

December 3, 2018

VIA ECF

The Honorable George J. Hazel
United States District Court
District of Maryland
6500 Cherrywood Lane
Greenbelt, MD 20770

**Re: Plaintiffs' Reply in Support of Letter Brief Requesting Reconsideration of Order, ECF No. 81, Denying Plaintiff's Motion for Discovery, ECF No. 70
*La Unión del Pueblo Entero, et al., v. Ross, et al., No. 18-01570***

Dear Judge Hazel,

Plaintiffs submit this letter brief in support of their request that the Court reconsider its order, ECF No. 81, denying Plaintiffs' request to depose Kansas Secretary of State Kris Kobach, ECF No. 70. The Court has the power to reconsider and modify its interlocutory judgments at any time prior to final judgment where: "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003). "Clear error or manifest injustice occurs where a court has patently misunderstood a party . . . or has made an error not of reasoning but of apprehension . . ." *Houston v. Kirkland*, No. GJH-15-2507, 2017 WL 128498, at *1 (D. Md. Jan. 12, 2017) (Hazel, J.) (citations and internal quotation marks omitted). To the extent the Court's order denying Plaintiffs leave to depose Mr. Kobach was based on the mistaken belief that Plaintiffs have had the opportunity to depose Secretary Ross, the order was clearly erroneous.

I. Factual Differences Between the Instant Case and the New York Cases Necessitate Discovery Beyond the Discovery Ordered in the New York Cases.

As set forth more fully in Plaintiffs' initial discovery request and request for reconsideration, factual differences between this case and the New York cases require discovery beyond what was ordered in those cases. *See* ECF Nos. 70 & 83. Defendants are incorrect that Plaintiffs' conspiracy claim rests fundamentally on the same facts as Plaintiffs' equal protection claim. *See* ECF No. 86, Defs.' Ltr. Br. at 2. Instead, Plaintiffs will need to show at trial that there was a meeting of the minds between the alleged conspirators to deprive Plaintiffs of their constitutional rights. *See Simmons v. Poe*, 47 F.3d 1370, 1376-77 (4th Cir. 1995). It is this element, which is not present in any of the claims raised in the New York cases, that necessitates the deposition of Mr. Kobach.

Defendants spend several paragraphs suggesting that the Court should deny Plaintiffs' request because the Supreme Court granted Defendants' request for a writ of mandamus to stay discovery in the New York cases, which the Supreme Court treated as a petition for a writ of

The Honorable George J. Hazel

December 3, 2018

Page 2

certiorari. Defs.' Ltr. Br. at 1-2. The issue of whether a Section 1985(3) conspiracy claim permits a court in a lawsuit under the Administrative Procedures Act to order extra-record discovery, however, is decidedly not before the Supreme Court. See Petition for a Writ of Mandamus, *In re United States Dep't of Commerce*, No. 18-557 at I (U.S. Oct. 22, 2018). That the Supreme Court has taken up a question in a related case that may or may not affect the instant case is not reason to deny Plaintiffs' request for discovery. Instead, the Court should allow the deposition of Mr. Kobach to go forward. If at a later date the Supreme Court issues an order that affects the propriety of the use of evidence that Plaintiffs discover in the course of deposing Mr. Kobach, the Court can disregard this evidence when it makes a final decision. See, e.g., *Harris v. Rivera*, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.").

II. Reconsideration of the Court's Order Denying Defendants' Motion to Dismiss Plaintiffs' Conspiracy Claim is not Warranted.

Defendants also try to get a second bite at the apple by requesting that the Court reconsider its decision to allow Plaintiffs' conspiracy claim to move forward, but they make no argument as to why reconsideration is warranted. Defs.' Ltr. Br. at 3-4. Nor can they. There is no evidence that has come to light which now requires an opposite conclusion, nor is there any controlling authority that has "*since* made a contrary decision of law applicable to the issue" *Am. Canoe Ass'n*, 326 F.3d at 515 (emphasis added). The only "error" Defendants point to is one of reasoning—they argue that the Court misunderstands the case law with respect to the relief available under Section 1985(3). Defs.' Ltr. Br. at 3-4. But the case law is clear: "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). Statutory construction principles that allow for inferences about what Congress may have intended simply have no weight where the Supreme Court requires more.

Finally, Defendants argue that because Plaintiffs have failed to show there was a meeting of the minds between Mr. Kobach and Secretary Ross, Plaintiffs are not entitled to depose Mr. Kobach. Defs.' Ltr. Br. at 4. As an initial matter, there is sufficient circumstantial evidence to, at a minimum, raise a question of fact as to whether Defendants, Mr. Kobach, and others agreed to violate Plaintiffs' constitutional rights. See ECF No. 87, Pls.' Corr. Mem. at 32-33. More importantly, however, Plaintiffs are not required to prove there was a meeting of the minds between the alleged conspirators before the Court allows discovery as to whether, in fact, there was a meeting of the minds—"[t]o require a determination by the court before the conduct of such discovery would put the cart before the horse." *Certain Interested Underwriters Subs. to Policy No. B1262PW0017013 v. Am. Realty Advisors*, No. 5:16-CV-940-FL, 2017 WL 7806610, at *1 (E.D.N.C. Sep. 26, 2017).

III. Conclusion

Plaintiffs respectfully request that the Court reconsider its order denying Plaintiffs' request to depose Mr. Kobach, and that it deny Defendants' request that the Court reconsider its order denying Defendants' motion to dismiss Plaintiffs' conspiracy claim.

Respectfully submitted,

By: /s/ Burth G. Lopez

**MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND**

Burth G. Lopez (Bar No. 20461)
Thomas A. Saenz (CA Bar No. 159430)*
Nina Perales (TX Bar No. 24005046)
Denise Hulett (CA Bar No. 121553)
Andrea Senteno (NY Bar No. 5285341)
Tanya G. Pellegrini (CA Bar No. 285186)
Julia A. Gomez (CA Bar No. 316270)

1016 16th Street NW, Suite 100
Washington, DC 20036
Phone: (202) 293-2828
Facsimile: (202) 293-2849

**ASIAN AMERICANS ADVANCING JUSTICE |
AAJC**

John C. Yang (IL Bar No. 6210478)
Niyati Shah^o (NJ Bar No. 026622005)
Terry Ao Minnis (MD Bar No. 20547)
1620 L Street, NW, Suite 1050
Washington, DC 20036
Phone: (202) 815-1098
Facsimile: (202) 296-2318

*^o Admitted in New Jersey and New York only. DC
practice limited to federal courts.*

**Pro hac vice application forthcoming*