U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

January 14, 2014

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Honorable Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *United Spinal Association v. Board of Elections in the City of New York*, 12-4412

Dear Ms. Wolfe:

This Office represents the United States as amicus curiae in support of plaintiffs-appellees United Spinal Association and Disabled in Action (collectively, "United Spinal") in the above-named appeal. We respectfully submit this supplemental brief, pursuant to this Court's order dated December 17, 2013, to address defendants-appellants' objections to the remedial order entered by the district court on October 18, 2012 (the "Remedial Order"), as well as "the scope of a district court's authority, in ordering remedies, to oversee the functioning of a municipality on an ongoing basis."

As set forth below, the district court has broad discretionary authority to enter appropriate equitable relief. This Court should reject the challenges to the Remedial Order now asserted by defendants-appellants the Board of Elections of the City of New York and its President (collectively, the "BOE"), both because the BOE has forfeited the issue by failing to raise it in its initial brief to this Court, and because the district court acted well within its discretion. For those

reasons, and for the reasons stated in the United States' amicus curiae brief filed on August 14, 2013, this Court should affirm the Remedial Order.

Argument

A. The BOE Waived Any Challenge to the Specific Relief Entered by the District Court

To begin with, the BOE has waived any challenge to the Remedial Order's substantive provisions, in two respects. First, the BOE did not raise before the district court any of the arguments it raised in its supplemental brief to this Court concerning certain substantive provisions of the Remedial Order. *See Virgilio v. City of New York*, 407 F.3d 105, 118 (2d Cir. 2005).[1] Second, in its opening brief in this appeal, the BOE did not challenge the propriety of any specific provision in the Remedial Order; instead, the BOE argued only that the district court was required to allow the BOE to formulate its own remedial plan (despite the fact that the BOE failed to take advantage of multiple opportunities to do so). (Brief for Defendants-Appellants ("BOE Br.") 41-43). It is "reasonable to hold appellate counsel to a standard that obliges a lawyer to include his most cogent arguments in his opening brief, upon pain of otherwise finding them waived"—a standard that "promotes the orderly briefing and consideration of appeals" and is required by Federal Rule of Appellate Procedure 28(a)(8). *McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005).

Nor is this a situation where the Court should exercise its discretion to consider a waived issue "to avoid a manifest injustice or where the argument presents a question of law and there is

[1] At an October 15, 2012, conference before the district court, the BOE complained that the proposed Remedial Order required the hiring of additional poll workers to serve as poll-site coordinators. (Supplemental Appendix ("SA") 137-38). The proposed Order was amended to address this concern by expressly providing that the BOE need not hire additional poll workers to satisfy this provision, and the BOE did not object to the new proposal on this ground. (Special Appendix ("SPA") 36). Therefore, the district court entered the Order as amended.

no need for additional fact-finding." *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004). To the contrary, this case demonstrates the wisdom of the waiver rule, as consideration of the issue would cause injustice to United Spinal and the voters with disabilities whom it represents. In its supplemental brief, the BOE asserts numerous fact-specific objections to the Remedial Order (particularly regarding certain unspecified burdens and expenses)—but cites exactly nothing in the record (or any other evidence), presumably because no record exists due to the BOE's failure to raise these issues earlier. In essence, the BOE asks this Court to reverse a remedial order based on nothing more than a lawyer's waived and unsupported allegations of harm. This Court should decline to do so.

B. The Remedial Order Imposes Appropriate Equitable Relief for United Spinal

Nor should the Court reverse on the merits. The district court had broad discretion to order equitable remedies for the BOE's violations of federal civil rights law, and the Remedial Order came nowhere close to the boundaries of that authority.

1. The Courts' Equitable Power to Remedy a Violation of Federal Law Is Broad

It has been a longstanding rule that " 'where legal rights are invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' " *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (alteration omitted)); *accord Miener v. Missouri*, 673 F.2d 969, 977 (8th Cir. 1982) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies.") (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)). "[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71.

Congress did not express any intent to limit the remedies available under Title II of the Americans with Disabilities Act (the "ADA") or section 504 of the Rehabilitation Act. To the contrary, and as set forth in the government's amicus brief, Congress intended the " 'full panoply of remedies' " to be available. (Brief for United States ("U.S. Br.") 29) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 289 n.18 (2d Cir. 2003)).

The BOE acknowledges that a district court has "broad equitable remedial powers" that are "committed to [its] informed discretion," even "to oversee the functioning of a municipality." (Supplemental Brief for Defendants-Appellants ("BOE Supp. Br.") 2-3). That concession is well advised, as it is plainly established that even with respect to state and local governments, "the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see Ass'n of Surrogates v. New York*, 966 F.2d 75, 79 (2d Cir. 1992) ("[F]ederal courts have broad discretion in fashioning equitable remedies for . . . constitutional violations."); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1542 (2d Cir. 1996) ("broad injunctive relief is justified in fashioning remedies for violations of [federal civil rights statute]"). District courts accordingly have wide latitude to fashion comprehensive relief that addresses "each element contributing to the violation" at issue. *Hutto v. Finney*, 437 U.S. 678, 687 & n.9 (1978). Moreover, "[t]he standard for reviewing the scope and type of injunctive relief issued by a district court is whether the relief amounts to an abuse of the court's equitable remedial discretion." *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988); *accord EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99 (2d Cir. 2012).

A district court's equitable discretion is not without limits. Injunctive relief must be "tai-lor[ed]" to the specific violation at issue, although the district court need not choose "the least restrictive means" of providing relief, *United States v. Yonkers Board of Educ.*, 837 F.2d 1181,

1236 (2d Cir. 1987) (quotation marks omitted), and may exercise its equitable powers to reflect concerns of "practical flexibility," *Milliken v. Bradley*, 433 U.S. 267, 282, 288 (1977) (quotation marks omitted). The court must also be mindful of federalism concerns and should avoid "remedies that intrude unnecessarily on a state's governance of its own affairs." *Ass'n of Surrogates*, 966 F.2d at 79; *accord Knox v. Salinas*, 193 F.3d 123, 129-30 (2d Cir. 1999). With due respect for those limits, however, district courts retain broad authority to correct governmental entities' unlawful conduct by entering equitable remedies regarding their administration of public programs and services. *See Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding injunctive relief affecting state's administration of prisons); *Swann*, 402 U.S. at 12; *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1068 (4th Cir. 1982) ("[O]nce a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, a district court has broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs.").[2]

2. The District Court Did Not Abuse Its Discretion in Entering the Remedial Order

The Remedial Order in this case comes nowhere near the bounds of this broad power. To the contrary, on its face it imposes reasonable conditions, closely related to the violations of the ADA and Rehabilitation Act committed by the BOE.

First, the Remedial Order requires the BOE to designate an existing poll worker at each polling site as the ADA coordinator responsible for monitoring and documenting accessibility

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[2] The BOE did raise in its opening brief the issue of whether the district court was obliged to allow the BOE "a reasonable opportunity to remedy" its unlawful conduct by crafting a remedial plan. *Schwartz v. Dolan*, 86 F.3d 315, 319 (2d Cir. 1996). But as explained in the government's amicus brief, the BOE had three such opportunities and failed to take advantage of them. (U.S. Br. 27-28); *see Swann*, 402 U.S. at 24-25 ("total failure" of municipal authority to come forward with plan, despite urging of district court on "at least three occasions," meant district court "was obliged" to fashion its own remedy). In its latest brief, the BOE makes no effort to argue that its opportunities to devise a plan were insufficient, or otherwise to refute this point.

complaints received at that site. (SPA 35-37). This provision is a reasonable remedy for the BOE's ongoing failure to comply with a regulation requiring a public entity to have an employee "to coordinate its efforts to comply with and carry out its responsibilities . . . including any investigation of any complaint communicated to it alleging its noncompliance" with the ADA. 28 C.F.R. § 35.107(a).[3] Moreover, before the district court entered the Remedial Order, the BOE had designated a poll-site coordinator at each polling site to report accessibility complaints and monitor accessibility issues. (SA 146-48). Thus, the duties assigned to the on-site ADA coordinators under the Remedial Order are akin to the duties that the BOE had already assigned to its poll-site coordinators.

Second, the BOE must contract with a third-party expert to conduct accessibility surveys of polling sites. (SPA 40). The expert's role is limited to issuing recommendations noting whether and how a polling site can be modified to be accessible on election days. (SPA 41-42). For polling sites at non-public locations that cannot be modified temporarily, the BOE must recommend a site to which the polling place can be relocated. (SPA 42-43). If the BOE opposes the expert's recommendations, it may confer with plaintiffs and the expert regarding the dispute; the district court becomes involved only if the parties are unable to resolve the issue. (SPA 44-45).

Significantly, the Remedial Order does not contemplate that the third-party expert will survey polling sites indefinitely. The BOE's obligation to implement the expert's recommendations (subject to the district court's consideration of the BOE's objections) persists only during the four-year term of the Remedial Order, through December 31, 2016. (SPA 44, 46). The

[3] In its opening brief, the BOE admitted that it "does not have an ADA coordinator or someone designated as having primary responsibility for ensuring compliance with the ADA, as 28 C.F.R. 35.107 requires . . . ." (BOE Br. 12).

Remedial Order provides that the expert is to train BOE employees, who will assume responsibility for evaluating the accessibility of polling sites going forward. (SPA 45-46).

Third, the Remedial Order requires the BOE's Assembly District Monitors ("AD Monitors"), who are responsible for reviewing the accessibility of polling places, to visit every poll site at least twice each election day to assess its accessibility. (SPA 38-40). As the BOE admitted in its opening brief, AD Monitors were "expected to visit and inspect each poll site at least twice during Election Day" even before the Remedial Order was entered. (BOE Br. 14). Thus, the Remedial Order simply required AD Monitors to perform the duties that the BOE previously imposed upon them. *See Eng*, 849 F.2d at 83 (upholding equitable relief that orders state defendants to implement procedures that defendants have voluntarily implemented).

The BOE concludes its supplemental brief with the assertion that the district court will likely end up "running the [BOE] in perpetuity." (BOE Supp. Br. 9). But as the above recitation makes clear, that conclusory and unsupported allegation is doubly wrong. The Remedial Order in no way puts the district court in the position of "running" the BOE, as the Order is limited to addressing solely one aspect of the BOE's function, that of ensuring accessibility. And even within that narrow scope, the role of the district court is confined to resolving possible disputes. In any event, the term of the Remedial Order is limited to four years. (SPA 46). Although it is true that, at least in some contexts, this Court has cautioned against remedial orders that "assum[e] control of the entire system in which the offensive condition exists and prescrib[e] a new system deemed to meet constitutional requirements," *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986), the Remedial Order does nothing of the kind—the district court takes control of nothing, and simply requires the BOE to work with its existing employees and a single third-party consultant to find ways to comply with the law. Far more intrusive remedies have been

repeatedly approved by the Supreme Court and other federal courts. *See Plata*, 131 S. Ct. at 1944-47 (affirming order imposing limit on prison population as remedy for Eighth Amendment violations arising out of inadequate medical and mental health care provided to prisoners); *United States v. City of New York*, 717 F.3d 72, 97 (2d Cir. 2013) (affirming injunction that ordered city to not only end challenged hiring practices, but also appoint monitor to oversee its "progress toward ending discrimination," develop "policies to assure compliance with anti-discrimination requirements," and undertake "comprehensive review of the entire process of selecting entry-level firefighters").[4]

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For all those reasons, the United States respectfully requests that this Court affirm the Remedial Order.

Respectfully submitted,

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[4] To the extent the Remedial Order is proved unworkable by future events, the BOE may move under Fed. R. Civ. P. 60(b) to modify it. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).