

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 BRIEF (DOC. 22)
AND IN SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

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 Brief (doc. 22) and in support of the motion for summary judgment filed by the Alabama Secretary of State contemporaneously herewith.

I.

STATEMENT OF THE PLAINTIFFS’ CLAIMS

The Secretary of State is sued in her official capacity for “actions taken under color of state law, including the promulgation of procedures for and the receipt and administration of applications for voter registration.” Doc. 1 ¶ 8. In their brief, Plaintiffs clarify their claims by asserting that the Defendant Secretary of State “has unlawfully instructed voter registrars throughout the State to refuse registration to *all individuals with felony convictions*, including those presently eligible citizens convicted of felony offenses *not involving moral turpitude*.”

(Doc. 22, page 1-2) Plaintiffs seek to enjoin the implementation of the alleged change in voting registration procedure, on the grounds that it has not been precleared. *Id.*, page 2.

II.

SUMMARY OF THE ARGUMENT

A. All claims not briefed by the Plaintiffs should be dismissed. To the extent that the Plaintiffs' complaint may be construed to raise claims that have not been briefed by the Plaintiffs, those claims have been abandoned, and they are due to be dismissed.

B. The Plaintiffs lack standing. The Plaintiff Ekeyesko Doss was convicted of a felony involving moral turpitude (Theft II); thus, he is not qualified to vote under Alabama law. Both of the remaining Plaintiffs were extended the right to vote before their complaint was filed. Because none of the Plaintiffs can demonstrate an injury in fact that is likely to be redressed by a favorable decision from this Court, they lack standing to challenge the Defendants' practices.

C. The advice given by the Secretary of State – to maintain the status quo – is beyond the reach of Section 5. The only change in a qualification or prerequisite to voting that has been challenged by Plaintiffs is the advice given by the Secretary of State to county boards of registrars to maintain the status quo with regard to their processing of felon voter applications. The parties have stipulated 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. Such 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, not preserve it.

D. When the State’s precleared procedures for processing voting applications are considered in their entirety, it is clear that no change was wrought by the Secretary of State’s advice. Any measurement of a voting change should be measured from the benchmark established by all the relevant precleared statutes. Because Alabama law establishes a process for judicial review of voter registration determinations, that process should be taken into account in determining whether a change requiring preclearance has occurred. When Plaintiff Gooden followed the State’s registration process through the judicial review procedure, he was extended the right to vote by the Jefferson County Circuit Court within 24 hours of the filing of his petition for review. Thus, the State’s voter registration process, considered in its entirety, was not “changed” by the advice rendered by the Secretary of State.

III.

STATEMENT OF UNDISPUTED FACTS

The Defendant Nell Hunter is the Jefferson County Voter Registrar, and she is vested with the authority under Alabama Code section 17-4-136 to grant or refuse an individual’s application to register to vote in Jefferson County. (Doc. 21, ¶ 9) The Defendants Anita Gibson, Walter Long, and Molly Meadows are the Houston County Voter Registrars, and they are vested with the authority under Alabama Code section 17-4-136 to grant or refuse an individual’s application to register to vote in Houston County. (Doc. 21, ¶ 10) No authority is given to the Secretary of State under Alabama law either to register voters or to direct county boards of registrars with respect to the registration of particular voters. (Doc. 21, ¶ 11)

Act No. 78-584, codified at section 17-4-124 of the Code of Alabama 1975, provides, in pertinent part, as follows:

Any person to whom [voter] registration is denied shall have the right of appeal, without giving security for costs, within 30 days after such denial, by

filing a petition in the circuit court in the county in which he or she seeks to register, alleging that he or she is a citizen of the United States over the age of 18 years having the qualifications as to residence prescribed by law and entitled to register to vote under the provisions of the Constitution of Alabama, as amended. Upon the filing of the petition, the clerk of the court shall give notice thereof to the district attorney authorized to represent the state in said county, who shall appear and defend against the petition on behalf of the state. The issues shall be tried in the same manner and under the same rules that other cases are tried in such court and by a jury, if the petitioner demands it. The registrars shall not be made parties and shall not be liable for costs. An appeal will lie to the Supreme Court in favor of the petitioner if taken within 42 days from the date of the judgment. Final judgment in favor of the petitioner shall entitle him or her to registration as of the date of his or her application to the registrars.

Ala. Code § 17-4-124 (1995). (Doc. 21, ¶ 46) Act No. 78-584 was precleared on June 12, 1978.

(Doc. 21, ¶ 47)

In 1995-1996, the Alabama Legislature proposed, and the people ratified, Act 95-443, which proposed a constitutional amendment to repeal Article VIII of the Constitution of Alabama of 1901 regarding voting, and replace it with Section 177. (Doc. 21, ¶ 2) The Alabama Constitution, Article VIII, Section 177 (Recompiled), now provides in pertinent part, “No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability.” (Doc. 21, ¶ 3) Act No. 95-443 was precleared on June 24, 1996. (Doc. 21, ¶ 3)

Separate from a restoration of civil and political rights, Alabama law provides for Certificates of Eligibility to register to vote. *See* Ala. Code § 15-22-36.1 (1995) According to Alabama Code section 17-3-10, county boards of registrars are without discretion to deny registration to any felon who obtains a Certificate of Eligibility from the Alabama Board of Pardons and Paroles, as provided in Alabama Code section 15-22-36.1. *See* Ala. Code § 17-3-10 (1995) (directing that persons granted Certificates of Eligibility by Pardons and Paroles “shall be permitted to register or reregister”). For years prior to 2005, the Jefferson County Registrar and

the Houston County Board of Registrars had a practice of denying the voting applications of all persons convicted of felonies, unless the felons had obtained a Certificate of Eligibility from the Alabama Board of Pardons and Paroles. (Doc. 21, ¶ 25) The denial of the voting applications triggered an unqualified right to appeal that denial to the circuit court for the county in which voter registration was sought. Ala. Code § 17-4-124 (1995).

On March 18, 2005, the Alabama Attorney General issued Opinion 2005-092 which explained that a person convicted of a felony not involving moral turpitude remains eligible to vote and is, therefore, ineligible to apply to the Alabama Board of Pardons and Paroles for a Certificate of Eligibility under Ala. Code § 15-22-36.1(1) (1995) (providing that only persons who have lost the right to vote by reason and a state or federal conviction may apply for Certificates of Eligibility). (Doc. 21, ¶ 30)

After the issuance of Attorney General Opinion 2005-092, the Alabama Board of Pardons and Paroles refused to issue Certificates of Eligibility to persons who had been convicted of felonies that were specifically identified in the opinion as crimes not involving moral turpitude. (Doc. 21, ¶ 31) After Attorney General's opinion 2005-092 was issued, in response to questions from various boards of registrars, 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) On January 10, 2006, Alabama Attorney General Opinion 2005-092 was distributed by the office of the Attorney General to all the county boards of registrars in Alabama by facsimile and by U.S. Mail, and county boards of registrars were invited to seek the advice of the Alabama Attorney General if they need legal assistance in determining whether a particular felony involves moral turpitude. (Doc. 21, ¶ 36)

The Jefferson County Registrar permits 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 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 consult the Secretary of State, who is not an attorney and is not qualified to render legal advice. (Doc. 21, ¶ 26)

The Houston County Board of Registrars asks an applicant who admits to a felony conviction to produce evidence either that his or her felony conviction did not involve a crime of moral turpitude or that his or her rights have been restored by the Board of Pardons and Paroles. 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 his or her criminal file from the jurisdiction of conviction or a letter from the Alabama Board of Pardons and Paroles stating that the felony conviction did not involve a crime of moral turpitude. To prove that the Board of Pardons and Paroles has restored his or her civil rights, the applicant must produce a Certificate from the Board so stating. If the applicant does not produce evidence either that his or her felony conviction did not involve a crime of moral turpitude or that his or her rights have been restored, the application is denied and the applicant is referred to the procedures for appeal set out in Alabama Code section 17-4-124. (Doc. 21, ¶ 27)

The Plaintiff Richard Gooden is a man of lawful voting age, a citizen of the United States and a lifetime resident of Birmingham, Alabama, who was registered to vote from the mid-1960s until 2000, when he was convicted of a felony — driving under the influence of alcohol (DUI). (Doc. 21, ¶ 5) On September 29, 2005, Plaintiff Gooden filed a complaint in the Circuit Court

for Jefferson County, Alabama, Civil Action Number CV 05-5778 (the “state court action”) “on behalf of himself and all others similarly situated.” (Doc. 21, ¶ 52) In Count Three of his complaint in the state court action, Plaintiff Gooden appealed the decision of the Jefferson County Registrar denying him the right to vote, pursuant to Ala. Code § 17-4-124. (Doc. 21, ¶ 53)

In the state court action, Plaintiff Gooden requested “an order under Ala. Code § 17-4-124 reversing the refusal of the Jefferson County Registrar to register him.” Exhibit 14 at ¶ 30. (Doc. 21, ¶ 54) The next day, on September 30, 2005, after conferring with counsel for the Plaintiff and the Defendant Jefferson County Registrar, the Jefferson County Circuit Court entered a preliminary order that Gooden be permitted to register to vote. (Doc. 21, ¶ 55) On November 23rd, the State of Alabama moved to intervene as a party in the state court action and filed an answer confessing judgment as to the relief requested by the Plaintiff Gooden in Count Three of his complaint. The State of Alabama’s motion to intervene was granted. (Doc. 21, ¶ 56)

The Plaintiff Andrew Jones is of lawful voting age, a citizen of the United States and a resident of Birmingham, Alabama, who was registered to vote from the mid-1970s until the early 1990s, when he was convicted of felony possession of drugs. (Doc. 21, ¶ 6) On December 19, 2005, when this case was commenced and when the First Amended Complaint was filed in the state court action, the Plaintiff Andrew Jones was registered to vote in Jefferson County, Alabama. (Doc. 21, ¶ 60)

The Plaintiff Ekeyesto Doss is of lawful voting age, a citizen of the United States and a resident of Dothan, Alabama, who was registered to vote from November 17, 1997, until November 3, 2003, when he was convicted of felony possession of marijuana (in violation of

Alabama Code section 13A-12-213) and theft of property in the second degree (in violation of Ala. Code section 13A-08-04). (Doc. 21, ¶ 7) Second degree theft under Alabama Code section 13A-8-4 is a Class C felony. Ala. Code § 13A-8-4(b) (1994). The Plaintiffs concede that theft of property in the second degree is a crime involving moral turpitude under Alabama law. *See* doc. 22 at 23 (identifying larceny – now theft – as a crime involving moral turpitude under Alabama law); *see, also., Stahlman v. Griffith*, 456 So. 2d 287 (Ala. 1984). The Plaintiff Doss, whose application to vote was denied by the Houston County Board of Registrars, has never filed an appeal in the Circuit Court for Houston County, pursuant to Ala. Code § 17-4-124, to challenge the decision denying him the right to vote. (Doc. 21, ¶ 61)

IV.

ARGUMENT

A. ALL CLAIMS NOT BRIEFED BY THE PLAINTIFFS ARE DEEMED ABANDONED AND SHOULD BE DISMISSED.

In their brief, Plaintiffs clarify their claims by asserting that the Defendant Secretary of State “has unlawfully instructed voter registrars throughout the State to refuse registration to *all individuals with felony convictions*, including those presently eligible citizens convicted of felony offenses *not involving moral turpitude.*” (Doc. 22, page 1-2) The only voting “change” challenged by Plaintiffs in their brief was the advice given by the Secretary of State to county boards of registrars, including the Defendant Jefferson and Houston County registrars. (Doc. 22, page 1-2)

Claims raised in the Complaint but not briefed by the Plaintiffs are deemed abandoned and should be dismissed. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001). *See also Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir.2000) (failure to brief and argue issue at the district court is sufficient to find the issue

has been abandoned). *Cf. McMaster v. United States*, 177 F.3d 936, 940-41 (11th Cir.1999) (claim may be considered abandoned when district court is presented with no argument concerning a claim included in the plaintiff's complaint); *Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir.1994) (concluding that a district court "could properly treat as abandoned a claim alleged in the complaint but not even raised as a ground for summary judgment").

B. THE PLAINTIFFS LACK STANDING TO CHALLENGE THE PAST PRACTICES OF THE DEFENDANT.

Plaintiffs seek a declaration that the Secretary of State's "advice" to registrars, given in the fall of 2005, was a voting change that requires preclearance before it could take effect. (Doc. 22, at 20) To the extent that the Plaintiffs seek a declaratory judgment with respect to past advice or past practices that are no longer in effect, this Court lacks jurisdiction to grant such relief. *Green v. Mansour*, 474 U.S. 64, 73 (1985) (noting the impropriety of issuing either declaratory or injunctive relief with regard to past conduct, when there is no claim of an ongoing violation of federal law by state officials). Because the Plaintiffs are not entitled to any prospective relief, they lack standing to pursue their claims.

In the context of redistricting litigation, the Supreme Court explained the elements of standing, as follows:

It is by now well settled that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

U.S. v. Hays, 515 U.S. 737, 742-43 (1995) (dismissing challenge to congressional redistricting scheme for lack of standing) (citations and internal quotation marks omitted). A "generalized

grievance against allegedly illegal governmental conduct” is insufficient to support standing. *Id.* The burden of proof with regard to standing rests upon the “party who seeks the exercise of jurisdiction in his favor.” *Id.* (citations and internal quotation marks omitted).

Thus, a plaintiff lacks standing unless he can “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). Furthermore, to have standing to challenge any of the Defendants’ voting practices, each Plaintiff must show that he has suffered an injury that “is likely to be redressed by a favorable decision.” *Valley Forge College*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

The parties have stipulated that the Plaintiff Ekeyesko Doss was convicted of theft of property in the second degree, in violation of Alabama Code section 13A-8-4. Doc. 21, ¶ 34. Second degree theft under Alabama Code section 13A-8-4 is a Class C felony. Ala. Code § 13A-8-4(b) (1994). The Plaintiffs in this case concede that theft of property in the second degree is a crime involving moral turpitude under Alabama law. *See* doc. 22 at 23 (identifying larceny – now theft – as a crime involving moral turpitude under Alabama law); *see, also, Stahlman v. Griffith*, 456 So. 2d 287 (Ala. 1984). Because Mr. Doss is not qualified to vote under Alabama law, he has suffered “no actual or threatened injury” as a result of the conduct of the Defendant. *Valley Forge College*, 454 U.S. at 472.

Both of the other Plaintiffs were extended the right to vote before they ever filed this action. On December 19, 2005, when their complaint in this case was filed, the Circuit Court of Jefferson County had already entered an order in the pending state case compelling the Jefferson

County Registrar to permit Plaintiff Gooden to register to vote. Doc. 21, ¶ 59. Likewise, on December 19, 2005, Plaintiff Jones had already been registered to vote by the Jefferson County Registrar. Doc. 21, ¶ 60. Because Plaintiffs Gooden and Jones are already registered to vote, they cannot demonstrate any ongoing injury that is “likely to be redressed by a favorable decision” from this Court.

Plaintiffs have failed to prove that any erroneous advice of the Secretary of State given in the fall of 2005 continues to have a negative residual effect on voting. On the contrary, the voting applications of Plaintiffs Gooden, Jones, and Doss prove that voting applications are now being correctly handled by the responsible officials.

The Plaintiffs have failed to prove an “actual or threatened injury” that “is likely to be redressed by a favorable decision” from this Court. *Valley Forge College*, 454 U.S. at 472. Instead, Plaintiffs seek only a declaration that the Secretary of State’s past “advice” to registrars, given in the fall of 2005, was a voting change. Their claims must, therefore, be dismissed for lack of standing.

C. ADVICE TO MAINTAIN THE STATUS QUO IS BEYOND THE REACH OF SECTION 5.

Section 5 is triggered by change. Under Section 5 of the Voting Rights Act, the Defendant may not “enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964,” without first obtaining preclearance. 42 U.S.C. § 1973c. As the Plaintiffs correctly point out in their brief, “The Supreme Court has held that an action under Section 5 seeking to enjoin voting procedures that have not been precleared merely aims to ‘preserv[e] the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change.’” (Doc. 22 at 8, quoting *Young v. Fordice*, 520 U.S. 273, 285

(1997)).

In this case, the “change” targeted by the Plaintiffs was not a change at all, but advice – specifically, advice given to county boards of registrars to maintain their long-standing practices. The parties have stipulated to the content of the advice at issue: 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. Thus, the advice given by the Secretary of State that is under fire in this case is, “Don’t change.”

The advice given by the Secretary of State was designed to prevent change, not incite it. Moreover, the advice was given to preserve the status quo temporarily, while clarification of the applicable state law was obtained. Such 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. *See, e.g., Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334 (2000) (“In § 5 preclearance proceedings – which uniquely deal only and specifically with *changes* in voting procedures – the baseline is the status quo that is proposed to be changed: If the change ‘abridges the right to vote’ relative to the status quo, preclearance is denied, and the status quo . . . remains in effect.”); *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1996) (holding that preclearance procedures target “decisions to modify voting practices”); *Holder v. Hall*, 512 U.S. 874, 883-884 (1994) (noting the “baseline for comparison is present by definition; it is the existing status”).

As a practical matter, the advice rendered by the Secretary of State was without legal effect or significance. County boards of registrars, not the Secretary of State, have the exclusive authority under Alabama Code section 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) Yet it is not the practice of the county boards of registrars that is under attack in this case. Instead, it is the Secretary of State’s advice.

Plaintiffs give too much weight to the Secretary of State’s advice, characterizing her remarks as “instructions” or “directives.” It is undisputed that 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”).

Moreover, 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.

Plaintiffs cite *Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986), for the proposition that the naked advice of a State official may trigger a preclearance requirement. For the sake of argument, the Secretary of State does not dispute the holding of *Henderson v. Graddick*. A close examination of the facts of that case, however, exposes the inapplicability of its holding to this case.

In *Graddick* voters brought suit claiming that the Alabama Attorney General had effected a change in the conduct of the runoff election, in violation of the Voting Rights Act. In *Graddick* the Attorney General encouraged voters to change their voting practices and ignore an anti-crossover rule, resulting in approximately 13,000 illegal ballots. 641 F. Supp. at 1197. In this case, there is no evidence that the advice of the Secretary of State, given to a group of registrars, precipitated any change in their practices at all. (Doc. 21, ¶ 34) In *Graddick* the Attorney General urged voters to violate a straight-forward, unambiguous party rule, and threatened civil liability against any persons who enforced the precleared cross-over rule. *Id.* In this case, the Secretary of State encouraged registrars to maintain the status quo, while she sought clarification of a complex issue of state law. (Doc. 21, ¶ 34) In *Graddick* the 3-judge court characterized the Attorney General’s advice as “flagrant.” 641 F. Supp. at 1204. In this case, the Secretary of State acted to prevent a change in long-standing practices that she feared could trigger the need for preclearance.

Graddick does not suggest that every piece of advice given without enforcement authority and unaccompanied by any threat of enforcement, requires preclearance before it can be offered. Instead, that 3-judge court considered all the relevant facts to determine whether a change had occurred. The emphasis in *Graddick* was on the wide-spread change in cross-over voting practices occasioned the Attorney General’s words, not the words themselves. The Attorney General’s words alone, without more, would have been no “change.”

It is appropriate that this Court focus its analysis on change, since the “sole consequence of a failure to obtain preclearance is the continuation of the status quo.” *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 335-36 (2000). A return to the status quo in this case would be a short trip, indeed, since the only thing intended by the Secretary of State was maintenance of the status

quo. Nothing in this case suggests that the Secretary of State's advice caused a change in voting practice. This Court should decline the Plaintiffs' invitation to hold that the giving of simple advice, without more, can constitute "change" within the meaning of Section 5.

D. AN EXAMINATION OF THE RELEVANT STATUTORY FRAMEWORK SHOWS THAT NO CHANGE HAS OCCURRED IN ANY PRACTICE PREREQUISITE TO VOTING.

To determine whether a prohibited "change" has occurred, the Court should review all the relevant precleared procedures, including the process under Alabama law for judicial review of all voting application decisions, to measure the effect of the Secretary of State's advice on existing precleared procedures. *See Reno v. Bossier Parish School Board*, 520 U.S. 471, 478 (1997) (noting that "the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured"). Decisions of state officials that simply interpret precleared statutes and procedures do not require additional preclearance. *See Williams v. Sclafani*, 444 F. Supp. 895, 904 (D.C.N.Y. 1977) (holding that section 5 "was not intended to apply to state court decrees which simply construe an already precleared statute").

Moreover, not every deviation from the established benchmark warrants an injunction. Section 5 review is not triggered " 'every time a state official deviates from the state's required procedures.' " *Ritter v. Bennett*, 23 F. Supp. 1334, 1341 (M.D. Ala. 1998) (quoting *Moore v. Caledonia Natural Gas District*, 890 F. Supp. 547, 551 (N.D. Miss. 1991)). Every "failure of state officials to follow state law is not necessarily a section 5 claim." *Id.*

In Alabama, only felonies involving "moral turpitude" – a term defined under State common law – are disenfranchising. Thus, any determination of the right of a convicted felon to vote necessarily involves a question of State law. This legal question may require superimposing antiquated case law upon more modern criminal statutes to determine which of

the older, moral turpitude offenses identified by the Alabama courts are most analogous to the felony offense committed by the prospective voter. The complexity of the legal issue is demonstrated by the inconsistencies in the list of crimes compiled by the State's Attorney General (Attorney General Opinion 2005-092, issued January 10, 2006) with the list of crimes compiled by the Plaintiffs' legal counsel, doc. 22 at 22-25. Moreover, neither of the lists prepared by the State's Attorney General and the Plaintiffs' legal counsel purports to be exhaustive, and neither even attempts to incorporate crimes of other jurisdictions, including federal crimes.

County boards of registrars, whose statutory qualifications include only a high school degree and no legal education, Alabama Code § 17-4-150 (1995), are poorly equipped to decide complex issues of State law. Decisions by the county boards of registrars are only preliminary decisions, however. Their initial denial of a convicted felon's voting application triggers an unqualified, statutory right to petition the State circuit court – the State trial court of general jurisdiction – for a judicial review of the decision. Ala. Code § 17-4-124 (1995). (Doc. 21, ¶¶ 46, 47) The petition for review is defended by the local district attorney. *Id.* Both the State circuit courts and the state district attorneys are in an excellent position to determine whether a particular felony is one that involves moral turpitude under state common law, and to handle the petition for review accordingly. Even so, the circuit court's decision is not binding on the applicant, who has the exclusive right to seek further appellate review. *Id.*

It is undisputed that the State's review process worked correctly in this case. Of the three Plaintiffs in this action, only two are entitled to vote under Alabama law – Mr. Gooden and Mr. Jones. Both Mr. Gooden and Mr. Jones were permitted to register to vote before their complaint was ever filed in this case. Mr. Jones received his voter registration card in the mail after

making application. (Doc. 21, ¶ 60) Mr. Gooden, however, obtained voter registration by following the State's application process through to a judicial review by the Jefferson County Circuit Court.

The Secretary of State advised the county registrars to maintain the status quo, and it is clear from the undisputed facts that the precleared statutory framework for voter registration did not change significantly. The facts of this case demonstrate that the statutory procedures were correctly followed by the registrars and the circuit courts, to the end that both Mr. Gooden and Mr. Jones were properly extended the right to vote, while the right to vote was properly denied to Mr. Doss who is disqualified by his Theft II conviction.

Advice given to assist in the enforcement of precleared state law is beyond the reach of Section 5 which was never intended to be a tool for micromanagement of state affairs by a federal 3-judge court. As the 3-judge court noted in *Graddick*, "a promulgated election rule that has been precleared for enforcement, consistent with Section 5, may be [] enforced as necessary without first seeking preclearance of the decision to do so." 641 F. Supp. at 1201. Alabama's system of judicial review, established by statute and properly precleared, requires the regular exercise of discretion by state and county officials with regard to matters of state law as part of the enforcement process. Difficult decisions regarding complex issues of state law are part of that process, and so is routine advice, given to assist the registrars in the performance of their statutory duties. Plaintiffs' attempt to disrupt the State process is unwarranted, especially given the facts of this case, which demonstrate that the process, considered in its entirety, worked correctly.

V.

CONCLUSION

For each of the foregoing reasons, the relief requested by the Plaintiffs in their complaint should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 21st, 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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