

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

JOSE MORALES, on behalf of himself)
and those similarly situated)

Plaintiff,)

v.)

KAREN HANDEL, in her official)
capacity as Georgia Secretary of State.)

Defendant.)

CIVIL ACTION
FILE NO.
1:08-CV-3172 JTC

**REPLY BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING
ORDER**

I. INTRODUCTION

In the three paragraphs that Secretary Handel devotes to explaining why she has not violated Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, she essentially concedes to the only two issues in determining liability in a Section 5 enforcement action: (1) she has made voting changes; and (2) the changes have not received Section 5 preclearance. Specifically, the State is implementing without preclearance 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.

Notwithstanding the existence of the numerous unprecleared changes in the new system, Secretary Handel makes a two-part argument as to why her actions should not be enjoined. First, she claims that using database matching to verify voting eligibility is mandated by the Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. § 15483, and that therefore the decision to use database matching for this purpose is exempt from the Section 5 preclearance requirement. However, as was clearly stated by the Eleventh Circuit just this year, HAVA does not include any such verification mandate and thus Section 5 fully applies to the Secretary’s action. Moreover, Secretary Handel concedes that even with this purported mandate, the State of Georgia retains substantial discretion under HAVA in selecting the specific implementation procedures, and concedes that these procedures must be precleared. Nonetheless, she argues that the Court should stay its hand because the State intends to file today a request for preclearance of the voting changes with the United States Department of Justice. But the law of Section 5 is both clear and contrary to her position: Section 5 prohibits the State from implementing changes unless and until preclearance is obtained, and the mere filing of a preclearance request does not permit the State to implement the changes.

In addition, Secretary Handel claims that its new citizenship-review procedures do not violate the prohibition in the National Voter Registration Act of

1993 (“NVRA”), 42 U.S.C. § 1973gg-6(c)(2)(A), on implementing a registration removal program within 90 days of an election. The Secretary argues that any registrant who is removed from the rolls pursuant to this database matching effort ultimately would be removed based on an individualized determination and contends, therefore, that no removal program is being undertaken. Her argument ignores the plain fact that the individualized reviews are not simply happening by chance, but instead result from the State’s program of using the state computer to identify a class of registrants whom the State contends could be noncitizens. The Secretary also claims that Plaintiff is not subject to removal. However, this ignores the evidence produced by Plaintiff that he remains subject to removal from the registration rolls unless he proves his citizenship.

II. DEFENDANT IS IMPLEMENTING VOTING CHANGES SUBJECT TO SECTION 5 THAT HAVE NOT BEEN PRECLEARED, AND THEREFORE THIS COURT MUST ENJOIN THIS UNLAWFUL CONDUCT

A. Georgia’s Citizenship Requirement for Voting is Not at Issue

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. However, the validity of the citizenship requirement does not excuse the Secretary from obtaining preclearance for the State’s discretionary choices as to the manner in which the citizenship requirement will be enforced.

In this regard, the Section 5 issue presented here is directly analogous to the question the Supreme Court faced in *Young v. Fordice*, 520 U.S. 272 (1997). In that case, the State of Mississippi contended that its procedures for implementing the NVRA were exempt from Section 5 because the state purportedly was carrying out mandates that are not subject to Section 5 review, i.e., the mandates of the NVRA. The Supreme Court unanimously rejected this argument. The Court agreed, as a preliminary matter, that the NVRA does include some mandates, and that compliance with these mandates, in and of themselves, do not require Section 5 preclearance. But, the Court found, the NVRA also leaves it open to the states to make their own discretionary policy choices with regard to implementation questions, and Section 5 applied to all such choices by Mississippi. *Id.* at 285-86.

B. HAVA Does Not Mandate That Database Matching Be Used to Verify Eligibility to Vote

HAVA does not mandate that database matching be used to verify eligibility to vote, and therefore the Secretary is wrong when she asserts that her decision to use database matching for this purpose is shielded from Section 5 review. In other words, unlike the situation that was presented in *Young* with respect to the NVRA, there is no applicable federal mandate that trumps Section 5 even in part.

The Secretary's "federal mandate" claim is directly contradicted by the Eleventh Circuit's ruling earlier this year in *Florida State Conference of the*

NAACP. 522 F.3d 1153. Plaintiffs claimed in that case that the Florida was violating HAVA by using database matching to verify voter eligibility, asserting first that HAVA does not include any such requirement and second that HAVA preempts the states from deciding on their own to use database matching for this purpose. While the Eleventh Circuit disagreed with plaintiffs' preemption claim, what is critical here is that court did agree with plaintiffs' first assertion: 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, the Secretary is wrong when she claims that HAVA requires that the State use database matching to verify voter eligibility, *i.e.*, to verify that registrants are United States citizens. Instead, this is a policy choice made by the State that is permissible, but not compulsory, under HAVA, and, as such, is subject to Section 5 preclearance.

C. The Secretary is Implementing Numerous Subsidiary Changes That Require Preclearance

Furthermore, as the Secretary seems to recognize, Section 5 applies to the host of other discretionary implementation decisions that have been made by the State, following its threshold decision to use database matching to verify voter

eligibility. These include: 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;¹ 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 does not claim that any of these implementation decisions are in any way mandated by HAVA.

¹ 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 Making the List: Database Matching and Verification Processes for Voter Registration, available at <http://tinyurl.com/66t6r8>.*

Section 5, by its terms, prohibits the State from implementing these discretionary policy choices unless and until preclearance is obtained. The fact that the changes have been submitted for Section 5 review does not grant the State the authority to proceed with implementation. As the Supreme Court stated in *Young*, “preclearance is a process aimed at preserving the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change.” 520 U.S. at 285. Furthermore, as the Supreme Court also has made clear, “[i]f 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). *See also Clark v. Roemer*, 500 U.S. 646 652-53 (1991).

III. DEFENDANT’S CITIZENSHIP CHECK AND REMOVAL OF REGISTERED VOTERS FROM THE VOTER ROLLS, SUCH AS PLAINTIFF MORALES, WITHIN 90 DAYS OF A FEDERAL ELECTION VIOLATES THE NATIONAL VOTER REGISTRATION ACT OF 1993.

Secretary Handel claims that her new citizenship check procedures do not violate the 90 day moratorium for voter removal under the NVRA. She apparently concedes that the the citizenship check is being applied to existing registrants, not just to registration applicants, which is confirmed by the evidence of record. However, she asserts that the NVRA removal prohibition does not apply because the citizenship check is individualized and not systematic. Yet, it is the State’s

computer-automated database system that is the basis for identifying existing registrants – including Plaintiff Morales – for removal from the voter rolls, rather than any individual, particularized determination made by a county registrar.

Accordingly, the State is implementing a program to systematically remove voter registrants within 90 days of a federal election, in violation of the NVRA. 42

U.S.C. § 1973gg-6(c)(2)(A).

A. Plaintiff Morales is a Registered Voter and Unless a Temporary Restraining Order is Issued, He Will Be Removed From the Voter List in Violation of the NVRA.

Defendant claims that Plaintiff Morales is not being removed from the voter list and that he will be permitted to vote. This argument mischaracterizes Mr. Morales's current situation and disregards the facts already established in the record. Despite Plaintiff's personal visit to the Cherokee County election office to establish – by presenting his United States passport – that he had been erroneously flagged as a non-citizen, he was issued another letter *after he received his voter registration card* demanding that he prove his citizenship again by October 15 or he will be removed. Morales Dec. ¶¶13-17.

If a TRO does not issue and Mr. Morales does not appear at the October 15 hearing to prove his citizenship again, his name will be removed from the list of registered voters within 90 days of the November 4, 2008 Presidential Election.

José Morales is facing irreparable and immediate harm – removal of his name from the registered voter list and the denial of his right to vote.

B. The Secretary is Implementing a Database Matching Removal System to Remove Existing Registrants from the Registration Rolls

1. 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. Response, 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.

It also is important to recognize that the 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.* 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. Valentin-Cruz Dec, & Exh. A.²

2. Registrants are being removed pursuant to a voter removal program.

The NVRA mandates 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 remove the names of ineligible votes from the official lists of eligible voters.

² 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 its 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 county. *Id.* Based on this number, these verification checks must cover not only voter registrants but also current registered voters.

42 U.S.C. 1973gg-6(c)(2)(A). See *Association of Community Organization for Reform Now v. Ridge*, 1995 WL 136913, at *9 (holding that Pennsylvania law permitting removal of voters up to 15 days before election violated NVRA).

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.”³

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

³ During oral argument, 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.

registration list within 90 days of the November 4, 2008 federal election contravenes the NVRA and should be enjoined by this Court.

IV. REMEDY

Given the dual nature of the violations, this Court's relief must be double-faceted:

First, under Section 5 of the Voting Rights Act, the Court should enjoin the implementation of the unprecleared procedures for verifying both the citizenship of new registration applicants and the citizenship of existing voter registrants, unless and until Section 5 preclearance is obtained. 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).

Second, under the NVRA, the Court should enjoin the implementation of the citizenship verification procedures insofar as they are being applied to existing voter registrants within 90 days of the November 4 election. This injunction should remain in effect through November 4 regardless of whether the State is able to obtain Section 5 preclearance for its new procedures.

The relief Plaintiff seeks is not excessive. Each element of the Plaintiff's Prayer for Relief was included in order to maintain or restore the legally enforceable *status quo ante*. The scope of the necessary relief is a direct function of the Secretary's own conduct in adopting a wide-ranging removal program and then failing to seek preclearance until just 21 days before the November 4 election.

The Secretary's "better late than never" Section 5 submission to the Justice Department does create some uncertainty in terms of whether preclearance will be obtained prior to November 4 and, if preclearance is obtained, what that may mean with regard to the State's administration of this election. With regard to the "whether" question, the review period provided under Section 5 is 60 days from receipt of a submission, 28 C.F.R. § 51.9, and DOJ may be expected to seek to expedite its review to the extent possible. However, there is no assurance that a decision will be forthcoming before the election. For example, it is unknown whether the State's submission will be complete, or whether the State may be

required to supplement it and/or whether DOJ will be required to request additional information. 28 C.F.R. §§ 51.37, 51.39. It may be difficult for the State even to document for DOJ the full scope of the unprecleared changes that have been adopted. Moreover, the inaccurate information upon which the state is basing its “non-citizen” challenges and removals will make it difficult for the State to meet its substantive burden of proving the absence of discriminatory purpose and effect. 28 C.F.R. § 51.52(a). Many individuals who have been incorrectly targeted are, like Plaintiff Morales, naturalized citizens with Spanish surnames. See Spears Dec. ¶4 and Attachment. In contrast, Georgia has not identified even one instance in which the unprecleared procedures have netted an ineligible non-citizen.⁴

If the result of the forthcoming Section 5 submission is a DOJ objection before the election, or if there otherwise is no preclearance before election day, then the obligation to maintain an injunction against the unprecleared changes will be unqualified.

⁴ For example, it was recently reported 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.

If the State obtains expedited preclearance for some or all of the submitted changes in advance of the election, then – and only then – should the Court decide whether and to what extent its injunction can be lifted with regard to affected new voter registrants, without creating undue disruption and confusion for voters.⁵ That decision necessarily would be contingent upon the timing of DOJ’s decision, and the specific procedures that receive preclearance.

Defendant 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 it is the Defendant’s misdirected targeting and purge of lawfully registered citizens that has undermined confidence in the system.

V. CONCLUSION

For the foregoing reasons, plaintiff Morales’ motion for a temporary restraining order and preliminary injunction should be granted.

⁵ Considerations of administrative convenience – as opposed to prejudice or inconvenience to lawful voters – must weigh against the Defendant due to her delay in seeking Section 5 preclearance for this program when it was legally required to do so: *prior* to the time that the State began to implement its verification program in 2007.

Respectfully submitted this 14th day of October, 2008.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this the 14th day of October, 2008, electronically filed the foregoing **REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER** 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:

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CERTIFICATE OF COMPLIANCE

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

This 14th day of October, 2008.

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