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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

RICHARD GOODEN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 2:05-cv-02562-WMA**
	)	
NANCY WORLEY, *etc.*, *et al.*,	)	
	)	
Defendants.	)	

BRIEF OF DEFENDANT ALABAMA SECRETARY OF STATE IN RESPONSE TO PLAINTIFFS' SECTION 5 ENFORCEMENT ACTION REPLY BRIEF AND OPPOSITION TO THE DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT (DOC. 33)

Without waiving any of the arguments made in the Brief of Defendant Alabama Secretary of State in Response to Plaintiffs' Section 5 Enforcement Action Brief (Doc. 22) and in Support of Defendant's Motion for Summary Judgment (Doc. 25), Troy King, as Attorney General for the State of Alabama, on behalf of the Alabama Secretary of State, who is sued only in her official capacity, submits this brief in response to Plaintiffs' Section 5 Enforcement Action Reply Brief and Opposition to Defendants' Motions for Summary Judgment (Doc. 33).

I.

In their brief, Plaintiffs continue to mischaracterize both the facts of this case and the legal implications of those facts. As a factual matter, Plaintiffs assert that "as a result [of the Secretary of State's advice], voter registrars throughout Alabama, pursuant to the advice of the Secretary of State, are employing practices and procedures that are both inconsistent with precleared Section 177 and have not themselves been submitted for preclearance." (Doc. 33

at 2). As a legal matter, plaintiffs assert that such a situation, were it to exist, would constitute a violation of federal preclearance law. *Id.*

In reality, irrespective of what the Secretary of State has advised county boards of registrars in the past, the evidence before this honorable Court is that the Secretary of State is now refraining from offering further advice pending "guidance from the Courts or the Attorney General's Office," (Doc. 21 ¶ 65), and that the registrars are complying with precleared state law. Moreover, any failure on the part of the Secretary of State to conform to the various precleared provisions of Alabama law at issue in this case would be a violation of state law, not federal law.

II.

Plaintiffs continue to focus on the advice given by the Secretary of State in the past, and to wrongly assert that the advice has not changed *and* is being followed by the registrars. The parties did stipulate that the Secretary of State advised the registrars to "continue their long-standing practices and not to make any changes to their practices until the Attorney General issues a response to legal questions posed by the Secretary of State and all the legal and administrative issues can properly be resolved." (Doc. 21 ¶ 34.) That, however, is not the end of the story.

The parties further stipulated that "[o]n January 10, 2006, Alabama Attorney General's opinion 2005-092 was distributed by the office of the Attorney General to all county boards of registrars in Alabama by facsimile and by U.S. Mail, and county boards of registrars were invited to seek the opinion of the Alabama Attorney General if they need legal assistance in determining whether a particular felony involves moral turpitude." (Doc. 21 ¶ 36) Moreover, the parties have stipulated that "[o]n March 29, 2006, the Secretary of State issued a letter to Alabama Voter

Registrars that included the following statement: 'The felon voter registration case is currently in Federal Court; therefore, our office cannot comment on this issue other than to say we continue to await guidance from the Courts or the Attorney General's Office on this matter before we give you any further information or advice." (Doc. 21 ¶ 65).

That letter was issued more than two months after the Attorney General's opinion was distributed. There can be no doubt that the registrars have been given correct legal advice by the State's chief legal officer, the Attorney General, and that the Secretary of State has refrained from interfering with or undermining that advice.

Assuming *arguendo* that the Secretary of State were giving erroneous advice to registrars on a daily basis, that fact would not save the Plaintiffs' case. As a practical matter, advice rendered by the Secretary of State on this matter is without legal effect or significance. County boards of registrars, not the Secretary of State, have the exclusive authority under Alabama Code § 17-4-136 to grant or refuse an individual's application to register to vote. (*See* Doc. 21 ¶¶ 9-11) Their grant or refusal – not the advice of the Secretary of State – triggers an applicant's right to judicial review. (*See* Doc. 21 ¶¶ 46-47)

Plaintiffs give too much weight to the Secretary of State's advice, characterizing her remarks as "instructions" or "directives." The Secretary of State lacks authority under Alabama law to direct voter registration. *See* Ala. Code § 17-4-136 (1995) (providing that "no person shall be registered until a majority of the board of registrars has passed favorably upon the person's qualifications"). Any directive issued by a State official without legal authority is void. *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963, 965 (1913) (noting that unauthorized acts of public officials are void, despite their apparent authority, and confer "no rights of any sort upon anyone").

The Secretary of State lacks the authority to enforce a void directive. She may effect the removal of registrars under State law only "for cause." Alabama Code § 17-4-151 (1995). Plaintiffs have failed to prove how a registrar's failure to follow a void directive, issued by the Secretary of State without legal authority, could ever serve as "cause" for removal under Section 17-4-151. *Cf.* Opinion to Honorable Lesley Vance, Member, House of Representatives, dated July 1, 2004, A.G. No. 2004-171, 2004 WL 1557049 ("Section 17-4-151 authorizes the Secretary of State to remove a board member for cause. The accepted view is that, when the power to remove an officer is for cause, notice and a hearing must be given to the person being removed. Removal for cause generally requires a finding that the person failed to exercise the skill and capacity necessary to perform the job. 'For cause' has been defined to be reasons relating to the effective discharge of the duties of the office so as to make further employment harmful to the public interest. It infers that the officer failed to perform his or her duties, was incompetent, inefficient, or is an unsuitable person for the position to which he or she was appointed.") (citations omitted.).

Plaintiffs have further failed to prove that any registrar actually heeded Secretary of State's advice.[1] To the contrary, the evidence before this Court is very clear on the point that the defendant registrars, despite advice given by the Secretary of State to maintain their practices, are now fully complying with precleared state law. The parties have stipulated as follows:

> 26. It is the current practice of the Jefferson County Registrar to permit felons whose only felony convictions are for crimes that do not involve moral turpitude, as that phrase is defined by the appellate courts of Alabama, to register to vote. To determine whether particular felonies involve moral turpitude under Alabama case law, the Registrar consults both Attorney General's Opinion 2005-092, and attorneys, including staff attorneys employed as Assistant Attorneys General in the Office of the Attorney General, as needed. The Registrar does not

[1] Granted, it is difficult under any set of facts to prove that advice to maintain the *status quo* actually caused the *status quo* to be maintained. For example, if you advise a baby to keep crying and she does so, has she done so on your advice or on her own initiative?

consult the Secretary of State, who is not an attorney and who is not qualified to render legal advice.

27. The current practice of the Houston County Board of Registrars is as follows: When an applicant seeks to register to vote in Houston County, the Board of Registrar's current practice is for the registrar to ask the applicant to fill out the form provided by the Secretary of State which asks whether the applicant has been convicted of a felony. The registrar also runs the applicant's name on a database maintained by the Secretary of State's office. (The database does not identify any felony conviction that might appear there as either a crime of moral turpitude or not.) If the applicant admits a felony conviction and/or the database shows a felony conviction, the registrar asks the applicant to produce that either their (sic) felony conviction did not involve a crime of moral turpitude or that the applicant's rights have been restored by the Board of Pardons [and] Parole[s]. To prove that the applicant's felony conviction did not involve a crime of moral turpitude, the applicant may produce either a certified copy of their criminal file from the jurisdiction of conviction or a letter from the Alabama Board of Pardons [and] Parole[s] stating that their (sic) felony conviction did not involve a crime of moral turpitude. To prove that the Board of Pardons and Parole[s] has restored their (sic) civil rights, the applicant must produce a Certificate from the Board so stating. If the Applicant either is incapable of producing (or refuses to produce) evidence that their (sic) felony conviction did not involve a crime of moral turpitude, or, the Applicant cannot produce evidence that his rights have been restored by the Board of Pardons and Paroles despite a prior felony conviction of a crime of moral turpitude, the applicant is referred to the procedures for appeal set out in Alabama Code § 17-4-124. Additionally, when the registrar receives the list of felony convictions from the Houston County Circuit Clerk's office, the registrar will inform those listed by certified mail that the convicted felon has thirty days to provide evidence (as described above) that he should be entitled to vote because his felony conviction was not involving a crime of moral turpitude or that, alternatively, that (sic) his civil rights have been restored by the Board of Pardons and Paroles. If the convicted felon cannot or will not provide such evidence to the registrar, his name will be purged from the voting lists and his recourse will be to follow the appeal procedures set out in Alabama Code § 17-4-124.

(Doc. 21 ¶¶ 26-27). Thus, despite any advice giving by the Secretary of State, it is clear that the current practices of the defendant registrars is to allow individuals with convictions for felonies not involving moral turpitude to register to vote.

After the filing of the joint Stipulation (doc. 21), an evidentiary hearing was held in the related state court case. The transcript from that hearing, complete with exhibits, has been filed with this Court. (Doc. 36) At the evidentiary hearing, Plaintiffs called Tonya Colvin, an

administrative assistant at the Jefferson County Registrar's Office. (Doc. 36, Exhibit A, at 42-55) Ms. Colvin testified that the Jefferson County Registrar's Office receives lists of individuals convicted of felonies and that they check those lists against the voter rolls. Their current practice is to send the lists of voters convicted of felonies to the Jefferson County Attorney's Office, so that they can advise the Registrar's Office whether any voter on the list has been convicted of a disqualifying felony. (*Id.* at 45-50, 54)

Theodore Lawson, the attorney in the Jefferson County attorney's office who responds to the inquiries from the Registrar's Office, then testified. (*Id.* at 58-72) Mr. Lawson testified that the Registrar's Office sends him lists of individuals convicted of misdemeanors or felonies and that the names of those registered to vote are highlighted. (*Id.* at 58-59) Mr. Lawson reviews each list to determine which voters have been convicted of felonies and then makes a determination about whether those felonies involve moral turpitude. (*Id* at 59-60) He then marks the list to indicate to the Jefferson County Registrar which voters should be removed from the rolls and which should remain. (*Id.*)

Mr. Lawson is an experienced prosecutor. (*Id.* at 71) To determine whether a felony involves moral turpitude – when there is no court decision on point - Mr. Lawson compares the elements of the felony committed to the elements of felonies that are established to involve moral turpitude. In this way, he reasons by analogy to make a determination about whether the felony committed involves moral turpitude. (*Id.* at 60-67)

Accordingly, not only have the parties stipulated that the current practices of the defendant registrars is to allow individuals with convictions for felonies not involving moral turpitude to register to vote, but testimony taken last month further proves that the current

practice of the Jefferson County Registrar is entirely compliant with precleared state law.[2] Thus, from all the evidence before this Court, it is clear that the only erroneous statements that continue to be made in this case are the Plaintiffs' assertions that the Secretary of State is misadvising registrars and "*[a]s a result*, voter registrars throughout Alabama . . . are employing practices and procedures that are both inconsistent with precleared Section 177 and have not themselves been submitted for preclearance." (Doc. 33 p. 2) (emphasis added); *see also* (*id.* at 7) (asserting that the Jefferson County registrar has been deterred from following precleared state law because of the advice of the Secretary of State).

Whatever might have been before, all is well now. The appropriate State officials have acted, and the Defendants' conduct conforms to State precleared law. There is no relief this Court need provide.

III.

Having set out the Plaintiffs' mischaracterization of the facts, we turn briefly to an important mischaracterization made with respect to the law. Without waiving any of our arguments from the earlier briefing, we want to now emphasize a point that was made without much emphasis the first time around: Fundamentally, this case is about whether State officials are complying with State law.

Plaintiffs' original brief and their reply brief each begin by alleging that State officials are not complying with State law. (Doc.22 at 1-2; Doc. 33 at 1-2) Each brief then says that the State officials' non-conforming practices have not been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (Doc.22 at 2; Doc. 33 at 2) Each brief then explains that the Plaintiffs seek to have this Court enjoin the non-conforming practices because they have not

[2] The Houston County registrars are not currently defendants in the state case and no testimony was taken as to their practices.

been precleared. (Doc.22 at 2; Doc. 33 at 2) That is, what Plaintiffs seek is for this Court to enjoin State officials to follow State law.

Continuing the same fallacy, periodically throughout the Plaintiffs' briefs one will find sentences like the following: "The Secretary of State's action must be precleared pursuant to Section 5 before it may legally take effect." (Doc. 22 at 13; Doc. 33 at 5); *see also* (Doc. 22 at 9, 10; Doc. 33 at 2, 9, 10) Accepting as true, for purposes of argument, that the Secretary of State is failing to conform her practices to precleared State law, preclearing her self-adopted practices will not make them legal. A State official has no authority to fail to abide by State law. The Secretary of State cannot overrule duly-enacted State constitutional and statutory provisions. She must follow State law, and, if she fails to do so, then a *State* court should enjoin her actions. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

This position is consistent with *Ritter v. Bennett*, wherein the three-judge Court said:

> The failure of state election officials to follow state law is not necessarily a § 5 claim. *See Moore v. Caledonia Natural Gas District*, 890 F. Supp. 547, 551 (N.D. Miss.1995); *Montgomery v. Leflore County Republican Executive Committee*, 776 F. Supp. 1142, 1145 (N.D. Miss.1991). As noted earlier, § 5 covers only changes in procedure with respect to voting that a state enacts or administers. "One would not normally conclude that a state 'enacts or administers' a new voting procedure every time a state official deviates from the state's required procedures." *Moore*, 890 F. Supp. at 551 (q*uoting United States v. Saint Landry Parish School Board*, 601 F.2d 859, 864 (5th Cir. 1979)).[3]

Ritter v. Bennett, 23 F. Supp. 2d 1334, 1341 (M.D. Ala. 1998).

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[3] *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) ("We hold that the decisions of the United States Court of Appeals for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

Plaintiffs rely on *Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986), to muddy the waters on this point. (Doc. 33 at 9) For the sake of argument, the Secretary of State did not dispute the holding of *Graddick* in her original brief and instead focused on the many ways that *Graddick* was distinguishable. (Doc. 24 at 13-14) Most important was that, in *Graddick*, the Alabama Attorney General had *effected a chang*e in the conduct of the runoff election by encouraging voters to change their voting practices and ignore an anti-crossover rule, and by threatening civil liability against any persons who enforced the precleared cross-over rule, resulting in approximately 13,000 illegal ballots. 641 F. Supp. at 1197. It does not appear that the parties in *Graddick* specifically raised the issue of whether a State official's failure to comply with State law could create a federal issue.

Ritter v. Bennett does consider that question, and it answers that such a failure does not necessarily result in a section 5 issue. *Ritter*, 23 F. Supp. 2d at 1341. That only makes sense. A Section 5 complaint is properly brought when the State duly enacts a new law or practice or procedure concerning voting and fails to submit it for preclearance, or persists implementing it when preclearance has been denied. On the other hand, when a State official is alleged to have failed to conform her behavior to the State's duly adopted and precleared laws, practices, or procedures, then a State court action will lie.

IV.

For all of the reasons set out above and those made in the earlier filed brief (Doc. 25), the relief requested by the Plaintiffs in their complaint should be denied, and the Secretary of State's motion for summary judgment (Doc. 24) should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12th, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Norman J. Chachkin, nchachkin@naacpldf.org; Bart G. Harmon, bharmon@webbeley.com; Ryan Paul Haygood, rhaygood@naacpldf.org; Theodore A. Lawson II, cockrellh@jccal.org; Jeffrey M. Sewell, cockrellh@jccal.org; Edward Still, docket@votelaw.com; Kendrick E. Webb, kwebb@webbeley.com.

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