.R. § 7.120(d)(2) 4, 10

40 C.F.R. § 7.35(b) 4

RULES

Fed. R. App. P. 4(a)(1)(B) 1

Fed. R. Civ. Pro. 12(b)(1) 3, 7, 10

CONSTITUTION

Article III of the United States Constitution 20

STATEMENT OF JURISDICTION

I. Statutory Basis of Subject Matter Jurisdiction of the District Court

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because this action involves the United States as a defendant and arises under the laws of the United States, including the Administrative Procedure Act (APA), 5 U.S.C. §§ 704 *et seq.* Venue was properly vested in the District Court pursuant to 28 U.S.C. § 1391(e) because the cause of action arose within the Western District of Washington and the Plaintiff and its members reside within that district.

II. Jurisdiction of the Court of Appeals and Timeliness of Petition for Review

The District Court granted Defendants' Motion to Dismiss in an Order on December 17, 2007, and issued its Judgment on December 18, 2007. ER 1-7.[1] The Plaintiff subsequently filed the Notice of Appeal on January 16, 2008. CR 40. The Notice of Appeal was timely filed pursuant to Fed. R. App. P. 4(a)(1)(B). The Ninth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291.

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[1] "ER" refers to the Excerpt of Record filed with the Court, and the page numbers refer to the bates stamps at the bottom right corner of the document. "CR" refers to the Clerk's Record as set forth in the Docket Report, which can be found at ER 205-210.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that Plaintiff's claims for declaratory and prospective injunctive relief are moot under the voluntary cessation doctrine where the Defendant federal agency:

a. demonstrated a pattern and practice of illegal delay and subsequent compliance only in response to litigation; and

b. has not carried its heavy burden of demonstrating that the wrongful conduct will not recur again in the future.

STATEMENT OF THE CASE

I. Nature of the Case

This actions arises from the Defendants Environmental Protection Agency's (EPA's) failure to respond to a civil rights complaint filed by Plaintiff Rosemere Neighborhood Association (RNA) pursuant Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, and EPA's implementing regulations, 40 C.F.R. Part 7. In 2003, RNA filed a complaint (Complaint of Retaliation) with EPA alleging that the City of Vancouver (the City) revoked RNA's recognition as a neighborhood association in retaliation for RNA filing a prior Title VI civil rights complaint alleging discrimination by the City. EPA repeatedly delayed responding to the Complaint of Retaliation in violation of EPA's implementing regulations. This is a civil action for declaratory and prospective injunctive relief under the Administrative

Procedure Act, 5 U.S.C. § 706(1), alleging that EPA's failure to respond to RNA's Complaint of Retaliation is an action unlawfully withheld and unreasonably delayed. ER 21.

After RNA filed the current action, EPA completed its investigation and moved to dismiss the action as moot pursuant to Fed. R. Civ. Pro. 12(b)(1). RNA opposed that motion because EPA failed to carry its burden of proof pursuant to the voluntary cessation doctrine. The District Court granted EPA's motion, and this appeal followed.

II. Background on Title VI of the Civil Rights Act

Title VI of the Civil Rights Act prohibits discrimination by institutions that utilize federal funds. 42 U.S.C. § 2000d. Section 601 provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* Section 602 requires federal agencies that provide federal funding assistance to issue regulations to effectuate the anti-discrimination provisions of the statute. 42 U.S.C. § 2000d-1. Specifically, Section 602 requires agencies to create a regulatory framework for processing complaints of racial discrimination in the use of federal funding. *Id.*

EPA has promulgated rules implementing Title VI for EPA-funded programs. 40 C.F.R. Part 7. EPA's rules prohibit funding recipients from carrying out programs or activities "which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex * * *." 40 C.F.R. § 7.35(b). The rules also prohibit retaliation or intimidation against any person that seeks to assert rights under the regulations. 40 C.F.R. § 7.100.

Citizens can file complaints with the EPA alleging discrimination or retaliation in violation of the regulations. 40 C.F.R. § 7.120(a). Once a citizen files a complaint with EPA, the Office of Civil Rights (OCR) "will notify the complainant and recipient of the agency's receipt of the complaint within five (5) calendar days." 40 C.F.R. § 7.120(c). "Within twenty (20) calendar days of acknowledgment of the complaint, the OCR will review the complaint for acceptance, rejection, or referral to the appropriate federal agency." 40 C.F.R. § 7.120(d)(1)(i). "OCR shall attempt to resolve complaints informally whenever possible." 40 C.F.R. § 7.120(d)(2). If OCR cannot resolve the complaint informally, it shall issue preliminary findings and recommendations for achieving voluntary compliance "[w]ithin 180 calendar days from the start of the compliance review or complaint investigation." 40 C.F.R. § 7.115(c)(1).

III. Statement of Facts and Procedural History

A. RNA's Initial Title VI Complaint

The Rosemere Neighborhood in Vancouver, Washington is one of 17 West Vancouver neighbourhoods, many of which satisfy EPA's thresholds for Environmental Justice qualifications that identify those areas as concentrated racial minority and low income populations representing the most impoverished areas of Clark County. ER 11. RNA is a community-supported non-profit organization whose mission includes: 1) encouraging participation of all residents in Rosemere and prohibiting discrimination based on race, national origin and ethnicity; and 2) promoting and encouraging environmental awareness and preservation in Rosemere and the community at large. ER 11-12.

In 2003, RNA filed an administrative complaint pursuant to Title VI of the Civil Rights Act with EPA alleging that the City's use of EPA funding had a discriminatory impact on minority communities. ER 9. More specifically, RNA alleged that the City of Vancouver used EPA funding to improve stormwater and septic management in affluent neighborhoods but neglected impoverished neighborhoods in West Vancouver. *Id.*

EPA initially rejected RNA's Title VI complaint, because RNA allegedly failed to demonstrate a funding nexus between EPA and the City of Vancouver. ER 13. RNA subsequently provided evidence of a funding nexus, but EPA never investigated the allegations of discriminatory conduct. ER 14. Many of the problems that RNA sought to address in the initial Title VI complaint continue to

this day and have never been addressed by either EPA or the City. ER 13-14; 127. RNA intends to continue its work to alleviate the problems of environmental degradation in its neighborhood and as part of that work intends seek redress in the future pursuant to Title VI of the Civil Rights Act to address ongoing discriminatory impacts. *Id.*

B. RNA's Complaint of Retaliation and Proceedings Below

After RNA filed the initial civil rights complaint, the City initiated an investigation into RNA's internal operations and revoked City recognition of RNA as an official neighborhood association. ER 9; 126. As a result, RNA was no longer able to qualify for certain community support grants, and RNA was also barred from participating in City-sponsored programs. ER 12-13. The dispute also caused significant injury to RNA's reputation and good will, which had a direct impact on its ability to raise money from the community and foundations, and the City's conduct also resulted in other community groups and agencies declining to participate with RNA in various projects. *Id.*

On December 13, 2003, RNA filed a second Title VI complaint alleging that the City retaliated against RNA by revoking its status as a recognized neighborhood association. ER 9. EPA failed to accept and respond to the Complaint of Retaliation within 20 days as required by 40 C.F.R. § 7.120. *Id.* On July 1, 2005, after several unsuccessful efforts in requesting EPA assistance, RNA

filed suit in the Western District of Washington to compel EPA to accept the complaint for investigation. *Rosemere Neighborhood Association v. U.S. Envt'l Protection Agency*, Civil No. 05-5443-FDB (W.D. Wa.) (*RNA I*).

On August 16, 2005, EPA finally sent a letter to RNA stating that it had accepted the complaint for investigation. ER 9. EPA then moved to dismiss the case as moot pursuant to Fed. R. Civ. Pro. 12(b)(1). ER 10. On December 7, 2005, the District Court dismissed the claims in *RNA I* as moot on the grounds that EPA had accepted the complaint for investigation after the suit was filed. ER 201-204. In rejecting arguments that EPA had failed to meet its burden under the voluntary cessation doctrine, the Court held that there "is no evidence that EPA's failure to act timely on Rosemere's complaint constitutes a 'practice' which EPA could resume once the action was dismissed on grounds of mootness." ER 204.

Once EPA accepted the complaint, it was required to issue preliminary findings within 180 days. 40 C.F.R. § 7.115(c). After August of 2005, RNA worked diligently with EPA to resolve the Complaint of Retaliation. ER 10; 18-20. RNA repeatedly provided EPA with documents related to the retaliatory conduct, lists of witnesses and the opportunity to interview RNA board members. *Id.* By May of 2006, EPA had not yet issued its preliminary findings when it dismissed the original case manager because he had "demonstrated a lack of impartiality towards" RNA. ER 192; *see also* ER 19. A new case manager then

made a trip to Vancouver, Washington on May 23, 2006 to interview RNA board members. ER 192-93.

Despite the assignment of a new case manager, the delays continued. From May 23, 2006 until February 20, 2007, RNA repeatedly inquired as to when EPA would issue its decision but received no concrete timeline from the agency. ER 20. RNA submitted a request pursuant to the Freedom of Information Act (FOIA) seeking information on the investigation, and EPA delayed responding to the FOIA request. ER 20-21. Finally, on February 20, 2007, more than three years after original Complaint of Retaliation was filed and more than eighteen months after the complaint was accepted for investigation, RNA filed a second civil action in District Court seeking declaratory and injunctive relief. CR 1.

On April 30, 2007, EPA finally issued an investigative report and decision letter on the Complaint of Retaliation. ER 196-200. In that letter, EPA found that RNA had made out a *prima facie* case of retaliation. ER 199. Despite these findings, OCR dismissed for complaint. *Id.* "While OCR found the timing of the City Attorney's investigation into concerns about RNA suspicious, OCR has concluded that the evidence did not demonstrate that it was more likely than not that RNA's filing of its February 2003 Title VI complaint 'actually motivated' the

City's January 12, 2004, decision to withdraw formal neighborhood association recognition of RNA." *Id.*[2]

EPA's delay in investigating the Complaint of Retaliation exacerbated the damage that had been caused to RNA by the initial retaliatory conduct. ER 13. EPA's delay provided an appearance of legitimacy to the City's conduct, further damaging RNA's reputation in the community and its ability to attract and retain volunteers and board members. Because of EPA's delay, critical factual evidence has gone stale, jeopardizing the successful investigation of RNA's complaint. *Id.*

A different outcome may have been reached if EPA had processed the complaint pursuant to the regulatory timelines. For instance, EPA found that "the investigation raised concerns about the City's previous compliance with the procedural requirements that must be implemented by all recipients and sub-recipients of EPA financial assistance. Specifically, it does not appear that the City had a grievance process that complies with EPA's nondiscrimination regulations." ER 200. EPA concluded by stating "if the City had a grievance process pursuant to EPA's implementing regulations, there may have been an opportunity for meaningful communication between the City and RNA." *Id.*

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[2] Although not an issue in the current cause of action, RNA agrees that the timing is "suspicious" but strongly disagrees that the City had other legitimate reasons to revoke recognition from RNA. Furthermore, EPA failed to interview many of the witnesses identified by RNA and selectively omitted important evidence from the investigative report.

EPA's findings underscore the harm to RNA resulting from EPA's illegal delay in this case. The implementing regulations require EPA to "resolve complaints informally wherever possible." 40 C.F.R. § 7.120(d)(2). EPA should have stepped in quickly as required by the rules, accepted the complaint within 20 days, and then tried to resolve the dispute informally. EPA's failure to provide a timely response to RNA's Complaint of Retaliation is no less significant than the City's failure to implement a proper grievance process. If EPA had taken quick action as required by the rules, the outcome may have been different and the dispute may have been resolved years ago without the need for two rounds of litigation and a full-blown investigation.

On the same day that EPA issued the investigative report, EPA once again moved to dismiss RNA's complaint as moot pursuant to Fed. R. Civ. Pro. 12(b)(1). CR 7. RNA then moved for a stay of the briefing schedule on the motion to dismiss, or, in the alternative, for a 45-day extension of time, to enable RNA to conduct discovery as to relevant jurisdictional facts implicated by EPA's motion to dismiss. CR 9. In an order dated May 9, 2007, the Court granted a stipulated stay of the briefing schedule to allow the parties an opportunity to brief whether RNA was entitled to discovery. CR 12.

RNA subsequently served EPA with a set of limited discovery requests on subject matter jurisdiction and mootness, seeking in part information on whether

EPA has demonstrated a pattern and practice of delay in processing Title VI complaints and what steps EPA had taken to correct the problem. On July 6, 2007, EPA filed a Motion for a Protective Order. CR 14. On August 1, 2007, the District Court issued an order granting in part and denying in part the Motion for Protective Order. ER 183-190. The Court allowed discovery as to EPA's "practices in handling complaints such as Rosemere's and how the EPA's claims handling practices have changed to prevent EPA from returning to its allegedly illegal action." ER 187.

RNA then completed discovery, including a deposition of Ms. Karen Higginbotham, Director of EPA's Office of Civil Rights. ER 100-120. On November 12, 2007, RNA filed an amended complaint, adding a claim for prospective relief to prevent EPA from repeating the wrongful conduct with respect to future complaints filed by RNA. ER 8-22.

On December 17, 2007, the District Court granted EPA's motion to dismiss. ER 2-7. In applying the voluntary cessation doctrine, the District Court disregarded the substantial weight of evidence the Court previously held was relevant, which demonstrated that: 1) EPA has a long and well-documented history of violating the timelines for processing Title VI complaints; and 2) the claims handling practices have not yet changed. Instead, the District Court held that "it cannot conclude that there is a likelihood that the alleged violation will recur with

respect to Rosemere." ER 7. In doing so, the District Court improperly discounted allegations of fact and evidence in the form of a declaration from one of RNA's officers that the organization intends to seek redress for ongoing discrimination pursuant to Title VI of the Civil Rights Act in the future. The District Court erred as a matter of law in dismissing RNA's claims for declaratory and prospective injunctive relief as moot.

C. EPA's Pattern and Practice of Illegal Delay in Administering the Title VI Program.

The delays experienced by RNA are part of a well-documented systemic failure on the part of EPA to properly administer Title VI of the Civil Rights Act in compliance with EPA's implementing regulations. EPA's malfeasance in processing Title VI complaints is a persistent problem that frustrates the ability of citizens to seek redress for civil rights violations. The systemic problems have existed since the inception of EPA's Title VI program, and they have continued unabated until the present day.

As early as 1996, the U.S. Commission on Human Rights (the Commission) reviewed EPA's Title VI program and noted both the lack of adequate staff resources and a "backlog" of citizen complaints that had not been processed in compliance with the required timelines. ER 29 (stating that "overall EPA does not have adequate staff to enforce Title VI"); 31 (finding that "EPA's overall complaint backlog for federally assisted programs, including Title VI complaints,

has grown over time"). In 2003, the Commission again reviewed EPA's program, and at that time EPA acknowledged its backlog of Title VI complaints and pledged to resolve it by the end of that summer. ER 39. The Commission found "agency officials had decided that the resolution of the backlog of complaints alleging violations of Title VI was an agency wide priority." *Id.* EPA also stated that it was "developing a post-award compliance review program" that would include procedures on "compliance and enforcement activities." ER 43.

Despite EPA's 2003 commitment to resolve the backlog, the problem continues unabated to this day and has only gotten worse. During her deposition, Ms. Karen Higginbotham, Director of EPA's Office of Civil Rights, identified the backlog of Title VI complaints within the agency and admitted that the backlog contributed to the delay in processing RNA's Complaint of Retaliation. ER 102.[3]

> Q. So how long has this backlog of Title VI complaints been an issue for the agency?
>
> A. The backlog has been an issue as far back as I can remember and that would probably be from about 1999 to present.

ER 103a.[4]

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[3] Page 27, lines 2-4. For references to the transcript of the Deposition of Ms. Higginbotham, citations have been provided in the footnotes to the page number and line number of the condensed transcript.

[4] Page 49, lines 15-19.

The record includes extensive quantitative evidence documenting the severity of the problem and the length of delays experienced by citizen groups, including RNA, who have filed complaints. During discovery, EPA provided RNA with a spreadsheet documenting all Title VI complaints that had been filed since 1993 and the dates on which EPA accepted or rejected those complaints and/or completed its investigation. ER 45-59; *see also* ER 116-118 (explaining how to interpret the spreadsheet of Title VI complaints).[5]

According to the August 27, 2007 version of the spreadsheet, which was the last version provided to RNA, EPA had a backlog of at least 27 Title VI complaints that had not been accepted or rejected within the 20-day timeframe allowed at 40 C.F.R. § 7.120(d)(1)(i). ER 45-49. Those complaints were filed with EPA between October, 2003 and July, 2007. *Id.*[6] In some cases, EPA was more than 1,300 days (more than three and half years) behind schedule in simply accepting or rejecting complaints for investigation. *Id.*

Furthermore, **EPA violated its regulatory timelines with respect to every single one of the twenty-four complaints filed in 2006 and 2007**. ER 45-46. The problem has only gotten worse over time, with some complaints languishing

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[5] Pg. 116, line 16 to pg. 119, line 6 and pg. 125, line 8 to pg. 129, line 18

[6] For instance, complaint 08R-03-R9 filed in October of 2003 had not been accepted or rejected for investigation at the time the last version of the Title VI spreadsheet was provided to RNA. ER 48.

for years and new complaints simply being tossed onto the stack and ignored with all the rest. EPA's claims handling practices have not improved.

EPA also has a backlog of 16 Title VI complaints that have been accepted for investigation but have not yet been resolved within their regulatory timeframes. *Id.* These complaints were filed between July, 1994 and September, 2005. *Id.*[7] In some cases, EPA was more than 4,750 days (more than thirteen years) behind schedule in issuing its preliminary report. *Id.* Ms. Higginbotham stated that there are approximately ten Title VI complaints still outstanding that were already pending when she started her current position as Director in 2002. ER 120.[8] The record also includes declarations from representatives of several citizen groups who currently have outstanding VI complaints and have experienced the same types of delays experienced by RNA in this case. ER 129-182. The wrongful conduct in this case is part of a long and well-documented pattern of illegal delay on the part of EPA, a pattern that continues to this day.

EPA admits that the pattern of illegal delay is caused, at least in part, by a lack of adequate staff resources. In 1996, the Commission identified a lack of staff resources as a primary cause of the backlog of complaints. ER 28-30. Ms.

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[7] For example, case number 01R-94-R5 was filed in July of 1994 and accepted for investigation in July of 1995, but EPA still has yet to issue a preliminary report or resolve the complaint. ER 58.

[8] Pg. 134, line 4-6.

Higginbotham also admitted that the level of staffing within OCR is contributing to the ongoing backlog and is still a "cause for concern." ER 104; 117.[9] She also stated that additional staff would help alleviate the existing backlog. ER 113-14.[10]

Furthermore, the delays experienced by RNA in this case were caused, at least in part, by the same lack of staff resources. After the initial case manager was dismissed for demonstrating a "lack of impartiality" towards RNA, EPA assigned a new case manager sometime in May of 2006. ER 192. Even after the new case manager was assigned, EPA took almost a year to issue the preliminary report and did so only after RNA filed a second cause of action. ER 196. Ms. Higginbotham admitted that the work load of the second case manager assigned to RNA's complaint contributed to the delay.

> Q. What was the cause of that new case manager's delay past 180 days?
>
> A. In part, because she already had an existing workload to manage and this was another significant case that took up a lot of time that had to be worked in with her existing workload.
>
> * * *
>
> Q. So it was solely the amount of time that she had to dedicate to the case that caused her to take more than 180 days?
>
> A. I believe so, yes.

ER 115.[11] The delays in this case result from the same key systemic problems that initially led to the agency-wide backlog of Title VI complaints. EPA has never

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[9] Pg. 52, lines 3-7; pg. 125, lines 2-7.

[10] Pg. 105, line 16 to pg. 106, line 19.

adequately administered the Title VI program by committing enough staff to respond to civil rights complaints in a timely fashion.

Moreover, EPA has not corrected the problems in the administration of the Title VI program or its claims handling practices. The wrongful conduct that led to RNA's complaint in this case is currently being repeated by EPA with respect to numerous citizen complaints filed all across the country. Ms. Higginbotham admitted that EPA is currently in violation of the timelines in the Part 7 regulations with respect to several pending Title VI complaints. ER 119.[12] The declarations offered by other citizen groups demonstrate that EPA is currently in violation of these same timelines with respect to numerous pending Title VI complaints that have languished within the agency for years. ER 129-182. Tellingly, EPA has not set a specific timeline for resolving the backlog of complaints, despite the fact that it told the Commission in 2003 that the backlog would be resolved by the end of that summer. ER 116[13]; *cf.* ER 39 (EPA stated to the Commission that the backlog would be resolved by the end of the summer of 2003). Finally, Ms. Higginbotham admitted that EPA may violate the timelines again in the future.

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[11] Pg. 110, line 9 to pg. 111, line 7.

[12] Pg. 130, line 16 to pg. 131, line 1

[13] Pg. 114, line 13.

Q. So Office of Civil Rights cannot assure us at this point that all new Title VI complaints will be processed in compliance with Title VI regulations?

MS. COHEN: Same objection. Go ahead.

THE WITNESS: No, I can't assure you.

ER 105.[14]

SUMMARY OF THE ARGUMENT

This case presents an egregious example of an administrative agency systemically failing to carry out its duties to investigate civil rights complaints filed by disadvantaged citizens. RNA filed the Complaint of Retaliation pursuant to Title VI of the Civil Rights Act on December 13, 2003, and EPA was required to have issued its preliminary findings within 200 days or by June 20, 2004. Instead, EPA's illegal delays twice forced RNA into court. After two rounds of litigation and years of stalling, EPA finally issued an investigative report on April 30, 2007, almost three years late. RNA seeks declaratory relief that EPA's action violated the applicable regulations and prospective relief prohibiting EPA from repeating the same illegal action with respect to future Title VI complaints filed by RNA.

EPA bears a "heavy burden" in demonstrating that RNA's action is moot, which it has not done in this case. EPA must demonstrate that it is "absolutely clear" that the illegal delays "could not reasonably be expected to recur." Over

[14] Pg. 56, lines 17-22.

many years, EPA has demonstrated a pattern and practice of failing to provide a timely response to Title VI complaints filed by citizen groups all across the country. The delays experienced by RNA are not an isolated instance, rather they result from the same problems in staffing and administration that caused EPA to miss the regulatory deadlines with respect to every single Title VI complaint filed in 2006 and 2007. EPA has not corrected the wrongful conduct and is, in fact, currently repeating this conduct with respect to dozens of other pending Title VI complaints.

The District Court erred as a matter of law in dismissing the case simply because RNA had not yet filed another Title VI complaint. RNA plead in its Amended Complaint that it intended to seek redress pursuant to Title VI of the Civil Rights Act in the future because of ongoing environmental problems in its neighborhood, and RNA also submitted a declaration from one of its officers stating the same. EPA, on the contrary, offered nothing to contradict this information. Nevertheless, the District Court dismissed the claims for declaratory and injunctive relief because RNA supposedly did not demonstrate the "likelihood" that it would file future Title VI complaints. In doing so, the District Court improperly shifted the burden of proof to RNA and required RNA to demonstrate far more than this Court has previously required pursuant to the voluntary cessation doctrine.

ARGUMENT

I. Standard of Review

Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *See Vu Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 n 2 (9th Cir. 2004); *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002); *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001). Mootness is also a question of law reviewed *de novo*. *See Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1133 (9th Cir. 2004); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1116 (9th Cir. 2003).

In resolving the motion, the Court should "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Outdoor Media Group Inc. v. City of Beaumont* 506 F.3d 895, 899-900 (9th Cir. 2007) (citing *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)).

II. Legal Background on Mootness and the Voluntary Cessation Doctrine

Mootness is fundamentally a question related to Article III of the United States Constitution, which grants federal courts jurisdiction where this is a "case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n 3 (1964). Under Article III, "voluntary cessation of the allegedly illegal conduct does not deprive the

tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Accordingly, it is "well-settled that 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. If it did, the court would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 528 U.S. 167, 189 (2000). "A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices." *W.T. Grant Co.*, 345 U.S. at 632 (internal citations omitted). The fact that a defendant could simply return to the old ways "together with a public interest in having the legality of the practice settled, militates against a mootness conclusion." *Id.* "The courts have rightly refused to grant defendants such a powerful weapon against" the enforcement of the law. *Id.*

The party moving for dismissal on mootness grounds bears a "**heavy burden.**" *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (citing Coral Construction Co. v. King County, 941 F.2d 910, 927-28 (9th Cir. 1991)) (emphasis added). The defendant must show that: 1) "'subsequent events have made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur;'" and 2) "'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Porter*, 496 F.3d at

1017 (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)); *see also Armster v. U.S. Dist Ct. for the Dist. of Alaska*, 806 F.2d 1347, 1357-58 (9th Cir. 1986). The Supreme Court has established "a powerful presumption favoring adjudication" in these circumstances. *Armster*, 706 F.2d at 1358.

Furthermore, the voluntary cessation doctrine applies equally in cases in which government entities are defendants. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (local school district as a defendant); *Porter*, 496 F.3d at 1017 (State of California as a defendant); *Buono v. Norton*, 371 F.3d 543, 545-46 (9th Cir. 2004) (Secretary of Interior as defendant).

III. RNA's Claims for Declaratory and Prospective Injunctive Relief are Not Moot.

In this case, the EPA has fallen far short of carrying its heavy burden of persuading the Court that the wrongful conduct could not reasonably be expected to recur. EPA demonstrated a pattern of illegal delay and twice processed RNA's Complaint of Retaliation only after RNA resorted to judicial action. In both instances, EPA took the legally required action as a means of avoiding judicial review and then sought to dismiss the case as moot. The fundamental underlying problems, however, still plague EPA's administration of the Title VI program. Inadequate staff and poor administration have perpetuated a situation in which EPA missed its deadline with respect to all twenty-seven Title VI complaints filed

in 2006-07. EPA's record of performance has only gotten worse since RNA field its Complaint of Retaliation.

Furthermore, the District Court erred as a matter of law in dismissing RNA's cause of action. Despite its previous ruling that RNA was entitled to discovery on EPA's claims handling practices, the District Court failed to consider any of the evidence RNA submitted that EPA has systematically failed to comply with its own regulations in administering the Title VI program and that EPA has not corrected the problems. Instead, the District Court placed the burden of proof on RNA to demonstrate that the recurrence of the offending conduct would again impact RNA in the future. In doing so, the Court erred in shifting the burden to RNA and improperly discounted uncontested evidence and well-plead allegations that RNA would file future Title VI complaints to address ongoing issue of discrimination and environmental degradation in its community.

A. EPA changed its conduct in response to the threat of judicial scrutiny.

There can be little doubt in this case that EPA has changed its conduct in response to litigation. "A change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy." *Armster*, 806 F.2d at 1357-58 (citing *W.T. Grant Co.*, 345 U.S. at 629).

In the first case, RNA waited from December of 2003 until July of 2005 before filing suit. ER 9. EPA missed its deadline to simply accept or deny the complaint for investigation by more than 18 months. On August 16, 2005, approximately six weeks after RNA filed suit, EPA voluntarily took the required action, albeit well past the required deadline, accepted the complaint for investigation, and moved to dismiss the case as moot. ER 9-10.

In the current case, EPA repeated the same pattern of conduct. RNA tried to work with EPA from August 16, 2005 until February 20, 2007, again waiting approximately 18 months for EPA to carry out its mandatory duty to investigate the Complaint of Retaliation. ER 10. On April 30, 2007, approximately 6 weeks after RNA filed suit, EPA voluntarily took the required action and issued preliminary findings and an investigative report. ER 192. On the same day, EPA moved to dismiss the case as moot. CR 8.

In both cases, EPA delayed for more than a year beyond the timelines and took action only after RNA filed suit. In both cases, EPA then moved for dismissal based on mootness. RNA's repeated requests for assistance from the EPA fell on deaf ears until RNA was forced to file suit to obtain the legally required agency services. Only once RNA had filed suit did EPA respond, albeit many months and years beyond the regulatory timelines. The timing of EPA's actions creates a

strong presumption that the agency voluntarily complied specifically for the purpose of avoiding judicial review and having the cases dismissed as moot.

Furthermore, EPA has offered no other explanation for the timing and sequencing of its voluntary compliance with the complaint investigation procedures. Ms. Higginbotham admitted that a lack of staff resources caused the delay in responding to RNA's complaint as well as a backlog of dozens of other Title VI complaints. ER 115. The spreadsheet provided by EPA documented that at least 43 other complaints were outstanding, many of them for a much longer time than RNA's. ER 45-49. EPA offers no explanation as to why it prioritized taking action on RNA's complaint as compared to all other complaints that had been pending at the agency for far longer. The only plausible explanation supported by the facts is that the agency prioritized responding to RNA's complaint because RNA had filed suit.

B. EPA has not carried its heavy burden of demonstrating that the wrongful conduct cannot reasonably be expected to recur.

EPA asserted during discovery and argued below that it had changed its claims handling practices and had corrected the problems in the administration of the Title VI program, but the facts demonstrate otherwise. EPA has not carried its heavy burden in this case, and the illegal delays continue to frustrate citizens' ability to seek redress for civil rights violations.

In response to RNA's discovery requests, EPA stated that it had "taken several steps to address the problems that resulted in the delays in processing RNA's Complaint of Retaliation." ER 65. Specifically, EPA claimed that it had: 1) increased its staff size, 2) trained its employees to process nondiscrimination complaints, and 3) implemented new Standard Operating Procedures ("SOPs") on processing complaints. ER 65-66; *see also* ER 105 (Ms. Higginbotham describing the steps that have been taken to resolve the backlog).[15] However, none of these alleged initiatives have resolved the backlog of Title VI complaints or ensured future compliance with the regulations.

1. EPA's increase in staff size has not resolved the backlog.

EPA's increase in staff size has not corrected the backlog problem. All of the staff increases occurred while RNA's complaint was pending at EPA, and those staff changes failed to ensure that RNA's complaint was processed in a timely fashion. Despite the additional staff, EPA still delayed investigating RNA's complaint until after RNA filed suit.

RNA's Complaint of Retaliation was filed on December 13, 2003. ER 9. Starting in fiscal-year (FY) 2003, EPA had four full-time equivalent (FTE) staff responsible for processing Title VI complaints. ER 82. In March of 2004, OCR

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[15] Pg. 57, lines 5-18.

increased its staff size from four to seven. ER 103.[16] Notwithstanding the new hires, it took OCR until August of 2005 to accept the Complaint of Retaliation for investigation. ER 9. In other words, even after three new hires EPA failed to meet its required deadline and voluntarily complied only after RNA filed suit. The three new hires from FY 2004 did not resolve the outstanding backlog or ensure that future complaints were processed in compliance with the regulatory timelines.

By FY 2006, staff had increased to eight FTE, and EPA had hired one new case manager. ER 82. Again, despite the new staff, EPA did not issue the investigative report in RNA's case until April 30, 2007, more than 20 months after accepting the complaint for investigation and well past the 180-day deadline in 40 C.F.R. § 7.115(c). ER 192. The one hire between FY 2004 and FY 2007 did not prevent EPA from again violating the regulatory timelines, and Ms. Higginbotham admitted that the case manager assigned to RNA's file had too little time to properly process RNA's complaint.

In FY 2008, OCR added another staff person, bringing the total to nine FTE. ER 82. As of August of 2007, the last time that EPA provided RNA with information in response to the discovery requests, EPA had not processed a single complaint from 2006 or 2007 in compliance with the regulatory timelines. ER 45-46. The backlog still exists to this day, and the one hire in FY 2008 has not

[16] Pg. 40, line 22 to pg. 41, line 2.

resolved the problem. As Ms. Higginbotham admitted in her deposition, the level of staffing is still a "cause for concern." ER 104.[17]

2. Staff training has not corrected the problems in processing Title VI complaints.

EPA claims that OCR staff have undergone training in 2004 and 2006 "to ensure * * * external compliance staff, are adequately trained in federal nondiscrimination statutes, regulations, and guidance." ER 81; *see also* ER 105.[18] To the contrary, the trainings have also been ineffective at correcting the problems that led to the long-standing backlog.

The trainings in 2004 could not have corrected the problem, because EPA failed to meet the deadlines in RNA's case well past 2004. EPA stated in its discovery responses that the trainings were also provided to the "newer hires in 2006." ER 81. Again, however, EPA failed to provide a timely response to RNA's complaint well into 2007, and there are still dozens of outstanding Title VI complaints, including several from 2007 that were not processed in compliance with the timelines.

Furthermore, the evidence suggests that the trainings did not instruct EPA staff as to EPA's unique timelines for conducting and completing an investigation.

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[17] Pg. 52, lines 6-7.

[18] Pg. 57, lines 5-10.

The trainings were given by the Department of Justice ("DOJ"). ER 110.[19] Ms. Higginbotham stated that DOJ would have distributed its investigation procedure manual at those trainings. *Id.*[20] Each agency has different Title VI procedures and regulations, but DOJ's manual is used for all agencies. As such, the manual does not include any information on EPA's specific timelines for conducting Title VI investigations as set forth in the Part 7 regulations. ER 111 (Ms. Higginbotham admitting that the DOJ manual does not speak to EPA's timelines).[21]

3. EPA's Standard Operating Procedures have not corrected the problems in processing Title VI complaints.

EPA also stated in its discovery responses that it had developed SOPs that corrected the backlog problem. ER 66. In fact, during discovery RNA came to learn that EPA had not yet implemented the SOPs and that they were still in the process of being developed. Furthermore, and perhaps more importantly, EPA was working only on SOPs for "Pre-Investigation" of discrimination complaints. The SOPs referenced by the agency do not address in any way the investigation of complaints once they have been accepted by the agency. The SOPs, therefore,

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[19] Pg. 76, lines 206.

[20] Pg. 77, lines 5-13.

[21] Pg. 80, lines 15-16. Ms. Higginbotham also admitted that EPA does not rely on the DOJ manual to instruct its staff about the regulatory timelines. ER 112. (pg. 82, lines 1-4). She also stated that there were no other written policies or procedures that EPA relies upon to instruct its staff as to those timelines. *Id.* (pg. 82, lines 5-10).

even if they had been completed, would not have addressed the timeline at issue in this case, which was the requirement to issue a preliminary report within 180 days of accepting the complaint for investigation.

In its first discovery response, EPA stated that it "**had developed** Standard Operating Procedures (SOPs) to ensure processes are followed in a timely fashion" and that those SOPs "include internal timeframes for **each step throughout the complaint or compliance review**." *Id.* (emphasis added).

In its second discovery request, RNA asked EPA to produce any policies or procedures "which have been in place within the past thirty-six months." ER 84. EPA stated at that time that it "**is working to develop** internal [SOPs]." ER 81 (emphasis added). Despite the fact that it previously represented that it "has developed" the SOPs, EPA did not produce that document in response to the second discovery request. ER 66.

When questioned about the discrepancy and EPA's failure to produce the SOPs, Ms. Higginbotham stated that the SOPs were in draft form but that they had been distributed to the staff before they were finalized. ER 107.[22] When pressed, she confirmed that they "are being used by the entire Title [VI] team." ER 110.[23] She also stated that she did not include the SOPs in response to the second

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[22] Pg. 62, line 14 to pg. 63, line 5.

[23] Pg. 75, lines 2-7.

discovery request, because "I do not consider procedures or policies in place until they are finalized and given approval from me." ER 107.[24] At that time, she again refused to produce a copy of the SOPs for review by RNA and the Court. ER 108.[25]

Following the deposition, counsel for RNA requested that EPA provide a copy of the SOPs to avoid a motion to compel. ER 121. Ms. Higginbotham subsequently provided a declaration explaining that she gave inaccurate information during her deposition and that the SOPs were not in use by her staff. ER 122-24. She finally admitted in that declaration that the SOPs are "**not helping the External Compliance team to meet the regulatory timelines found in Part 7.**" ER 122 (emphasis added). She clarified that EPA had developed a draft set of "*Pre-Investigation*" SOPs and provided a copy of the draft document. *Id.*

The draft SOPs provided by EPA **do not address the Title VI complaint investigation process**. The draft SOPs provide guidance on "**Pre-Investigation** of Discrimination Complaints" and do not contain any mention whatsoever of the 180-day timeline for issuing preliminary findings after the investigation has been conducted. ER 88 (emphasis added). In her declaration, Ms. Higginbotham states that EPA has not yet developed "**Investigation** SOPs," which will "provide a step-

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[24] Pg. 65, lines 17-19.

[25] Pg. 68, line 12 to pg. 74, line 12.

by-step procedural framework for the investigation of such complaints." ER 122 (emphasis added). Ms. Higginbotham provided no timeline on when the Investigation SOPs would be completed.

In sum, the SOPs provide no support for EPA's argument that it has resolved the backlog of Title VI complaints. The Pre-Investigation SOPs have not been finalized, and they included no mention of the timelines for completing the investigation. In her final deposition, Ms. Higginbotham admitted that they are not helping EPA's staff to meet the timelines in the Part 7 regulations. The backlog of Title VI complaints continue to this day.

C. The District Court Erred as a Matter of Law by Applying the Wrong Legal Standard for the Voluntary Cessation Doctrine.

The District Court disregarded all of the factual evidence regarding the systemic problems in EPA's administration of the Title VI program and claims handling practices, facts which speak directly to the central issue of whether EPA carried its burden of proof to demonstrate that the wrongful conduct could not reasonably be expected to recur. In a briefly worded opinion, the Court indicated simply that "Rosemere cannot persuade the Court that the recurrence of the offending conduct would impact the same parties." ER 6 (citing *Luckie v. E.P.A.*, 752 F.2d 454, 458-59 (9th Cir. 1985)). Because RNA had not yet filed another Title VI complaint, the Court reasoned that it "cannot conclude that there is a likelihood that the alleged violation will recur with respect to Rosemere." *Id.* In

doing so, the Court improperly disregarded well-plead allegations and an uncontested declaration from one of RNA's officers that the organization intends to avail itself of the Title VI process in the future to address ongoing discriminatory conduct and environmental degradation. This Court has never required more from a plaintiff than RNA submitted in this case to defeat a claim of mootness based on voluntary cessation of the wrongful conduct. *See, e.g.*, *Porter*, 496 F.3d at 1017-18; *Armster*, 806 F.2d at 1357-58; *cf. Luckie*, 752 F.2d at 458-59.

1. The record demonstrates that the wrongful conduct could reasonably be expected to recur with respect to RNA and that the Court can still grant effective relief.

Despite the fact that EPA belatedly complied with its legal obligations in this case, the Court can still provide effective relief in the form of a declaratory judgment and a prospective injunction. RNA and its members continue to struggle with pollution and environmental degradation in their community and intend to seek redress through Title VI of the Civil Rights Act in the future. ER 13-14; 127. The District Court erred as a matter of law in holding that the conduct could not reasonably be expected to recur again simply because RNA had not yet filed a new Title VI complaint.

Part of RNA's mission is to address discrimination and improve upon the protection of its local natural resources. ER 11-12. In order to fulfill that mission, RNA has worked for the past several years in an effort to address alleged

discriminatory conduct and pollution through the Title VI program. RNA filed its first Title VI complaint with EPA in 2003. ER 9. EPA initially rejected that complaint because RNA did not demonstrate a funding nexus between EPA and the City. After RNA provided evidence of a funding nexus, EPA never investigated the complaint. ER 13-14. The alleged discrimination in the provision of municipal services such as sewer connections and stormwater controls continues to this day. ER 13.

As set forth in RNA's allegations and the declaration of Mr. Bertish, RNA intends to file future Title VI complaints in an effort to rectify the ongoing discrimination in the provision of municipal services. ER 13-14; ER 127. RNA has not yet done so, because it has dedicated its limited organizational resources to addressing EPA's illegal delays in resolving the Complaint of Retaliation under Title VI of the Civil Rights Act over the past four years. ER 127-28.

The fact that RNA has not yet filed another Title VI complaint does not in any way contradict its well-plead allegations and Mr. Bertish's declaration that it intends to do so in the future. If anything, it indicates simply that RNA, as a small community group, can take on only one issue at a time with its limited resources. The systemic delays in EPA's program fundamentally frustrate the public's ability to exercise rights pursuant to Title VI. RNA has reasonably chosen to seek judicial redress for those past violations in the form of declaratory relief that EPA

acted contrary to its own implementing regulations and injunctive relief requiring EPA to timely process future complaints filed by RNA.

RNA has decided first to address those past wrongs to ensure that they do not recur before again seeking redress under Title VI of the Civil Rights Act. Without a declaration that EPA acted contrary to law or an injunction prohibiting similar conduct in the future, RNA strongly believes that EPA would simply continue to ignore the mandatory deadlines as it has done with every other Title VI complaint filed by citizens in 2006-07. RNA does not have the resources to keep pursuing EPA in the courts in order to gain EPA's compliance with the regulations and in order to seek review and possible relief pursuant to Title VI of the Civil Rights Act. ER 127. Without the requested relief, EPA's pattern of delay and litigation tactics will simply resume if RNA takes future steps to address the problems in its neighborhood through Title VI of the Civil Rights Act.

This case is not moot, because the District Court can still grant RNA effective relief. "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W.T. Grant Co.*, 345 U.S. at 633 (citations omitted); *see also Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). "The purpose of an injunction is to prevent future violations, *Swift & Co. v United States*, 276 U.S. 311 (1928), and, of course, it can be utilized even without a showing of past wrongs." *W.T. Grant Co.*, 345 U.S. at 633. Here, RNA

intends to file future Title VI claims to address ongoing discrimination, and the Court can grant effective relief by ordering EPA to process those future complaints in a timely manner.

Furthermore, even if a request for an injunction is rendered moot during litigation, and it has not been rendered moot in this case, "if a declaratory judgment would nevertheless provide effective relief the action is not moot." *See Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006) (citing *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002)). A "declaratory judgment could help to remedy the effects of the agency's * * * violations and to ensure that similar violations would not occur in the future." *Id.* "In deciding such a case the court is not merely propounding on hypothetical questions of law, but is resolving a dispute which has present and future consequences." *Id.* (quoting *Northwest Envt'l Defense Ctr. v. Gordon*, 849 F.2d 1241, 1245). Here, a declaratory judgment, even in the absence of injunctive relief, would clarify for the first time that EPA's delays in responding to Title VI complaints are illegal and contrary to the applicable regulations. By doing so, a declaratory judgment would help to prevent future violations and would hold EPA accountable for its systemic pattern and practice of illegal delay.

2. This Court has never required more than RNA has offered to defeat a motion to dismiss based on the voluntary cessation doctrine.

The opinion of the District Court offers little in the way of explanation as to how the Court reached its conclusions or what legal standard it applied. The District Court did not discuss any of the evidence regarding EPA's claims handling practices or EPA's administration of the Title VI program. Instead, the Court briefly noted that RNA had not filed a Title VI complaint since 2005 and then stated that it "cannot conclude that there is a likelihood that the alleged conduct will recur with respect to Rosemere." ER 7. In discounting the uncontested allegations and evidence submitted by RNA that it intends to seek redress through the Title VI program in the future, the District Court went far beyond any other cases in this Circuit in placing a heavy evidentiary burden on the plaintiff.

The case law is clear that the "heavy burden" rests upon EPA to demonstrate that "subsequent events have made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" in the future. *Porter*, 496 F.3d at 1017. In this case, EPA takes the position that RNA's Complaint of Retaliation has been resolved, and therefore the alleged wrongful conduct will not recur again. In order to establish mootness, however, EPA must carry the heavy burden of showing that it is "absolutely clear" that RNA "could not reasonably be expected" to seek future EPA assistance for civil rights violations pursuant to Title VI of the

Civil Rights Act. EPA has not and cannot carry this burden based upon RNA's demonstrated history of advocacy, the purpose and mission of the organization, and the declaration and well-plead allegations that RNA intends to continue its important work in this area.

A review of previous Ninth Circuit cases demonstrates the heavy burden that EPA must bear in this regard. In *Porter*, this Court addressed a case in which the California Secretary of State shut down a vote swapping web site set up during the 2000 Presidential election, and plaintiffs alleged that their First Amendment rights had been violated. 496 F.3d at 1017. After the election and while the case was pending, the California Secretary of State asked for legislative clarification and stated in a letter that he would not seek to prevent operation of similar web sites in the future until receiving such clarification. *Id.* at 1013.

This Court rejected arguments that the Secretary of State's letter mooted the case. The Court held that the letter failed to carry the "heavy burden" of demonstrating that it is "'absolutely clear' that California will not threaten to prosecute the owners * * * **if they create vote-swapping websites in the future.**" *Id.* at 1017 (emphasis added). The Court included a footnote commenting that plaintiffs "have stated that they will set up vote-swapping websites analogous to" the previous sites "if they will not again be threatened with prosecution for doing so." *Id.* at n 6. Based on the future intent of the plaintiffs, the Court therefore

reversed the "district court's ruling that Appellants' claims for prospective relief were mooted." *Id.* at 1018.

This case is closely analogous to the factual situation addressed by the Court in *Porter*. Here, RNA also seeks prospective relief to prevent similar conduct from recurring in the future. ER 22. RNA also submitted a declaration and plead in its complaint that it intended to continue its advocacy work under Title VI of the Civil Rights Act. The intent of RNA to engage in similar conduct establishes, just as it did in *Porter*, that the request for prospective relief is not moot.

The District Court appears to have relied upon a single case in ruling that Appellants failed to carry the burden the Court impliedly placed upon them. ER 7 (citing *Luckie v. EPA*, 752 F2d at 458-59). *Luckie* is easily distinguishable and demonstrates how the appropriate burden of proof should operate in voluntary cessation cases.

In *Luckie*, residents who lived on a toxic dump sued EPA for failing to address contamination. 752 F.2d at 455. After the citizens filed suit, EPA undertook "a comprehensive program" that included "permanent removal and relocation of all Residents, purchase of their property at full value, and on-site destruction of their mobile homes." *Id.* The Court dismissed the case as moot, holding that there was no reasonable expectation of recurrence beacuse "Residents would have to be relocated atop another asbestos dump, or similar site, and again

be subject to EPA's regulatory and enforcement scheme." *Id.* at 458. The Court also noted that the residents had received full value for their property, which "completely and irrevocably" eradicated the effects of EPA's violations. *Id.* at 459.[26]

This case is easily distinguishable from *Luckie*. There was no "reasonable expectation of recurrence" in *Luckie* because there was no reason to believe that the plaintiffs would again end up living atop of a toxic dump. Therefore, the court had no basis to determine that the plaintiffs would seek the same type of assistance from EPA in the future. EPA carried its heavy burden of proof by demonstrating that it had relocated the residents and purchased their property.

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[26] In *dicta*, the Court stated in a footnote that when government actions are involved "'the mere probability of recurrence must be coupled with a certainty that the impact will fall on the same objecting litigants.'" *Id.* at n 7 (quoting *State Highway Comm'n of Missouri v Volpe*, 479 F.2d 1099, 1106 (8th Cir. 1973)). This standard has never been repeated by this Court since that time and directly conflicts with the applicable standard, which requires only a reasonable expectation of the possibility of recurrence. *Porter*, 496 F.3d at 1017.

Furthermore, the footnote in *Luckie* was supported by citation to *Halvonik v. Reagan*, 457 F.2d 311 (9th Cir. 1972). In *Halvonik*, the Ninth Circuit stated that where "the allegedly unlawful conduct has terminated, the party seeking a determination on the merits must establish that the case nevertheless has not been rendered moot." *Id.* at 313. The Court stated in a footnote that the plaintiff must also show that "recurrence would precipitate a dispute between the same parties." *Id.* at 313 n 3. The Ninth Circuit's holding in *Halvonik* was based upon an outdate rule on the burden of proof. Since that time, the Supreme Court has clarified that the "heavy burden" of demonstrating that "the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness" and not with the party requesting a determination on the merits. *Laidlaw*, 528 U.S. at 189.

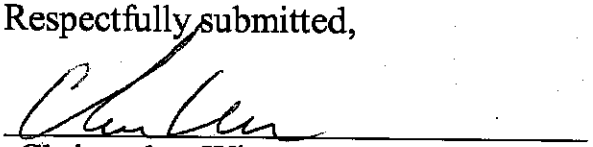
Here, however, a reasonable possibility exists that RNA will again request similar assistance from EPA in the future. Just as in *Porter*, RNA intends to engage in the same advocacy activities in the future that gave rise to the wrongful conduct on behalf of the government defendant. The underlying discrimination in the provision of sewer and stormwater services continues to this day. RNA continues to work to improve the conditions of its neighborhood and has expressed an intent to seek similar assistance from EPA in the future to address these problems.

Whereas the residents in *Luckie* had been moved from the toxic dump by EPA, the residents in Rosemere continue to struggle with the same problems that motivated them to ask for assistance from EPA in the first instance. EPA originally ignored those requests for assistance and has done nothing but stall and delay since that time. As opposed to the situation in *Luckie*, EPA has never taken any action to address the underlying environmental conditions. Pursuant to the voluntary cessation doctrine, RNA's claims for declaratory and prospective injunctive relief are not moot. "The courts have rightly refused to grant defendants such a powerful weapon against" the enforcement of the law. *W.T. Grant Co.*, 345 U.S. at 632.

CONCLUSION

Appellant Rosemere Neighborhood Association respectfully requests that the Court reverse and remand the decision of the District Court dismissing Appellants' First Amended Complaint as moot.

Respectfully submitted,



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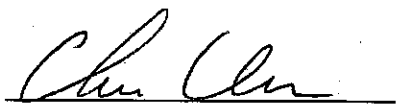
April 29, 2008

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R.APP.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed.R.App.P 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief of Plaintiff-Appellant Rosemere Neighborhood Association is proportionally spaced, has a typeface of 14 points, and contains 9,774 words.

Dated this 29th day of April, 2008.



Christopher Winter

Attorney for Plaintiff-Appellant Rosemere Neighborhood Association

STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, Plaintiff-Appellant Rosemere Neighborhood Association is not aware of any related cases pending in this Court.

PROOF OF SERVICE

I, Megan Hooker, certify that on April 29, 2008, an original and fifteen (15) copies of the OPENING BRIEF OF APPELLANT ROSMERE NEIGHBORHOOD ASSOCIATION was sent by first-class mail, postage prepaid, to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California, 94119-3939. Two (2) copies of the OPENING BRIEF OF APPELLANT ROSEMERE NEIGHBORHOOD ASSOCIATION were sent by first-class mail, postage prepaid, to:

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