

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

JOSE MORALES, on behalf of himself)	
and those similarly situated)	
)	
Plaintiffs,)	CIVIL ACTION
)	FILE NO.
v.)	1:08-CV-3172 JTC
)	
KAREN HANDEL, in her official)	
capacity as Georgia Secretary of State.)	
)	
Defendant.)	

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN
SUPPORT OF PLAINTIFF’S MOTION FOR PRELIMINARY
INJUNCTION**

Pursuant to the Court’s Order of October 16, 2008, Plaintiff Jose Morales submits the following proposed findings of fact and conclusions of law.

PROPOSED FINDINGS OF FACT

1. Prior to 2007, the State of Georgia did not, as part of its statewide voter registration database required by the Help America Vote Act of 2002 (“HAVA”), systematically attempt to check the citizenship status of registered voters or voter registrants. Declaration of Jon M. Greenbaum (Greenbaum Dec.)

¶ 3 & Ex. 1.

2. In or around May 2007, the State of Georgia established and implemented a process for its statewide voter registration database that involved administrative record matching with the Department of Driver Services (“DDS”) database, which was linked to the Social Security Administration database (“SSA”). Greenbaum Dec. ¶ 6 & Ex. 4.

3. On January 14, 2008, the Office of the Secretary of State issued a memorandum to the county registrars informing them that the new system enabled them to check the citizenship status for voter registrants who had registered to vote at DDS offices since January 15, 2007. Greenbaum Dec. ¶ 8 & Ex. 6.

4. On August 20, 2008 (76 days before the November 4 general election), the Office of the Secretary of State issued a memorandum which stated, among other things, that “[c]ounties must continue to conduct voter list maintenance efforts to ensure that ineligible voters are removed from the electors list in a timely manner.” Greenbaum Dec. ¶ 12 & Ex. 10.

5. On September 12, 2008, the Office of the Secretary of State issued a memorandum to the county registrars which was later revised on September 24, 2008. These memoranda told how the citizenship check process worked and directed the county registrars as to what they must do if an individual was flagged as an alleged non-citizen. Greenbaum Dec. ¶¶ 6, 8 & Ex. 4, 6.

6. According to the September 24, 2008 memorandum, the DDS database routinely is queried to identify all new voter registration applicants who allegedly have previously informed DDS that they were not United States citizens. The individuals identified by these matching procedures are listed in county-level reports titled “SSVRZ791R1” and “SSVRZ791R2”. Greenbaum Dec. ¶ 6 & Ex. 4.

7. The September 24 memorandum also provides detailed instructions governing the procedures to be used during in-person absentee voting for individuals who are flagged as “non-citizens” in the database. The memorandum states that “if DDS records show that the person is not a United States citizen, the voter maintenance screen (2) and absentee ballot maintenance screen (16) show a flashing red warning indication of the individual’s non-citizen status.” *Id.* The memorandum also states that “[u]nder no circumstances should a poll officer allow an individual to cast a regular ballot on a DRE without confirming through the registrar that such an individual is a United States citizen.” *Id.*

8. County election officials have implemented these memoranda in different ways. Cherokee County has sent out letters to persons flagged as alleged non-citizens, including plaintiff José Julian Morales.

9. Mr. Morales became a United States citizen in November 2007. Morales Declaration (“Morales Dec.”), Ex. A, ¶ 2. In early September 2008, Mr.

Morales, who studies International Affairs at Kennesaw State University, filled out a voter registration form on campus. *Id.* at ¶¶ 8, 9. Approximately two weeks after filling out his voter registration form, he received a letter from Cherokee County notifying him that he was unable to vote unless he provided evidence of his citizenship in court. *Id.* at ¶ 10. Based upon the letter, Mr. Morales believed that he had to go to court to prove his citizenship. *Id.* The letter further explained that his name would be eliminated from the voter list if he did not prove his citizenship. *Id.*

10. A week later, Plaintiff Morales received another letter that indicated he was required to provide additional information, such as a passport or other document that verifies he is a U.S. citizen. Morales Dec. ¶ 12. After he received the second letter, Mr. Morales drove to the Cherokee County Elections office and proceeded to show his passport to a clerk in the Elections office. *Id.* at ¶ 13. A week later, Mr. Morales received a copy of his voting card by mail. Morales Dec. ¶ 15, Ex. 1.

11. On October 7, 2008, Plaintiff Morales received a certified letter from the Cherokee County Elections and Registration office. Morales Dec. ¶ 16, Ex. 2. The letter informed Mr. Morales that he “may **NOT BE QUALIFIED TO VOTE** in Cherokee County” because he “may not be a U.S. citizen.” Ex. 2 (capitals and

boldface in original). The letter also informed Mr. Morales that if he did not respond prior to an October 15, 2008 hearing date, and he did not attend the hearing his “**NAME WILL BE REMOVED** from the list of registered voters.” Ex. 2 (capitals and boldface in original).

12. Cobb County scheduled hearings beginning on Monday, October 13, 2008, with regard to approximately two hundred individuals who received letters from the county. Greenbaum Dec. ¶ 13 & Ex. 11. The recipients of these letters were selected because their names appeared on a SSVRZ791 report for Cobb County. The form letter sent to each individual states that “[w]e received notification that you may not be qualified to vote in Cobb County, Georgia because **you may not be a U.S. citizen.** The information came from an automated verification system that may possibly produce errors.” (emphasis in original). *Id.* The letter then warns that: “[i]f we do not hear from you prior to the hearing, and you do not attend the hearing, your name will be removed from the list of registered voters and **YOU WILL NOT BE ALLOWED TO VOTE.**” (emphasis in original). *Id.* On or about October 9, Cobb County cancelled its hearings.

13. Existing voter registrants are being removed from the rolls. The Secretary concedes that the database matching removal system is being applied to individuals who previously were placed on the registration rolls as validly

registered voters in some cases. Defendant's Response to Motion for Temporary Restraining Order and Preliminary Injunction, at 7. Thus, for example, both DeKalb County and Clayton County election officials have sent letters to current registered voters informing them that they have been flagged as non-citizens, pursuant to their request for an absentee ballot. Greenbaum Dec. ¶¶ 4, 11, & Ex. 2, 9. Likewise, the form letter Cobb County election officials sent to 200 individuals indicates that current registered voters will be removed if they do not verify their citizenship. Greenbaum Dec. ¶ 13 and Ex. 11.

14. The citizenship flagging system has misidentified a large number of citizens as non-citizens.

15. The Secretary's database matching system appears to be misidentifying native-born citizens, who have registered to vote, as non-citizens. For example, Linda Lattimore, Voter Registration & Election Director in DeKalb County, sent a letter to a registered voter who is serving in the military apologizing to the voter for challenging his citizenship when he applied for an absentee ballot. *Id.*, ¶ 11 & Ex. 9. Ms. Lattimore explained she had informed her staff they should not send such letters without her approval because the database matching process is not accurate, and she assured the voter that his absentee ballot would be among the first to be mailed. *Id.*

16. One registered voter affected by the misidentification is Ms. Mary Mullins Lee, a 66 year old native born registered voter in Albany, Georgia. *See* Mary Lee Declaration (“Lee Dec.”), Court Docket No. 23. After registering to vote on September 26, 2008, she was told on October 17, 2008, that she was “not in the system” and not registered. Lee Dec. ¶¶ 3, 4. Later the same day, she was told that although she was in the registration system, she must bring proof of her citizenship to the registrar’s office in order to vote. *Id.* at ¶ 6. At no time has the county registrar issued notice to Ms. Lee of any question regarding the propriety of her registration or questions concerning her qualifications to be an elector. *Id.* at ¶¶ 4, 8. Instead, verbal instructions only have been issued to her reflecting that her citizenship is at issue. *Id.* at ¶¶ 4, 8.

17. Gerri Valentin-Cruz, a native-born citizen, who has been registered since March 2008, received a letter from Fulton County dated October 2, 2008, which stated that she had been flagged as a possible non-citizen. Declaration of Gerri Valentin-Cruz (“Valentin-Cruz Dec.”) ¶ 9 & Exh. A. Ms. Valentin-Cruz was born in Pine Bluff, Arkansas and is a natural-born United States Citizen. *Id.* at ¶ 1. Ms. Valentin-Cruz is Afro-Puerto Rican. *Id.* at ¶ 3. Ms. Valentin-Cruz is a resident of Fulton County, Georgia and has been a resident of Georgia since approximately 1993 or 1994. Valentin-Cruz Dec. ¶ 4 & Exh. A.

18. Ms. Valentin-Cruz registered to vote in Fulton County in March 2008. She received her voting card on or about March 18, 2008. *Id.* at ¶¶ 6, 7. Ms. Valentin-Cruz and her husband were planning to vote early because they will be moving on Election Day, November 4, 2008. *Id.* at ¶ 8. On Saturday, October 11, 2008, Ms. Valentin-Cruz received a letter dated October 2, 2008 by regular U.S. mail, from the Fulton County Department of Registration and Elections indicating that the Elections office had received notification from the State of Georgia that she was not a U.S. Citizen and was ineligible to vote. *Id.* at ¶ 9. The letter stated that if Ms. Valentin-Cruz did not provide proof of her U.S. citizenship within one week from the date of the letter, she would be removed from the list of registered voters. *Id.* at ¶ 10.

19. Ms. Valentin-Cruz was very concerned when she received the letter because she has been a United States citizen her entire life. *Id.* at ¶ 11. She was also concerned because she did not receive the letter until October 11, 2008, which was more than one week from the date of the letter (October 2), and, according to the letter, she would have already been removed from the list of registered voters. *Id.* at ¶ 12.

20. On October 13, 2008, Ms. Valentin-Cruz spoke with Brenda Williams from the Fulton County Department of Registration and Elections. Ms. Williams

explained to Plaintiff Valentin-Cruz that the Secretary of State's office had provided Fulton County with information indicating that she was a non-citizen. *Id.* at ¶¶ 13, 14. Ms. Williams then asked Ms. Valentin-Cruz for the proper spelling of her name, and was able to locate her on a certain database, although Ms. Williams did not indicate which database. *Id.* at ¶ 15. Ms. Williams then informed Plaintiff Valentin-Cruz that she (Ms. Valentin-Cruz) had been deleted from the list, although Ms. Williams did not provide any details regarding which list. Ms. Williams also indicated that that Ms. Valentin-Cruz should not "have a problem" voting early. *Id.* at ¶ 16. Ms. Valentin-Cruz asked Ms. Williams to provide her with written confirmation indicating that she would be allowed to cast her ballot during the early voting period. *Id.* at ¶ 17. Ms. Williams sent Ms. Valentin-Cruz an e-mail indicating that Plaintiff Valentin-Cruz would have to follow up with the Secretary of State if she wanted written confirmation she would be allowed to cast her ballot during the early voting period. *Id.* at ¶ 18.

Many individuals who have been incorrectly targeted are, like Plaintiff Morales, naturalized citizens with Spanish surnames. *See* Spears Dec. ¶4 and Attachment.

21. In Whitfield County, a number of naturalized citizens with Spanish surnames were flagged by the Secretary of State according to 11 e-mails sent from the County to the Secretary of State. *Id.* at Ex. B. (E-mails from Carol Byers to

the Secretary of State dated September 26, September 30, October 1, October 2, October 4, October 7, 2008 from Carol Byers). For example, in the five e-mails Ms. Byer sent on September 26, 2008 to the Secretary of State, approximately 35 of the 47 naturalized citizens (close to 75%) who had been flagged by the Secretary had Hispanic surnames. *Id.* All of the individuals identified as naturalized citizens in the September 30, October 1, 4 and October 7 e-mails have Hispanic surnames. *Id.*

22. The Court notes that Georgia has not identified even one instance in which the unprecleared procedures have netted an ineligible non-citizen.

23. The Court takes judicial notice of the recent report that “[o]f the 110 names the Secretary of State's Office provided the Richmond County Elections Board on Sept. 24, not one has turned out to be ineligible to vote, said Executive Director Lynn Bailey. Her office has resolved problems with 60 to 70 percent of the voters as of Friday.” Armstrong, Jake, "Voter checks reveal little, county elections chiefs say," *Augusta Chronicle* (October 11, 2008), *available at* http://chronicle.augusta.com/stories/101108/met_479085.shtml.

24. The registration official in Cobb County who sent the approximately 200 letters to alleged non-citizens reported that (as of October 8, 2008) no less than

84 of the alleged non-citizens already had provided proof of citizenship.

Greenbaum Dec. ¶ 7 & Ex. 5.

25. On October 8, 2008, the Chief of the Voting Section at the United States Department of Justice wrote the Attorney General of Georgia a letter stating that the State of Georgia had implemented a number of voting changes including

revisions to voter registration applications; a process of attempting to verify voter information against databases maintained by both the Georgia Department of Driver's Services and the federal Social Security Administration (SSA), generating and distributing reports of the results of those checks to county registrars for further action; and issuing a series of guidance memoranda from the Office of the Secretary of State to the counties concerning a number of aspects of the identity verification/voter registration processes.

Greenbaum Dec. ¶ 3 & Ex. 1. The letter noted that “[t]he scope of these changes appear to be substantial, and these changes appear to be different in force or effect under Section 5 of the Voting Rights Act.” *Id.* The letter stated that these voting changes had not been submitted for Section 5 preclearance, and therefore, were legally unenforceable. *Id.* at 1-2.

26. Plaintiff's evidence corroborates the conclusions of the Department of Justice. The existing, legally enforceable provisions of the Georgia election code provide the Section 5 “benchmark” or “baseline” point of reference against which new practices must be compared. Voter registration in Georgia is governed by the provisions of Title 21, Chapter 2, Article 6, of the Georgia Code; there is no

contention here that the provisions of Article 6 are not in force or effect within the meaning of Section 5. In comparison to the procedures established in Article 6, the record-matching procedures at issue here concerning citizenship status are new, as are the follow-up procedures being applied to Plaintiff Morales, and the absentee ballot procedures specified by the September 24 memorandum of the Office of Secretary of State.

27. As of May 2007, when Georgia began to implement the records-matching procedures described in the memorandum of September 24, 2008, Greenbaum Dec. ¶ 6 & Ex. 4, Georgia's statutes contained no requirement that voter registration records be matched with DDS citizenship records, and so there necessarily could have been no requirement that the results of such matching be used for any particular purpose, such as instituting voter challenge hearings. As reflected in Greenbaum Dec. ¶ 10 & Ex. 8, Plaintiff's counsel sought from the Defendant any information establishing that the May 2007 procedures have been precleared under Section 5. As of October 3, counsel for the Attorney General's office informed Plaintiff's counsel that he was not aware of any such Section 5 submissions, and no information showing Section 5 preclearance has been provided by the State.

28. The range of unprecleared voting changes currently being implemented by the Defendant has not yet fully been established.

29. The record before the Court demonstrates that Defendant has established -- and is enforcing -- new voter registration list maintenance procedures, which in turn serve as triggers for other new procedures concerning absentee voting and voter challenge hearings.

30. In the process of implementing Defendant's matching procedures a number of discretionary decisions have been made, including: whether to initiate the database matching process only for new registrants or whether to also initiate it for existing registrants (e.g., who amend their registration record in some specific manner or request an absentee ballot); the circumstances under which the State will conclude that an individual record in the registration database has been matched with a record for the same individual in the driver's license database; the procedures that will be used to notify individuals who have been identified by the computer as potential non-citizens; the procedures that will be used to resolve the question whether the identified registrants are citizens; the documents that will be accepted as proof of citizenship; and the procedures that will be followed if the eligibility of an identified registrant is not resolved before election day and the individual then seeks to vote. The Secretary has not argued that any of these

implementation decisions was specifically mandated by federal law, such as HAVA or the NVRA.

31. Attempting to match records for the same individual in two unique databases is an inherently problematic process. Data for one individual may be entered differently in the two databases for a variety of reasons, such as data entry errors, varying use of married and maiden names, and inconsistent treatment of hyphenated or compound last names. As a result, depending on the rules established for concluding that a match exists, the computer can claim a match when two different individuals are involved, or that records for the same individual do not match. Different states have adopted different matching criteria. *See Generally* Justin Levitt, Wendy R. Weiser, & Ana Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration*, available at <http://tinyurl.com/66t6r8>.

32. Secretary of State Handel also appears to be using the Social Security Administration (“SSA”) database to for verification of registered voters, and not just voter registration applicants, which would go beyond its agreement with the SSA. Greenbaum Dec. ¶ 6, Ex. 4. The Department of Justice noted in an October 8, 2008 letter that the SSA has reported excessive verification checks over the last fiscal year for the State of Georgia. Greenbaum Dec. ¶ 3, Ex. 1. According to

SSA records, verification checks against SSA records alone over the last fiscal year have extended to *nearly two million records from Georgia*, far more than any other State in the country. *Id.* Based on this number, these verification checks must cover not only voter registrants but also current registered voters. In Secretary Handel's response to the Department of Justice, she states that the SSA received 943,848 requests for verification in Georgia in the month of September 2008 alone, Defendants Exh. 2-D at 4. This is more than double the number of voters (406,279) that were added to the registration rolls for the first *nine* months (through September) in Georgia this year. See Georgia Secretary of State, *Voter Registration System Newly Added Voters By Race and Gender 2004 vs. 2008*, available at http://sos.georgia.gov/elections/voter_registration/Newly_Registered_04_08.pdf. It is clear that the Secretary of State is using the SSA database to check on people other than voter registration applicants.

33. Plaintiff and his counsel aver that they discovered the existence and implementation of the Secretary's matching procedures during the week of September 29, 2008. There is no evidence to the contrary.

PROPOSED CONCLUSIONS OF LAW

Standing

1. Plaintiff José Morales has standing to maintain this action.
2. Plaintiff Morales is a registered voter and resident of the State of Georgia. As such he has standing to maintain an action under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c.
3. Plaintiff Morales also has standing to maintain an action under the NVRA. 42 U.S.C. § 1973gg *et seq.* As of October 9, 2008, the date the Complaint was filed, Plaintiff Morales was (for the second time) subject to removal from the voter registration list if he did not provide proof of citizenship to Cherokee County by October 15, 2008. Defendant has submitted a letter from Cherokee County dated October 10, 2008, the day after the complaint was filed, informing Mr. Morales that his challenge hearing was cancelled. In the 11th Circuit, “[s]tanding is to be ‘determined as of the time . . . the plaintiff’s complaint is filed,’ and is not altered by events unfolding during litigation.” *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1352 n.3 (11th Cir. 2005) (holding that plaintiff had standing in a challenge under the NVRA) (quoting *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003)).

Thus, Mr. Morales' standing to bring an NVRA claim is unaffected by the October 10 letter.

Section 5 of the Voting Rights Act

4. Plaintiff's first claim is under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Georgia is a covered jurisdiction under Section 5 of the Voting Rights Act, *see* 42 U.S.C. § 1973b, with a coverage date of November 1, 1964. *See* 30 Fed. Reg. 9897 (1965).

5. Section 5 forbids covered jurisdictions, including all jurisdictions in Georgia, from implementing any voting change absent federal preclearance. Within jurisdictions covered under Section 5 "all changes in voting must be precleared and [] the scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting, changes effected through any of the mechanisms described in the statute. Those mechanisms are any 'qualification or prerequisite' or any 'standard, practice, or procedure with respect to voting.' *Presley v. Etowah County Commission*, 502 U.S. 492, 501-502 (1992) (internal citation to *Allen v. State Bd. Elections*, 393 U. S. 544 (1969) omitted).

6. "[P]reclearance is a process aimed at preserving the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change." *Young v. Fordice*, 520 U.S. 273, 285 (1996).

7. Registration list maintenance procedures such as those at issue in this case fall squarely within the scope of Section 5 coverage. This remains true even if they have been precipitated by general federal-law requirements. In *Young v. Fordice*, 520 U.S. at 285, the Supreme Court explained why Section 5 preclearance is required for changes to voter registration procedures reflecting the policy choices of state officials, even where they represent an attempt to comply with federal law:

This Court has made clear that minor, as well as major, changes require preclearance. *Allen v. State Bd. of Elections*, 393 U. S. 544, 566–569 (1969) (discussing minor changes, including a change from paper ballots to voting machines); *NAACP v. Hampton County Election Comm’n*, 470 U. S. 166, 175–177 (1985) (election date relative to filing deadline); *Perkins, supra*, at 387 (location of polling places). See also 28 CFR § 51.12 (1996) (requiring preclearance of “[a]ny change affecting voting, even though it appears to be minor or indirect . . .”). This is true even where, as here, the changes are made in an effort to comply with federal law, so long as those changes reflect policy choices made by state or local officials. *Allen, supra*, at 565, n. 29 (requiring State to preclear changes made in an effort to comply with § 2 of the VRA, 42 U. S. C. § 1973) []. Moreover, the NVRA does not forbid application of the VRA’s requirements. To the contrary, it says “[n]othing in this subchapter authorizes or requires conduct that is prohibited by the” VRA. 42 U. S. C. § 1973gg–9(d)(2). And it adds that “neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the” VRA. § 1973gg–9(d)(1).

Young v. Fordice, 520 U.S. at 284 (citations omitted).

8. “In order to determine whether an election practice constitutes a ‘change’ as that term is defined in our §5 precedents, we compare the practice with the covered jurisdiction’s ‘baseline.’ We have defined the baseline as the most recent practice that was both precleared and ‘in force or effect’—or, absent any change since the jurisdiction’s coverage date, the practice that was ‘in force or effect’ on that date. See *Young*, 520 U. S., at 282–283. See also *Presley*, 502 U. S., at 495. The question is ‘whether a State has ‘enact[ed]’ or is ‘seek[ing] to administer’ a ‘practice or procedure’ that is ‘different’ enough’ from the baseline to qualify as a change. *Young*, 520 U. S., at 281 (quoting 42 U. S. C. §1973c).” *Riley v. Kennedy*, 128 S.Ct. 1970, 1982 (2008).

9. The potential for discriminatory impact inherent in changes to voter registration procedures is illustrated by a Section 5 objection that closely mirrors this case. On January 16, 1996, the Attorney General interposed a Section 5 objection to a 1995 Texas law that authorized state agency employees to make determinations of individuals’ eligibility to register based upon citizenship information contained in state agencies’ files. Greenbaum Decl. ¶ 5 & Ex. 3.

10. The Secretary’s decision to use database matching to verify voter eligibility is a policy choice that is subject to Section 5 preclearance.

11. Section 5 applies to all discretionary implementation decisions that have been made by the State following its threshold decision to use database matching to verify voter eligibility. *See Foreman v. Dallas County*, 521 U.S. 979, 980 (1997) (“the fact that the county here was exercising its ‘discretion’ pursuant to a state statute does not shield its actions from § 5”).

12. Section 5 prohibits the Secretary from implementing discretionary policy choices unless and until preclearance is obtained. Accordingly, the filing of a preclearance request does not permit the State to implement the changes in the interim. The fact that certain changes may have been submitted for Section 5 review does not grant the State any additional authority to proceed with their implementation.

13. The jurisdiction of a Court deciding a Section 5 enforcement action such as this is limited:

The three-judge court determines ‘(1) whether a change [is] covered by § 5, (ii) if the change [is] covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate.’ *City of Lockhart v. United States*, 460 U.S. 125, 129, 103 S. Ct. 998, 1001 n.3, 74 L. Ed. 2d 863 (1983). The court does not consider the merits of a plaintiff's claim that the proposed changes are discriminatory. *United States v. Board of Supervisors*, 429 U.S. 642, 97 S. Ct. 833, 51 L. Ed. 2d 106 (1977); *Perkins v. Matthews*, 400 U.S. 379, 385, 91 S. Ct. 431, 27 L. Ed. 2d 476 (1971). The court may consider any equitable arguments put forth by the defendants or the plaintiffs only in the limited context of fashioning an appropriate remedy.

Brooks v. State Board of Elections, 775 F. Supp. 1470, 1474-75 (S.D. Ga. 1989), *aff'd mem.* 498 U.S. 916 (1990).

14. The obligation for a Section 5 court having found a violation is maintain the legally enforceable *status quo ante*. “If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.” *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996) (citing *Clark v. Roemer*, 500 U.S. 646, 652-653 (1991); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)).

15. In *Clark v Roemer*, 500 U.S. 646 (1991), the Supreme Court made clear that courts hearing Section 5 enforcement actions may not countenance the prospective use of unprecleared voting changes: “Here the District Court did not face the *ex post* question whether to set aside illegal elections; rather, it faced the *ex ante* question whether to allow illegal elections to be held at all. On these premises, § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election.” 500 U.S. at 654. *See also Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J.) (order enjoining election under Section 5 one day before it was to be held).

16. The four-part test normally used to decide preliminary injunction motions is inapplicable when Section 5 is at issue. Instead, the responsibility of

the district court is simple and clear: “If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.” *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991); *see also Lopez v. Monterey County*, 519 U.S. 9, 20 (1996).

17. The only two issues in determining liability on Plaintiff’s Section 5 claim are: (1) whether the Defendant has made voting changes; and (2) whether the changes have received Section 5 preclearance.

18. In enacting and reauthorizing Section 5, Congress has already determined that voting changes in covered jurisdictions cannot be implemented until they are precleared. In this respect, Section 5 itself enjoins covered jurisdictions from implementing voting changes until they demonstrate to the Attorney General or the District Court of the District of Columbia that the changes do not have a discriminatory purpose or effect. When a jurisdiction implements voting changes prior to receiving preclearance, it has not respected the “statutory injunction” of Section 5, and a Section 5 enforcement action provides for an *in personam* judicial injunction.

19. The lack of discretion granted a district court in a Section 5 enforcement is illustrated by the facts of *Clark* and *Lopez*, where the Supreme Court reversed the three-judge district courts that had denied injunctions. In *Clark*,

a unanimous Supreme Court reversed the district court's refusal to enjoin the State of Louisiana's implementation of unprecleared changes in its judicial election system, noting that the lower court had "ignored [Section 5] principles altogether." 500 U.S. at 653. The district court offered a number of reasons for its action, including the short time between election day and the request for injunction, concern about voter confusion, and concern that an injunction might cast doubt on the validity of certain state court judgments. The Court found none of these reasons to be persuasive. *Id.* at 653-55.

20. In *Lopez*, 519 U.S. at 9-19, the district court faced the predicament that Monterey County had failed to obtain preclearance for voting changes relating to its judicial system enacted many years previously and, because of intervening changes, it was not practical for the county to return to the judicial election system that predated the unprecleared changes. The district court decided that the best course was to allow the county to conduct one more election implementing the unprecleared changes, with elections thereafter enjoined unless and until preclearance was obtained. *Id.* at 19. A unanimous Supreme Court reversed. The Supreme Court stated that it "appreciate[d] the predicament that the District Court faced," because it was unrealistic to go back to a 30 year old judicial election plan. *Id.* at 22. The Court stated that these "complications do not, however, change the

basic nature of the § 5 preclearance process,” *id.* at 23, and held that the district court erred in permitting the county to conduct even one additional election in which the unprecleared changes would be implemented.

21. The Secretary of State presents facts even less compelling than those in *Clark* and *Lopez*, where the district courts denied requests to enjoin elections and the Supreme Court held that the elections must be enjoined. Here, Plaintiff is not trying to stop an election. Moreover, the Secretary has created the problem at hand. The Secretary of State did not seek Section 5 preclearance until it had implemented the unprecleared changes for 17 months, the Department of Justice had sent a “please submit” letter, and Plaintiff had filed the instant lawsuit. Conversely, Plaintiff has moved expeditiously: Plaintiff filed this action ten days after the issue came to the attention of Plaintiffs’ counsel, and during that ten-day period, Plaintiffs’ counsel requested that the Secretary of State stop implementing the unprecleared changes.

22. This case does not challenge the State of Georgia’s substantive requirement that individuals who seek to register and vote in the State must be United States citizens. This requirement, however, does not excuse the Secretary from the obligation to first obtain Section 5 preclearance before enforcing new procedures purporting to enforce that requirement.

23. The Defendant argues that her database matching program was required by the Help America Vote Act (“HAVA”).

24. HAVA requires that all states (except those that do not conduct voter registration) implement a single, statewide, computerized database of registered voters. 42 U.S.C. § 15483(a)(1)(A). HAVA specifies various standards for creating and maintaining these databases. One of these standards is that “only voters who are not registered or who are not eligible to vote [may be] removed from the computerized list.” 42 U.S.C. § 15483(a)(1)(B)(ii).

25. In order to ensure that only ineligible voters are removed, HAVA includes specific restrictions on the authority of states to remove persons from the registration list. All states must provide “[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.” 42 U.S.C. § 15483(a)(4)(B). In addition, ineligible voters may be removed under HAVA only “in accordance with the provisions of the National Voter Registration Act of 1993.” 42 U.S.C. 15483(a)(2)(A)(i).

26. HAVA also provides that “duplicate names [must be] eliminated from the computerized list.” 42 U.S.C. § 15483(a)(1)(B)(iii). To facilitate this, HAVA provides for a two-step maintenance system. States begin by assigning “a unique identifier [in the database] . . . to each legally registered voter in the State.” 42

U.S.C. § 15483(a)(1)(A)(iii). The identifier is either: the registrant's driver's license number (supplied by the registrant on the voter registration application); the last four digits of the registrant's social security number, for those applicants without a driver's license (again supplied by the registrant on the registration application); or another number generated by the state, for those who lack both a driver's license and a social security number. 42 U.S.C. § 15483(a)(5)(A). Next, in order to make sure that the identifying numbers are correctly entered into the registration database, states must "coordinate" their voter registration database with the state driver's license database and the Social Security Administration database. 42 U.S.C. §§ 15483(a)(1)(A)(iv), 15483(a)(5)(B).

27. HAVA's database "coordination" provision does not require that Georgia (or any other state) use database matching to determine whether persons who register to vote are eligible to vote in elections. Instead, HAVA generally only requires Georgia (and other states) to utilize database matching for the limited purpose of ensuring that accurate identifying numbers are assigned to registered voters.

28. The case law in the 11th Circuit makes clear that states are not required to use HAVA database matching to determine eligibility. In *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the court

found that, with the exception of first-time voters who register by mail, “[t]here is nothing at all in [HAVA] that discusses the requirements and procedures for establishing [voter] eligibility and identity.” *Id.* at 1172; *accord, Washington Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006). Thus, HAVA does not require Georgia to use database matching -- or any other method -- to verify voter eligibility, *i.e.*, to verify that registrants are United States citizens.

29. HAVA, therefore, does not mandate that database matching be used to verify eligibility to vote. The Secretary’s decision to use database matching for this purpose is not shielded from Section 5 review by any requirement of HAVA.

30. The statewide voter registration database requirement under the Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. § 15301 *et seq.*, does not mandate or otherwise provide a legal basis for the citizenship check and subsequent denial of registration or purge performed by Georgia.

31. The State of Georgia retains substantial discretion under HAVA in selecting the specific implementation procedures, and these procedures require preclearance under Section 5.

32. The Court finds that the Defendant, in violation of Section 5 of the Voting Rights Act, is implementing a multifaceted, new system that aims to identify persons who have registered to vote but who, the State believes, might not

be United States citizens. The implementation of this system must be enjoined unless and until Section 5 preclearance is obtained.

33. The Court notes that although election officials in Georgia may not use standards, practices or procedures that have not received preclearance under the Voting Rights Act, they remain free to check registration applicants' qualifications using the same methods and evidence they have used for decades if not centuries.

The National Voter Registration Act (“NVRA”)

34. Plaintiff raises a second claim under the National Voter Registration Act of 1993 (“NVRA”). 42 U.S.C. § 1973gg *et seq.*

35. Georgia is subject to the NVRA. *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005).

36. In addition to voter registration applicants, the Secretary of State is systemically checking the citizenship of at least some registered voters and directing counties to take action against those who are flagged; from documents received from county election officials, it appears that the check is activated when a registered voter requests an absentee ballot.

37. To the extent that Georgia is systematically applying the citizenship check procedures to registered voters and removing them within 90 days of a federal election, Georgia is in violation of the NVRA.

38. The NVRA contains a private right of action. The NVRA normally requires that a party serve notice on the chief election official before filing suit but the notice is waived if the violation occurs within 30 days of a federal election. 42 U.S.C. §1973 gg-9. Given that the alleged violation is ongoing and within 30 days of the election, no prior notice is necessary. Secretary of State Handel nonetheless was notified on October 7, 2008. Greenbaum Dec. ¶ 10, Ex. 8.

39. While states maintain the overall responsibility for conducting and regulating voter registration activities, the NVRA imposes certain minimum requirements and restrictions upon the process, including limits on activities that remove voters from the registration list for federal elections, as well as defining methods by which the accuracy of voter registration lists is to be achieved and maintained. A carefully crafted compromise, the legislative process took more than twelve years before the NVRA became law in 1993. Access to registration was expanded by mandating that voter registration be available by mail, at driver's license offices, and at offices that provide public assistance as well as other state and federal agencies. 42 U.S.C. § 1973gg-4 and § 1973gg-5. The NVRA requires

that states undertake efforts to remove the names of ineligible voters, but in doing so states are regulated in several ways so that voters are protected from wrongful purging.

40. One of the most significant ways that the NVRA regulates the removal of voters is in mandating that jurisdictions terminate any systematic list maintenance procedures within 90 days of a federal election:

A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically removed the names of ineligible voters from the official lists of eligible voters.

42 U.S.C. § 1973gg-6(c)(2)(A); *see Association of Community Organizations for Reform Now v. Ridge*, 1995 WL 136913, at *9 (Pennsylvania law permitting removal of voters' names up to 15 days before election violated NVRA); *Montana Democratic Party v. Eaton*, No. 08-141, slip op. at 9 (D. Mon. Oct. 8, 2008) (Section 8 (c)(2)(A) of the National Voter Registration Act “expressly prohibits a state from conducting any program to identify ineligible voters any less than 90 days before an election for federal office.”), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MDP-Order-10-8-08.pdf>.

41. The NVRA includes this restriction because “purg[ing] voters less than 90 days before a federal election creates an unacceptable risk that eligible

voters will be denied the right to vote.” *Montana Democratic Party v. Eaton*, slip op. at 11 (district court granted temporary restraining order enjoining *en masse* challenges to voter’s residency based on information contained in the United States Postal Service registry).

42. The only exceptions to the 90 day cutoff are removals done: (1) at the request of the registrant; (2) as provided by State law, by reason of criminal conviction or mental capacity; and (3) at the death of the registrant. 42 U.S.C. §§ 1973gg-6(c)(2)(B), 1973gg-6(a)(3)(A-B), 1973gg-6(a)(4)(A).

43. By performing a purported citizenship check of voters who have requested absentee ballots (and possibly other voters) within the 90 day cutoff and directing counties to remove voters who do not verify their citizenship, the Secretary of State is contravening the NVRA. In addition, the NVRA only permits removal procedures that are “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.” 42 U.S.C. §§ 1973gg-6(b)(1).

44. The Secretary claims that she is not engaging in a “systematic removal” of voters’ names from the registration list because removals from the rolls based on database matching also involve individualized determinations, and are therefore not systematic. However, this argument ignores the fact that individualized reviews are not occurring by chance but instead are being triggered

by the State's database matching program that identifies certain classes of existing registrants (as well as new registration applicants) whom the State believes could be non-citizens. Furthermore, the Secretary is engaging in a systematic removal based on an automated matching system that contains outdated information rather than on particularized specific information or individuals coming forward with personal knowledge of a "no-match."

45. During oral argument at the hearing on the Motion for Temporary Restraining Order, counsel for defense conceded that the DDS database contains no mechanism for updating citizenship information if a lawful permanent resident receives a driver's license and at some point in the future becomes a naturalized citizen, as is the case with Plaintiff. Transcript of October 10, 2008 hearing at 44.

46. Accordingly, the Secretary of State's use of the database matching system for purposes of verifying the citizenship of registered voters currently on the voter registration list within 90 days of the November 4, 2008 federal election is prohibited by the NVRA and is subject to being enjoined by this Court.

Remedy

47. If the State obtains expedited Section 5 preclearance for some or all of the submitted changes in advance of the election, the Court will then decide whether and to what extent its preliminary injunction can be lifted.

48. The statutory review period provided under Section 5 is 60 days from receipt of a submission. 28 C.F.R. § 51.9. DOJ may expedite its review. However, there is no assurance that a decision will be forthcoming before the election. It is unknown whether the State's submission is complete, or whether the State may be required to supplement its submission and/or whether DOJ will be required to request additional information. 28 C.F.R. §§ 51.37, 51.39.

49. Plaintiff's proposed preliminary injunction order asks this Court to enjoin the *use* of citizenship information collected via the unprecleared procedures. While this may not prevent the Defendants from continuing to implement every aspect of the unprecleared matching procedures (for example, the automated query and matching procedures might continue to operate), some accommodation is necessary under the circumstances. The unprecleared list maintenance procedures appear so commingled with the State's legally enforceable registration procedures that they cannot simply be enjoined in their entirety, because to do so would disrupt or halt the legal aspects of the State's system. In light of the proximity of the upcoming election, and the State's legitimate need for its registration database to be functional, such a result would be inequitable.

50. The Secretary of State will be ordered preliminarily to employ her full authority to direct all county boards of elections cease using the SSVRZ791R1 and

SSVRZ791R2 reports as the basis for voter challenges, hearings, correspondence or removal unless and until the new procedures have received Section 5 preclearance, and to report immediately to the Court any county that refuses to comply. The Secretary of State also will be ordered to halt the absentee voter procedures directed in the September 24, 2008 memorandum by the Office of Secretary of State, unless and until the new procedures have received Section 5 preclearance.

51. Although the four-part test for granting a preliminary injunction is not applicable to actions to enforce Section 5, Plaintiff would meet such a test in this case on the basis of his NVRA claim with respect to the removal of registered voters. Plaintiff has shown: (1) a substantial likelihood that he will prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. See *Lucero v. Trosch*, 121 F.3d 591, 598 (11th Cir. 1997); *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd sub nom. McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991).

52. Defendant Handel invokes the importance of public confidence in the electoral system, Opp. at 6-7, apparently suggesting that this end justifies the

intimidation and disenfranchisement of lawfully registered voters. But where the State's program on the one hand has not been shown to have detected any ineligible voters, while on the other it has been shown to repeatedly misidentify citizens as non-citizens and subject them to intimidating threats of purging or prosecution, Defendants' program cannot reasonably be understood as instilling public confidence.

53. Though election officials in Georgia may not use standards, practices or procedures that have not received preclearance under the Voting Rights Act, they remain free to check registration applicants' qualifications using the same methods and evidence they have used for decades if not centuries.

DATED: October 21, 2008

Respectfully submitted,

Elise Sandra Shore
Georgia State Bar no: 557131
Mexican American Legal Defense and
Educational Fund
34 Peachtree St. NW Suite #2500
Atlanta, GA 30303
Phone: 678-559-1071
eshore@MALDEF.org

Laughlin McDonald
Georgia Bar No. 489550
Neil Bradley
Georgia Bar No. 075125
Meredith Bell-Platts
Georgia Bar No 048948
ACLU VOTING RIGHTS PROJECT
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303
(404) 523-2721 (phone)
(404) 653-0331 (fax)
lmcdonald@aclu.org
mbell@aclu.org
nbradley@aclu.org

Brian Spears
1126 Ponce de Leon Ave., NE
Atlanta, Georgia 30306
(404) 872-7086 (phone)
(404) 892-1186 (fax)
bspears@mindspring.com

Jon Greenbaum
Robert A. Kengle
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600 (phone)
(202) 783-0857 (fax)
jgreenbaum@lawyerscommittee.org
bkengle@lawyerscommittee.org
PRO HAC VICE

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing document was prepared using 14 pt
Times New Roman font.

This 21st day of October, 2008.

/s/ Elise Sandra Shore
ELISE SANDRA SHORE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this the 21st day of October, 2008, electronically filed the foregoing **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW INSUPPORT OF PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION** 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:

Dennis R. Dunn
Stefan Ritter
Julia B. Anderson
Attorney General
State Law Department
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
ddunn@law.state.ga.us
sritter@law.ga.gov
janderson@law.ga.gov

/s/ Elise Sandra Shore _____
ELISE SANDRA SHORE

