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

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<tr><td>JOSE MORALES, on behalf of
himself and those similarly situated,
NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE (NAACP), as an
organization; GEORGIA
ASSOCIATION OF LATINO
ELECTED OFFICIALS (GALEO),
as an organization; and THE
CENTER FOR PAN ASIAN
COMMUNITY SERVICES (CPACS),
as an organization,

Plaintiffs,
V

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

Defendant.</td><td>)
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1:08-CV-3172 JTC</td></tr>
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PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Plaintiffs respectfully submit the following brief in opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment.

Defendant's memorandum in support of her motion presents a hodgepodge of arguments and citations that neither support Defendant's request for dismissal or summary judgment nor support a denial of Plaintiffs' Motion for Summary Judgment. Although Defendant's Motion refers to Federal Rules 12(b)(6) and 56,

Defendant's brief makes only passing reference to dismissal or judgment and is almost wholly a plea for the Court to withhold any relief beyond the preliminary injunction.[1] Indeed, Defendant's brief cites neither Rule 12 nor Rule 56.

Nothing in Defendant's brief challenges or contradicts the conclusion of this Court and the Attorney General that the citizenship verification program is a covered voting change under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Oct. 27, 2008 Order, at 21-22; May 29, 2009 Section 5 Objection Letter, at 2 (Exhibit 3 to Plaintiffs' Motion for Summary Judgment). Nor does Defendant's brief provide any reason to change this Court's conclusion that the citizenship verification program was implemented without Section 5 preclearance. Oct. 27, 2008 Order, at 22. Moreover, nowhere in Defendant's brief does she indicate any intention of terminating her implementation of the unprecleared citizenship verification program, although she also does not dispute the clear and oft affirmed requirement of Section 5 that covered jurisdictions are prohibited from implementing any voting change that has not received Section 5 preclearance from the Attorney General or the United States District Court for the District of Columbia. Thus, Defendant affirms each of the essential premises of Plaintiff's Motion for Summary Judgment, and this Court should issue the requested final

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[1] Defendant's motion is at least in part incorrectly pled under F.R.C.P. 12(b)(6). A motion to dismiss for lack of ripeness or mootness is correctly brought under Rule 12(b)(1) because if established they would deprive the Court of jurisdiction.

injunction enjoining Defendant from implementing the unprecleared verification program and restoring the *status quo ante*. *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) (" [i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes"); *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996) (same).

I. Defendant's Discussion of HAVA Does Not Merit Any Reconsideration of this Court's Prior Determination That Defendant's Citizenship Verification Program is a Voting Change Covered by Section 5

Several pages of Defendant's "Argument and Citation of Authority" simply recapitulate provisions of the Help America Vote Act ("HAVA"). Def. Brief, at 12-14. Defendant argues at several points that HAVA "authorizes" its citizenship verification program. *Id.* at 12-14, 19-21. For example, Defendant cites *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1172 (11th Cir. 2008), for the proposition that HAVA leaves "the qualification and registration of voter applicants . . . to the determination of the states." *Id.* at 13.[2]

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[2] In *Florida State Conference*, the Eleventh Circuit found that the only voter registration verification procedure that Congress mandated via HAVA concerns those individuals who register to vote by mail and who have not previously voted in a federal election in that state. 522 F.3d at 1172, *discussing* 42 U.S.C. § 15483(b) (which establishes an identity verification procedure, but not a citizenship verification procedure, for such voters). Thus, for example, with regard to individuals who register to vote in person "[t]here is nothing at all in the statute that discusses the requirements and procedures for establishing eligibility and

As this Court already has found, even though HAVA gives states discretion to enact or seek to administer additional registration requirements, this in no way absolves the State of Georgia from the need to obtain Section 5 preclearance for the exercise of that discretion. Oct. 27, 2008 Order, at 21-22, *citing Young v. Fordice*, 520 U.S. 273, 284 (1997). That discretion is in fact precisely the reason that the citizenship verification program is covered under Section 5. *Id.*

Defendant's discussion of *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Circuit 2008) (en banc), *reversed* 129 S. Ct. 5 (2008), is wholly beside the point. First, the Sixth Circuit's decision (denying the Ohio Secretary of State's motion to vacate a temporary restraining order) was reversed by the Supreme Court (the Supreme Court vacated the TRO). Second, the Eleventh Circuit's decision in *Florida State Conference* is directly on point as to the discretion granted Defendant by HAVA, and is controlling authority in this case. Lastly, the issues in *Brunner* had nothing whatsoever to do with a citizenship verification procedure, but instead concerned distribution of the results of record matching that is required by HAVA. 544 F.3d at 716. Thus, even if the Sixth Circuit's decision in *Brunner* had not been reversed, it still would not have provided even persuasive authority that the citizenship verification program at issue here was subject to any federal mandate.

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identity." *Id.* In sum, "on issues relating to voter registration and identification not specifically addressed by HAVA, Congress essentially punted to the states." *Id.*

II. Defendant's Argument That Her Citizenship Verification Procedure Should Receive Section 5 Preclearance is Legally Irrelevant

Defendant invites the Court to commit clear legal error by arguing the merits of the Attorney General's Section 5 objection. Def. Brief, at 16-19. It is hornbook law that a Section 5 enforcement court may not determine the merits of a Section 5 change; the jurisdiction for that question is reserved exclusively for the Attorney General and the United States District Court for the District of Columbia. Oct. 27, 2008 Order, at 14, *citing Perkins v. Matthews*, 400 U.S. 379, 384-85 (1971). *Accord*, *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984); *Allen v. State Board of Elections*, 393 U.S. 544, 555 n.19 (1969)[3] Such considerations are therefore irrelevant to this Court's decision as to whether summary judgment should be granted to Plaintiffs and a final injunction issued.

Because the merits of Defendant's citizenship verification program are not before this Court, Defendant's discussion of the citizenship eligibility requirement for voting in Georgia likewise misses the point. Based upon Defendant's Exhibit 1, Defendant asserts that there have been at least "25 instances" since 2005 in which non-citizens registered to vote. From this, Defendant argues that the "evidence demonstrates the need to verify an applicant's information." Def. Brief, at 4. Clearly, the State of Georgia has a legitimate general interest in maintaining

[3] Plaintiffs need not dispute Defendant's specific arguments on the merits of preclearance, but so that no waiver is implied, Plaintiffs categorically deny and dispute them.

its voter qualifications, and neither Plaintiffs nor the Attorney General have suggested otherwise. *E.g.,* May 29, 2009 Section 5 Objection Letter (Exhibit 3 to Plaintiffs' Motion for Summary Judgment); Section 5 Comment Letters of November 25, 2008, May 19, 2009, and August 28, 2009) (Exhibits 14, 15, and 18 to Plaintiffs' Motion for Summary Judgment). But contrary to Defendant's suggestion, whether Defendant's verification program has a discriminatory purpose or effect within the meaning of Section 5 is a decision for the Attorney General or the D.C. Court, not this Court.[4]

Similarly, Defendant's assertion that three states, Arizona, New Hampshire, and Virginia, "require an applicant to present proof of citizenship as part of the voter registration process," Def. Brief, at 14, is legally irrelevant. What practices

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[4] Plaintiffs note that Defendant's Exhibit 1 only contains information relating to 17 persons identified as non-citizens, and Defendant's source for the figure of 25 is otherwise unidentified. In any event, neither of these figures is even remotely close to the *thousands* of individuals already established to have been incorrectly flagged as non-citizens pursuant to Defendant's verification program, including *hundreds* of persons born in the United States with birth certificates to prove it. *See* Def. Exhibit 7 (May 29, 2009, Section 5 Objection Letter) at 4. Plaintiffs also note that their proposed permanent injunction provides that no person who admits to being a non-citizen shall be permitted to register to vote.

may be followed in other states does not bear on whether Georgia has implemented a voting change without Section 5 preclearance.[5]

III. Defendant's Arguments That Plaintiffs' Section 5 Claim is Unripe and/or Moot Are Wrong

A. This Case Remains Ripe for Adjudication

Defendant contends that Plaintiffs' Section 5 claim is not ripe because on August 11, 2009 Defendant submitted a request to the Attorney General that he reconsider and withdraw his May 29, 2009 objection to the citizenship verification program. This contention is without merit.

At the outset, it should be noted that since the request was made on August 11, 2009, the Attorney General is required to respond no later than October 13, 2009. 28 C.F.R. § 51.48(a). This is a mere two and a half weeks after briefing closes in this case, on September 25, 2009.

It also is important to emphasize that Section 5 prohibits covered jurisdictions from implementing voting changes *unless and until* Section 5 preclearance is obtained. *E.g.*, *Lopez v. Monterey County, supra*; *Clark v. Roemer, supra.* The law is not, as Defendant would have it, that voting changes may be

[5] Plaintiffs note that Defendant misreads (and also miscites) Virginia law. Virginia in fact does not have a citizenship documentation requirement. Va. Code Ann. §§ 24.2-410.1, 24-2-427 (Defendant cited the former code section as "42.2-410.1").

implemented until preclearance is denied or until the Attorney General acts on a pending request for reconsideration.

Here, moreover, Defendant's reconsideration request is only an empty shell. As discussed in Plaintiffs' Memorandum of Points and Authorities filed on September 4, 2009 (at 12, n.6), the reconsideration request is completely devoid of any legal or factual argument to the effect that the Attorney General erred in interposing the May 29, 2009 Section 5 objection to the citizen verification program.[6] According to the Attorney General's Procedures for the Administration of Section 5, reconsideration requests are to "contain relevant information or legal argument" explaining why the Attorney General wrongly interposed an objection. 28 C.F.R. § 51.45(b). Since Defendant's request to the Attorney General does not include any such information or argument, Defendant has not presented any colorable basis for believing that the objection might be withdrawn.[7]

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[6] Defendant's letter to the Attorney General requesting reconsideration is Exhibit 17 to Plaintiffs' Motion for Summary Judgment and Exhibit 15 to Defendant's Motion.

[7] Defendant's reconsideration request also seeks preclearance for a "revised" version of the citizenship verification program, which ostensibly would affect a narrower class of registrants. That request should be treated by the Attorney General as a new voting change. See *Blanding v. Dubose*, 454 U.S. 393, 399 (1982). Nonetheless, Defendant explicitly asks the Attorney General to "withdraw the objection" as it affects the "R2" list. Def. Exhibit 9 at 9. Defendant therefore has not abandoned her effort to implement that program.

Defendant's citation to *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009), Def. Brief, at 2, also provides no basis to conclude that this case is not ripe. [8] The *Harris* case did not concern Section 5, and the *Harris* court in fact found that the case before it was ripe for adjudication. *Id.* at 1308. [9]

B. <u>This Case is Not Moot</u>

Finally, Defendant raises the passage of S.B. 86 as justifying inaction by this Court, claiming mootness. Def. Brief, at 24. Defendant concedes that the S.B. 86 legislation, by its terms, will not be effective until January 1, 2010, Def. Brief at 9, and that the legislation provides that "[a]ny individual who has registered to vote prior to that date shall be deemed to have provided satisfactory evidence of citizenship." *Id.* at 10. Moreover, Defendant concedes that the voting changes enacted by this legislation must receive Section 5 preclearance, *id.*, but as yet

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[8] Defendant miscites the case as "*Harris v. United States*." However, the United States was not a defendant in the litigation but was an Intervenor-Plaintiff-Appellant.

[9] The *Harris* decision does cite a Section 5 case, *Texas v. United States*, 523 U.S. 296 (1998). *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d at 1308. However, *Texas* concerned the ripeness of a Section 5 coverage determination sought by a covered jurisdiction (the State of Texas) from the D.C. District Court with regard to an entire class of administrative actions, of which none was proposed or pending at the time, making it uncertain that any such action would ever occur, or what form it would take if it did occur. *Texas v. United States*, 523 U.S. at 300. Here, by contrast, Defendant's citizenship verification program was adopted and in effect at the time the case was filed, and no contingency has made its implementation uncertain. Thus, *Texas* is entirely off point.

neither the changes enacted by the statute, nor the administrative procedures that the statute requires to be adopted for its implementation, have even been submitted for preclearance.

Thus, S.B. 86 has not ended the Defendant's effort to "enact or seek to administer" her citizenship verification program, and that program continues to be a live issue. For some undetermined period of time – at least until January 1, and unless and until S.B. 86 receives Section 5 preclearance – the statute cannot even arguably supersede Defendant's verification program. In the interim, Georgia residents will continue to apply to register to vote. And thousands of Georgia residents who previously have sought to register to vote continue to sit in voter registration limbo – not registered to vote – because of the application of Defendant's program to them (this includes the individuals who are listed in the Statewide Voter Registration Database with a "noncitizen" flag next to their name, as well as the individuals whose registration application was rejected outright before the preliminary injunction in this case was entered). Under the terms of S.B. 86, the procedures these individuals must follow to register to vote are different now from what they will be if S.B. 86 goes into effect, and thus the ongoing implementation of Defendant's program has a direct impact on them.[10]

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[10] Defendant essentially concedes that the Section 5 claim is not moot by her request to the Attorney General for reconsideration of the objection. If Defendant

It also is important to note that a final judgment establishing Plaintiffs' Section 5 claim and a permanent injunction issued to enjoin Defendants' program and restore the *status quo ante* will neither prejudice Defendant from making her best case for preclearance of S.B. 86, nor will it prevent Defendant from implementing S.B. 86 if preclearance is obtained. Plaintiffs' request for injunctive relief is aimed solely at the implementation of Defendant's verification program.

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no longer intended to implement the program, or if S.B. 86 now precludes its implementation, there would be no live issue for the Attorney General to address with regard to Defendant's program.

IV. Conclusion

For the preceding reasons Defendants' Motion should be denied, and Plaintiff's Motion for Summary Judgment should be granted.[11]

Respectfully submitted,

/s/Elise Sandra Shore
Elise Sandra Shore
Counsel for Plaintiffs

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[11] To the extent that Defendant's Motion addresses Plaintiffs' claims under HAVA and the National Voter Registration Act, Plaintiffs again state their position that these claims should be dismissed without prejudice if summary judgment is granted on Plaintiff's Section 5 claim.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this, the 18th day of September, 2009, I electronically filed the within and foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT** 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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/s/ Elise Sandra Shore
Elise Sandra Shore
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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 18th day of September 2009.

/s/ Elise Sandra Shore
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Georgia Bar No. 557131

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

JOSE MORALES, on behalf of himself and those similarly situated, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), as an organization; GEORGIA ASSOCIATION OF LATINO ELECTED OFFICIALS (GALEO), as an organization; and THE CENTER FOR PAN ASIAN COMMUNITY SERVICES (CPACS), as an organization,	)	**CIVIL ACTION NO. 1:08-CV-3172 JTC**
Plaintiffs,	)	
V	)	
KAREN HANDEL, in her official capacity as Georgia Secretary of State,	)	
Defendant.	)	

<u>PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS</u>

Pursuant to Local Rule 56.1(B)(2), Plaintiffs respectfully submit the following responses to Defendant's Statement of Undisputed Facts:

1. Pursuant to L.R. 56.1(B)(2)(a)(2)(iii), Plaintiffs dispute Defendant's contention that "Since 2005, the Secretary of State has removed at least 25 individuals from the list of eligible voters because they were not U.S. citizens.

Defendant's Exhibit 1." The cited record source purports to list only 17 individuals as non-citizens.

2. No dispute.

3. No dispute.

4. No dispute.

5. No dispute.

6. No dispute.

7. No dispute.

8. No dispute.

9. No dispute.

10. No dispute.

11. No dispute.

12. No dispute.

13. No dispute.

14. No dispute.

15. No dispute.

16. No dispute.

Plaintiffs submit no additional facts pursuant to Local Rule 56.1(B)(2)(b).

Respectfully submitted,

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