

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JOSE MORALES, et al.)	
)	Civil Action Number
Plaintiffs,)	1:08-CV-3172 JTC
)	
v.)	
)	
BRIAN KEMP, in his official)	
capacity as Georgia Secretary of State,)	
)	
Defendant.)	

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO
COURT'S APRIL 30, 2010 SCHEDULING ORDER**

Pursuant to this Court's April 30, 2010 Scheduling Order, Plaintiffs respectfully submit the following Supplemental Brief to respond to the questions posed by the Court concerning the necessity for and scope of further injunctive relief in this action. For the reasons discussed below, this Court should lift the preliminary injunction, and enter a permanent injunction based on Plaintiffs' claim under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The permanent injunction should prohibit Defendant from implementing the citizenship verification procedure for voter registration at issue in this lawsuit, unless and until the procedure receives Section 5 preclearance. Such an injunction will eliminate the need to resolve the remaining claims in this action.

Background

The material facts with respect to Plaintiffs' Section 5 claim have not changed since Plaintiffs filed their motion for summary judgment in September 2009. At that time, the voter registration procedure at issue in this action had been objected to by the Attorney General, and the Attorney General had declined to withdraw that objection. Since then, the Attorney General has again declined to withdraw the objection. Plaintiffs submit that continued forbearance from granting permanent relief in this action is therefore not justified. *Lopez v. Monterey*, 519 U.S. 9, 21-22 (1996); *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991).

The necessity for entry of a permanent injunction in this case is not affected by Defendant's adoption of a modified citizenship verification procedure for voter registration in 2009, or by the Georgia General Assembly's adoption of a different set of citizenship verification procedures for voter registration in Act 143, S.B. 86 (2009) (later supplemented by implementing regulations). As the Supreme Court unanimously observed in *Lopez*, any such collateral factual "complications do not . . . change the basic nature of the §5 preclearance process," or "the role of the three-judge district court." 519 U.S. at 23. When presented with an unprecleared voting change, a three-judge Section 5 court has two obligations: first, it must "ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible," *id.* at 24; and second,

“[i]f a voting change subject to §5 has not been precleared, §5 plaintiffs are entitled to an injunction prohibiting implementation of the change.” *Id.* at 20. Here, the citizenship verification procedure that is the subject of this lawsuit has been submitted to the Attorney General, and the Attorney General has interposed an objection. Accordingly, this Court should enter an injunction prohibiting future implementation of the change.

The fact that Georgia has adopted changes which may, if precleared, supplement or supersede the original, unprecleared procedure at issue here does not, and could not, affect the State’s legal authority to implement that procedure: regardless of the subsequent changes, the fundamental precept of Section 5 remains that “[n]o new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance.” *Id.* at 20. *See also Clark v. Roemer*, 500 U.S. 646, 652-55 (1991) (district court was required to enjoin elections for unprecleared judgeships notwithstanding the fact that the state had subsequently adopted other judgeships for the same judicial districts, which were to be implemented since they had been precleared).¹

¹ A three-judge district court in the Fourth Circuit recently entered a permanent injunction in a Section 5 case, on March 1, 2010, enjoining implementation of an unprecleared South Carolina election practice. *Gray v. South Carolina Election Commission*, 2010 U.S. Dist. Lexis 18034 (D. S.C.). The district court relied on the Supreme Court’s decision in *Lopez* in issuing the injunction.

Responses to the Court's Questions

Plaintiffs respectfully submit the following responses to the Court's specific inquiries:

1. The current Section 5 status of the citizenship verification procedure at issue in this lawsuit is that the procedure remains unprecleared. The Attorney General interposed an objection to the procedure on May 29, 2009, and on October 13, 2009, the Attorney General denied the State's request that the objection be withdrawn (these letters were previously lodged with the Court). Most recently, on February 22, 2010, the Department of Justice wrote to the State regarding the procedure and reiterated that the Attorney General would not withdraw the objection. See Attachment A.

Subsequent to the May 29, 2009 objection, Defendant requested that the Attorney General preclear a modified version of the objected-to citizenship verification procedure; however, that procedure remains unprecleared as well. On October 13, 2009, the Attorney General responded to the State's submission of the modified procedure by requesting additional information, pursuant to 28 C.F.R. § 51.37. The State has not yet provided that information and the Justice Department, in its February 22, 2010 letter to the State, reiterated that the Attorney General requires the requested information in order to make the Section 5 determination on the modified procedure. The Justice Department also stated in

the February 22 letter that the modified procedure must be reviewed simultaneously with the new citizenship verification procedures contained in Act 143, and with the verification procedures included in regulations adopted to implement that Act. As of this date, the State has not sought preclearance for the Act 143 procedures (either by making a submission to the Attorney General or by filing a declaratory judgment action in the United States District Court for the District of Columbia), although the Act (by its terms) was to become effective on January 1, 2010.²

2. It is Plaintiffs' understanding that Defendant and the Office of the Georgia Attorney General have had some discussions with the Department of Justice concerning the citizenship verification procedure that is the subject of this lawsuit. Plaintiffs are not aware of the full extent of those discussions, but these discussions have not led the Attorney General to withdraw the Section 5 objection and there is no indication that the objection will be withdrawn in the future.

As of this date, Defendant has not filed a declaratory judgment action in the United States District Court for the District of Columbia seeking preclearance for the citizenship verification procedure at issue in this lawsuit. Defendant has had

² Plaintiffs do not have any information indicating that the modified administrative verification procedure or the Act 143 procedures have been implemented (contrary to Section 5) in any Georgia county; however, Plaintiffs cannot speak with certainty on this issue.

the option since before the citizenship verification procedure was first put into effect to seek judicial Section 5 preclearance from that court. There have been news reports to the effect that the Georgia Attorney General and Defendant disagree as whether to file a suit in the District of Columbia Court, a suit which might include a claim seeking preclearance of the objected-to citizenship verification procedure. Defendant has not informed Plaintiffs of any decision to institute litigation in the District of Columbia Court.

3. For the reasons set forth above, the State's enactment of Act 143 and its promulgation of regulations to implement that statute have no effect upon this lawsuit.³

Plaintiffs note, however, that an injunction prohibiting the implementation of the citizenship verification procedure at issue here would not affect the State's ability to implement Act 143, if the Act 143 procedures are precleared. To ensure that this is clear, Plaintiffs' proposed order explicitly provides that it does not apply to Act 143.

³ Assuming that the State seeks preclearance for the Act 143 verification procedures in the near future, it is likely that a final Section 5 determination on these changes will not be forthcoming for several months, at a minimum. If the State seeks preclearance by filing suit in the District of Columbia District Court, even an expedited litigation process will require at least several months to yield a resolution. If the State files an administrative submission, it is reasonably likely that the Attorney General's initial response would be to request additional information, pursuant to 28 C.F.R. § 51.37, and accordingly the 60-day review period would not begin until that information is provided by the State.

4. Entry of a final injunction in this case would affect voter registration for this year's regular, biennial, 2010 primary and general elections. The primary is to be held on July 20, 2010, with a runoff primary, if needed, on August 10, 2010. The voter registration deadline for the primary is June 21, 2010. The general election will be held on November 2, 2010, with a runoff, if needed, on November 30, 2010. The voter registration deadline for the general election is October 4, 2010. See http://sos.georgia.gov/elections/elections_events.htm.

5. The core term of the permanent injunction that should be entered in this case is that the Defendant (and all county election officials) be prohibited from implementing the citizenship verification procedure at issue in this lawsuit for purposes of conducting voter registration. This necessarily means that Defendant would be prohibited from applying the verification procedure to new voter registration applicants or newly applying it to existing registered voters.⁴ In addition, individuals who previously were flagged pursuant to the verification procedure should have their voter registration applications processed without regard to the unprecleared procedure (however, any registration applicant who has notified election officials that he or she is not a United States citizen should, of course, remain unregistered). As indicated above, the injunction should further

⁴The State has applied the unprecleared verification procedure to new voter registration applicants, and to existing registered voters who seek to make changes to certain data fields in their voter registration record.

specify that it has no application to the State's potential implementation of Act 143. Plaintiffs refer the Court to their "Proposed Final Judgment and Order" previously lodged with the Court (Document 89, Attachment #22).

6. For the reasons set forth above and in our prior court submissions concerning the pending motions (Document 89, Attachment # 1; Document 92; Document 94; and Document 96), the current preliminary injunction must be replaced by a permanent injunction. If the preliminary injunction were to be continued, it would need to be modified to update it to the current election cycle. Plaintiffs respectfully submit, however, that the circumstances under which the existing injunction was entered (i.e., the then-imminent 2008 general election and the lack of Justice Department review regarding the verification procedure) are not present today, and do not justify any continued implementation of the unprecleared change.⁵

7. This Court is obligated to resolve the Section 5 claim prior to addressing Plaintiffs' claims under the National Voter Registration Act and the Help America Vote Act. These latter claims were raised by Plaintiffs prior to the Attorney General interposing the Section 5 objection to the citizenship verification

⁵ Although the Court attached certain conditions to the State's implementation of the citizenship verification procedure for purposes of conducting the 2008 general election, that only temporarily postponed application of the Supreme Court directive that "§5 plaintiffs are entitled to an injunction prohibiting implementation of [an unprecleared voting] change." *Lopez v. Monterey County*, 519 U.S. at 20.

procedure. Since, under Section 5, the unprecleared status of the verification procedure means that the procedure is not “enforceable,” Plaintiffs’ other statutory claims are not ripe for consideration at this time. *See Connor v. Waller*, 421 U.S. 656 (1975) (district court erred in deciding constitutional challenges to state redistricting plans because the plans “are not now and will not be effective as laws until and unless cleared pursuant to § 5”).

Conclusion

For these reasons, and as set forth in greater detail in Plaintiffs’ previous submissions, Plaintiffs urge this Court to now enter a permanent, final injunction prohibiting Defendant from implementing the unprecleared citizenship verification procedure for voter registration.

Respectfully submitted,

s/ Laughlin McDonald
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

Undersigned counsel hereby certifies that the foregoing was prepared in Times New Roman, 14-point, in compliance with Local Rule 5.1B.

This 10th day of May, 2010.

s/ Laughlin McDonald

Laughlin McDonald
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this, the 10th day of May, 2010, I electronically filed the foregoing Brief with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise, including the following:

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FEB 22 2010

Dennis R. Dunn, Esq.
Deputy Attorney General
40 Capitol Square, S.W.
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Dear Mr. Dunn:

This refers to your December 22, 2009, letter concerning the revised 2009 verification program for voter registration data, including citizenship status, only for individuals registering to vote by use of the mail-in application who do not provide identification listed in Section 303(b) of the Help America Vote Act with their application; this also refers to your apparent request that the Attorney General reconsider and withdraw the May 29, 2009, objection interposed under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your correspondence on December 22, 2009.

To the extent that your December 22 letter may be intended as a request that the Attorney General reconsider and withdraw the May 29, 2009, objection, we have reconsidered our earlier determination based on the information and arguments you have advanced in support of your request. That review indicates that the state has not provided any additional information or arguments related to the original voter registration verification program to which an objection was interposed, to support its request that the objection to the original program should be withdrawn. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.52. In light of these considerations, I remain unable to conclude that the State of Georgia has carried its burden of showing that the original voter registration verification program has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973). Therefore, on behalf of the Attorney General, I must decline to withdraw the May 29, 2009, objection.

With regard to the revised 2009 verification program for voter registration data, we note that your December 22, 2009, letter does not address the questions set forth in our October 13, 2009, letter that identified information we determined was necessary to complete our review of your submission of the revised program. In a number of conversations with your office, we have discussed at some length why this information is necessary to complete our review.

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Likewise, you have advised us that the State of Georgia has enacted S.B. 86, Act 143 (2009), which requires proof of citizenship for voter registration purposes, and which has an effective date of January 1, 2010. You have also advised us of the adoption of two additional sets of related administrative rules. We understand that the State Board of Elections has approved Rule 183-1-6-.06, entitled "Verification of United States Citizenship of Applicants for Voter Registration," on December 10, 2009, and that the Secretary of State adopted Rule 590-8-1-.02 entitled "Verification of Voter Registration Information," on December 10, 2009. In each of our previous letters to you on this matter, and in our discussions with your office, we have identified the state's enactment of S.B. 86 and adoption of implementing regulations as having a significant impact on our determination under Section 5.

Although the legislation's effective date has now passed and the state has adopted the necessary implementing regulations, our records do not indicate that these changes affecting voting have been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965. Accordingly, it is necessary that these changes either be brought before that federal district court or submitted to the Attorney General for a determination that they have neither the purpose nor will have the effect of discriminating on account of race, color, or membership in a language minority group. Changes that affect voting are legally unenforceable unless and until the appropriate Section 5 determination has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.10.

Because these unsubmitted changes and the revised 2009 verification program for voter registration data are directly related, they must be reviewed simultaneously. Accordingly, it would be inappropriate for the Attorney General to make a determination on the revised 2009 verification program until the related changes have been submitted for Section 5 review, and until the information we have previously identified in our October 13, 2009 letter has been provided. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.22(b) and 51.35.

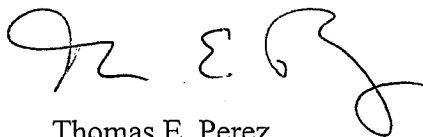
Should you elect to make a submission to the Attorney General for administrative review, rather than seek a declaratory judgment from the United States District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the Procedures. At that time we will review all changes simultaneously; however, any documentation previously provided need not be resubmitted.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Georgia plans to take concerning these matters. If you have any questions please call Robert S. Berman (202-514-8690), a deputy chief in the section. Refer to File Nos. 2009-3122 and 2010-0535 in any response to this letter so that your correspondence will be channeled properly. As our prior letters have indicated, and as we have discussed with your office on a number of prior occasions, the Department believes it to be appropriate and

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desirable to continue to discuss this matter with the state. We are prepared to promptly arrange a meeting with your office and the office of the Secretary of State to discuss the remaining issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. E. Perez', with a stylized flourish at the end.

Thomas E. Perez
Assistant Attorney General