

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

RICHARD GOODEN, ANDREW JONES, and
EKEYESTO DOSS,

Plaintiffs,

v.

NANCY WORLEY, in her official capacity as
Alabama Secretary of State; NELL HUNTER,
in her official capacity as Jefferson County
Voter Registrar; and ANITA GIBSON,
WALTER LONG, and MOLLY MEADOWS in
their official capacities as Houston County
Voter Registrars,

Defendants.

Civil Action No. 2:05-cv-2562

**PLAINTIFFS' SECTION 5 ENFORCEMENT ACTION REPLY
BRIEF AND OPPOSITION TO DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In their responsive briefs, Defendants *concede* that Defendant Secretary of State, Alabama's chief election official, has advised and *continues to advise* voter registrars throughout the State to defy the duly enacted and precleared Article VIII, Section 177, of the Alabama Constitution ("Section 177") — the benchmark for voting practices and procedures in the State under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as amended. Notwithstanding that Alabama's duly enacted and precleared law denies the vote *only* to those citizens convicted of felonies involving moral turpitude, Defendant Secretary of State has unlawfully advised and continues to advise voter registrars

throughout the State to refuse registration to *all individuals with felony convictions*, including Plaintiffs and other presently eligible citizens convicted of felony offenses *not involving moral turpitude*. As a result, 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, in violation of Section 5 of the Voting Rights Act. Defendants' failure to comply with the preclearance procedures that Section 5 of the Voting Rights Act mandates has resulted in the unlawful denial of the right to vote to Plaintiffs and a substantial but undetermined number of similarly situated Alabama citizens. In this limited Section 5 enforcement action, however, Plaintiffs seek only to enjoin the Defendants' impermissible implementation of voter registration procedures for which they have failed to obtain the required preclearance.

For the reasons set forth below, Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment and find that Defendant Secretary of State's advice to voter registrars throughout the State of Alabama to deny registration to all people with felony convictions qualifies as a voting practice or procedure that constitutes a voting change within the meaning of the Voting Rights Act, which must be precleared pursuant to Section 5 before it may legally take effect.

II. ARGUMENT

DEFENDANT SECRETARY OF STATE AND DEFENDANT REGISTRARS HAVE VIOLATED SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c, AS AMENDED, BY ADMINISTERING VOTING PRACTICES AND PROCEDURES THAT HAVE NOT BEEN, BUT ARE REQUIRED TO BE, PRECLEARED PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT

- 1. Plaintiffs have standing to challenge Defendants' *continuing* implementation of practices and procedures that are both inconsistent with precleared Section 177 and have not themselves been submitted for preclearance, in violation of Section 5 of the Voting Rights Act.**

As an initial matter, Plaintiffs have standing to bring this action. The Supreme Court first recognized a private right of enforcement under Section 5 of the Voting Rights Act in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). In *Allen*, the Supreme Court, in considering whether a private litigant may bring an enforcement suit under Section 5, recognized that “Section 5 does provide that ‘no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5].’” *Id.* at 555. The Supreme Court noted that an examination of Section 5’s language, when taking into account the broad remedial purpose of the Voting Rights Act, permits private plaintiffs to seek enforcement of Section 5 through a declaratory judgment and to seek an injunction to prevent a state from continuing a Voting Rights Act violation, pending the state’s submission of the legislation for approval pursuant to Section 5’s requirements. *Id.* The Supreme Court also noted that the “achievement of the Act’s laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.” *Id.* The Court in *Allen* also recognized that “it is consistent with the

broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.” *Allen*, 393 U.S. at 555.

Under *Allen*, Plaintiffs, who were unlawfully deprived of their voting rights, have standing to challenge Defendant Secretary of State’s violation of Section 5 of the Voting Rights Act by failing to submit for preclearance her official, continuing unlawful advice to voter registrars throughout the State of Alabama to refuse to register eligible voters. The conduct of state actors responsible for depriving Plaintiffs and similarly situated citizens of their voting rights has not, to this point, been cured.

2. Defendant Secretary of State’s advice and instruction to voter registrars throughout the State of Alabama to refuse registration to *all* people with felony convictions constitutes a change in standard, practice or procedure that is required to be, but has not been, precleared pursuant to Section 5 of the Voting Rights Act.

Defendants, against the weight of Supreme Court precedent, and the letter and spirit of Section 5 of the Voting Rights Act, assert that the “‘change’ targeted by the Plaintiffs was not a change at all, but advice . . . given to county boards of registrars” by the Secretary of State to defy Alabama’s duly precleared and enacted voting law by “maintain[ing] their long-standing practices” of denying registration to *all* people, including those who are presently eligible to vote with felony convictions. Brief of Defendant Alabama Secretary of State (“Def. Sec.’s Br.”), at 12. Defendants assert that “the advice given [by the Secretary of State to voter registrars throughout Alabama] was designed to prevent change” and to “preserve the status quo temporarily,” and that “[s]uch temporary advice to maintain the status quo is beyond the reach of Section 5,

which was intended by Congress to inhibit changes that would disturb the status quo.”

Id. Defendants’ argument is without merit for the following reasons.

First, Article VIII, Section 177 of the Alabama Constitution, which was adopted by the will of the people of Alabama and precleared by the Department of Justice in 1996, is the law of Alabama with respect to felon disfranchisement in the State and constitutes the benchmark for Section 5 purposes. Because Section 5 of the Voting Rights Act covers the entire State of Alabama, *see* 42 U.S.C. § 1973c, the State is prohibited from “enact[ing] or seek[ing] to administer . . . *any standard, practice, or procedure* with respect to voting” different from Section 177 until the State obtains either judicial or administrative preclearance from the federal government. *Connors v. Bennett*, 202 F.Supp.2d 1308, 1317 (M.D. Ala. 2002) (emphasis added). In this case, the Secretary of State’s advice to voter registrars throughout the State of Alabama not to register *any* people with felony convictions substantially departs from — and, in fact, defies — Section 177, and triggers Section 5’s preclearance requirement. *See Ritter v. Bennett*, 23 F.Supp.2d 1334, 1340 (M.D. Ala. 1998) (3-judge court) (suggesting that “the broad dissemination of misleading information . . . could constitute a change within the meaning of § 5.”). Accordingly, the Secretary of State’s advice to voter registrars is clearly a voting practice and procedure that contradicts, enlarges and frustrates Section 177 and constitutes a voting change within the meaning of Section 5. The Secretary of State’s action must be precleared pursuant to Section 5 before it may legally take effect.

Second, Defendants’ suggestion that “temporary advice to maintain the status quo is beyond the reach of Section 5,” Def. Sec.’s Br., at 12, is equally without merit because

it is not supported by Supreme Court precedent. In *Young*, the Supreme Court held that an action under Section 5 seeking to enjoin voting procedures that have not been precleared aims to “preserv[e] 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 (1997). In *Young*, the Supreme Court sought to protect the “status quo” — that is, the voting policies and procedures in place that had been precleared — from changes to the status quo that had not themselves been precleared. *Id.* at 284-85. Accordingly, the Supreme Court noted that it “is *the change [to the status quo] that invokes the preclearance process*; evaluation of that change concerns the merits of whether the change should in fact be precleared.” *Young*, 520 U.S. at 285 (emphasis added); *see also*, *NAACP v. Hampton County Election Com’n*, 470 U.S. 166, 178 (1985) (holding that “the form of a change in voting procedures cannot determine whether it is within the scope of § 5 . . . [since] [t]hat section reaches informal as well as formal changes, such as a bulletin issued by a state board of elections.”).

Although Defendants here assert that the Secretary of State’s and voter registrars’ so-called “long-standing practice” of defying Section 177 itself is the status quo, Def. Sec.’s Br., at 12, there is simply no support under Section 5 for the proposition that state actors can unilaterally create a status quo by refusing to follow a duly enacted and precleared law. As discussed *supra*, the plain language of Section 5 prohibits Alabama from “enact[ing] or seek[ing] to administer . . . *any standard, practice, or procedure* with respect to voting” different from Section 177 until the State obtains either judicial or administrative preclearance from the federal government. *Connors*, 202 F.Supp.2d at

1317 (emphasis added). Under Section 5, the Secretary of State’s action must be precleared before it may legally take effect.

In an effort to distract this Court’s attention from the fact of the clear violation of Section 5 in this case, Defendant Secretary of State asserts that “Plaintiffs give too much weight to the Secretary of State’s advice, characterizing her remarks as ‘instructions’ or ‘directives,’” and suggests that “the Secretary of State lacks the authority under Alabama law to direct voter registration.” Def. Sec.’s Br., at 13. Defendants’ assertion is contradicted by Defendant Jefferson County Registrar, who “[a]dmitted” that she had been “*directed* by the Secretary of State not to register people with any felony conviction — whether or not the felony involved moral turpitude — without a Certificate of Eligibility.” See Def. Jeff. Co. Regist.’s Answer to Pls.’ Compl., ¶ 32 (emphasis added); see also Def. Jeff. Co. Regist.’s Answer to Pls.’ Compl., ¶ 41 (admitting that “Defendant Jefferson County Registrar informed the Board of Pardons that the Defendant Secretary of State had directed them not to register individuals with felony convictions who had not obtained a Certificate of Eligibility, without regard to whether or not such felony convictions involved moral turpitude.”). Thus, Defendant Secretary of State’s unlawful advice encourages even those voter registrars who would otherwise undertake to follow Alabama’s law to defy Article 177.

The precise language used to define the Defendant Secretary of State’s authority over voter registrars, whether it is identified as “directing,” “advising,” “providing guidance” or “encouraging,” is not as significant as the manner in which it is being received, and acted upon, by voter registrars to the detriment of Plaintiffs and other

similarly situated citizens in the State of Alabama. *See Hampton County*, 470 U.S. at 178 (holding that because the form of a change in voting procedure is irrelevant to a Section 5 coverage determination, administrative changes can trigger the preclearance requirement). As a practical matter, the fact that the Secretary of State, the chief election official, has the authority to *remove* voter registrars, whose qualifications, as Defendants point out, “include only a high school degree,” Def. Sec.’s Br., at 16, makes Defendant Secretary of State’s inquiry into the precise nature of her authority over voter registrars largely academic in nature. *See* Ala. Code § 17-4-151 (Supp. 2005) (“The registrars appointed under this article may be removed for cause by the Secretary of State at any time before the end of their term of office, upon submitting written reasons therefore to the registrar removed and the members of the appointing board.”).

As the chief elections official, the Secretary of State is required to follow and facilitate, not undermine, the implementation of Alabama’s Constitution and laws. Here, notwithstanding the plain language of precleared Section 177, the Secretary of State has advised voter registrars throughout the State of Alabama to refuse to register persons, including Plaintiffs, who are currently eligible to register to vote under the law, in violation of Section 5. *See* Pls.’ Compl., ¶¶ 54-56. The effect of the Secretary of State’s practice is to deny the vote to Plaintiffs, and to a substantial but undetermined number of other similarly situated citizens of Alabama. The Alabama Board of Pardons and Paroles, for example, has identified 330 individuals from across the State of Alabama who applied for a Certificate of Eligibility but were found to be already eligible to vote

because they had been convicted of felonies *not involving moral turpitude*. Doc. 21 Stip. ¶¶ 63-64.

The Secretary of State's advice to voter registrars throughout the State of Alabama not to register any people with felony convictions substantially departs from — and, in fact, defies — the precleared Section 177, and triggers Section 5's preclearance requirement. *See Ritter v. Bennett*, 23 F.Supp.2d at 1340. Accordingly, the Secretary of State's unlawful advice to voter registrars must be precleared pursuant to Section 5 before it may legally take effect. *See Henderson v. Graddick*, 641 F.Supp. 1192, 1194 (M.D. Ala. 1986)(holding that a candidate for the Democratic Party's nomination for governor violated Section 5 of the Voting Rights Act when, without preclearing his actions, he "advised voters" who had voted in the State's Republican primary to participate in the Democratic gubernatorial runoff in violation of the Democratic party rules prohibiting cross-over voting). The Defendants struggle mightily and unsuccessfully to distinguish *Henderson* on the grounds that the "facts of that that [sic] case" are inapplicable to this case. Def. Sec.'s Br., at 13. In reality, the facts of *Henderson* illustrate its applicability to the instant case. In *Henderson*, the Court, recognizing the Attorney General as the "chief legal officer of the State of Alabama," noted that he, through his advice and encouragement to voters, "*made every effort to get voters to violate the [precleared] anti-crossover rule*" at issue. *Henderson v. Graddick*, 641 F.Supp. at 1195 (emphasis added). As a result, the Court concluded:

Since this rule was clearly authorized by Alabama statute and since the rule had been precleared by the Attorney General of the United States in 1980, we hold that the Attorney General's actions effected a change in procedure with respect to

voting. This change was not “precleared” as required by the Voting Rights Act. The Act has, therefore, been violated.

Id. at 1201.

In this case, the Defendant Secretary of State, like the Attorney General in *Henderson*, has advised registrars throughout the State of Alabama to refuse to follow Alabama’s precleared law. Like the Attorney General’s advice to voters in *Henderson*, the Defendant Secretary of State’s advice to registrars effected a change in practice and procedure with respect to voting that is subject to Section 5 preclearance. That the Defendant Secretary of State’s actions constitute a voting change is clearly demonstrated by the unlawful vote denial that is resulting from the voter registrars’ implementation of the Defendant Secretary of State’s unlawful advice.

Plaintiffs in this case urge this Court to enter a declaratory judgment that Defendant Secretary of State’s actions violate Section 5 of the Voting Rights Act of 1965. *See* Pls.’ Compl., ¶ 60.

Plaintiffs also request that this Court enter a declaratory judgment that Defendant Secretary of State and Defendant Registrars lack the authority, unless and until Defendants obtain preclearance for such practices and procedures after submitting those practices and procedures for preclearance, as required by Section 5 of the Voting Rights Act, to preclude individuals convicted of felonies not involving moral turpitude from registering to vote under Alabama law. *See Lopez*, 519 U.S. at 24 (“The goal of a three-judge district court facing a § 5 challenge must be to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as

expeditiously as possible.”); *see also*, *Young*, 520 U.S. at 291 (court ordered remedy for Mississippi’s failure to preclear voting practices was to enjoin use of State’s unprecleared changes).

Finally, Plaintiffs request the award of reasonable attorneys’ fees, expenses, and costs under 42 U.S.C. §§ 1973l(e) and 1988, and such other, further, and different relief as the facts and circumstances may warrant. *See* Pls.’ Compl., ¶¶ 61-62.

III. CONCLUSION

For the reasons set out above, the Plaintiffs respectfully request that this Court deny Defendants’ Motion for Summary Judgment and find that the Defendant Secretary of State’s advice to voter registrars throughout the State of Alabama to deny registration to all people with felony convictions qualifies as a voting practice or procedure that constitutes a voting change within the meaning of the Voting Rights Act, which must be precleared pursuant to Section 5 before it may legally take effect.

Dated: Birmingham, Alabama
May 5, 2006

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CERTIFICATE OF SERVICE

I certify that on 5 May 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 attorneys:

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