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

JOSE MORALES, et al.	)	
	)	**Civil Action Number**
Plaintiffs,	)	**1:08-CV-3172 JTC**
	)	
v.	)	
	)	
KAREN HANDEL, in her official capacity as Georgia Secretary of State,	)	
	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN RESPONSE TO SECOND MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

Pursuant to this Court's request of October 26, 2009, Plaintiffs respectfully submit the following Brief in Response to the Second Memorandum of the United States as Amicus Curiae.

Plaintiffs agree with the United States that all which remains before this Court is whether, under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a final injunction should be granted to prohibit Defendant from continuing to implement the citizenship verification registration procedure that is the subject of this lawsuit and to which the Attorney General interposed a Section 5 objection on May 29, 2009. In this regard, Plaintiffs and the United States agree that of the three issues this Court has jurisdiction to decide[1] – Section 5 coverage,

[1] See, *e.g.*, *Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

preclearance status, and entry of relief – the first two and an essential element of the third must be decided in Plaintiffs' favor and together demonstrate, without a shadow of a doubt, that Defendant is acting in violation of Section 5. First, the citizenship verification procedure is a voting change subject to Section 5, as this Court held in its October 27, 2008 Order. Second, this procedure has been denied Section 5 preclearance (and the Attorney General recently declined to withdraw the objection). Third, Defendant is continuing to implement the procedure (subject to the conditions imposed by this Court in the October 27, 2008 Order), although Section 5 prohibits the implementation of unprecleared changes.[2]

Nonetheless, without any analysis of the facts of this case or citation to any Section 5 case law, the United States suggests that this Court defer consideration of the entry of a final injunction until after January 1, 2010. Plaintiffs strongly disagree. This suggestion has no basis in the factual circumstances relevant to Plaintiffs' motion for relief. The reasons the United States provides for asking the Court to defer making a decision – the then-pending response by the Attorney General to the State's request that the Attorney General withdraw the Section 5

[2] As to the last matter, see United States Memorandum, at 4 ("the State continues to implement these procedures, and the State has shown no evidence of abandoning the procedures"). Defendant also generally has not disputed that she is acting in violation of Section 5; instead, her principal basis for opposing the granting of an injunction has been that her reconsideration request was – but is no longer – pending before the Attorney General.

objection and the concern expressed by the Untied States that more recent and unprecleared citizenship verification procedures may be related to the objected-to procedure – dissolved when the Attorney General informed the State of Georgia on October 13, 2009 that he is not withdrawing the Section 5 objection and that the subsequent unprecleared procedures are, in fact, unrelated to the objected-to procedure. Moreover, the Supreme Court's most recent and principal rulings on the granting of injunctive relief under Section 5, *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991) and *Lopez v. Monterey County*, 519 U.S. 9, 21-22 (1996), plainly require that injunctive relief be granted and do not allow for deferring injunctive relief based on the kinds of contingencies alleged by the United States.

ARGUMENT

1. The Contingencies Identified by the United States Are Irrelevant to Plaintiffs' Request for Permanent Injunctive Relief, as Demonstrated by the Attorney General's Subsequent Letter to Georgia

In its Memorandum, the United States maintains that, as a "prudential matter," this Court should defer ruling on Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief because of several matters that "remain unresolved as of this moment." United States' Memorandum, at 4. The matters listed by the United States (*id.* at 4-5) are: 1) the State of Georgia's August 11, 2009 request that the Attorney General reconsider and withdraw his May 29, 2009 Section 5 objection to the citizenship verification procedure; 2) the State of

Georgia's Section 5 submission, also on August 11, 2009, of a revised citizenship verification procedure proposed by the Secretary of State following the May 29, 2009 objection; and 3) the State of Georgia's forthcoming submission of the citizenship verification procedures for registering to vote enacted by the General Assembly earlier this year. Act 143, S.B. 86 (2009), *codified at* O.C.G.A. § 21-2-216(g).

As to the first matter, to the extent that the pendency of the reconsideration request may have posed a concern at the time the United States filed its Memorandum, that request no longer poses any impediment to the issuance of an injunction now. On October 13, 2009, approximately two and a half weeks after the United States filed its Memorandum, the Attorney General denied the State's request that the May 29, 2009 objection be withdrawn.[3]

With regard to the second matter, the Attorney General's October 13, 2009 determination letter also effectively has resolved this, and it now should be clear that the Secretary's submission of a post-objection verification procedure is not relevant to Plaintiffs' request that the earlier, objected-to procedure be enjoined. The two procedures are substantively distinct, although they share one important

[3] A copy of this letter was provided to the Court by the Justice Department.

element in common.[4] Given this circumstance, it is significant that the United States does not say in its Memorandum why the Secretary's submission of the post-objection procedure has any relationship to the objected-to procedure. Indeed, in his October 13 determination letter, the Attorney General concluded that the two verification procedures in fact are unrelated and must be treated as separate, distinct, and severable for Section 5 purposes: the Attorney General declined to withdraw the objection to the procedure at issue here, and decided that additional information is needed in order to make a determination on the post-objection procedure. Based on the Attorney General's own Section 5 Procedures, the Attorney General would have deferred ruling on the State's reconsideration request – until the post-objection procedure is ready for a final determination – if

[4] The Secretary's proposed post-objection procedure would continue to rely on the same automated system for checking citizenship that is at the heart of the objected-to verification procedure. However, unlike the objected-to procedure, which has been applied to all registration applicants and to certain existing registrants, the post-objection procedure would be applied only to a subset of new applicants, i.e., certain individuals who submit a mail-in registration application. Also, unlike the objected-to procedure, it would be implemented by county election officials following a uniform set of procedures. See Plaintiffs' Statement of Undisputed Material Facts, at statement 26 (attaching the State's August 12, 2009 Section 5 submission letter), and Defendant's Response to Plaintiffs' Statement of Undisputed Facts (admitting that the attached letter is an accurate copy) (the letter advises that under the new procedure, the automated checking process would remain the same (letter at 2), but it now would be applied only to "voters who register by mail and whose identity or eligibility is not otherwise established" (letter, at 4); in addition, "processing [of flagged voters] would be conducted in a uniform manner across the state" (*id.*)).

the two different procedures are interdependent under Section 5.[5] It follows, therefore, that the submission of the post-objection verification procedure does not provide a basis on which this Court may defer ruling on Plaintiffs' motion for injunctive relief.[6]

As to the third matter, the legislatively-enacted citizenship verification procedures, O.C.G.A. § 21-2-216(g), also are substantively distinct from the objected-to procedure. Yet, in its Memorandum, the United States does not explain why the as-yet unmade Section 5 submission of the legislative procedures is relevant to this Court's consideration of Plaintiffs' request for injunctive relief. In its Memorandum, the United States avers that "[t]he Attorney General has previously advised the State that the submission of the new legislation and related changes could have [a] bearing on the analysis of the verification procedures that are the subject of the May 29 objection." United States' Memorandum, at 5. This

[5] The Attorney General's Procedures for the Administration of Section 5, 28 C.F.R. § 51.39(b), provide that when two Section 5 submissions are so related that they cannot be reviewed independently, the Attorney General will consider them jointly and concurrently.

[6] The Secretary's proposed post-objection procedure also does not moot the need for an injunction against the objected-to procedure since the Secretary is continuing to implement the objected-to procedure pending resolution of the State's request that the post-objection procedure be precleared. Furthermore, as explained by Plaintiffs in their initial Memorandum in support of their pending motion, an injunction is needed to restore the *status quo ante* with respect to those individuals whose registration status has been and continues to be affected by the illegally-implemented verification procedure.

statement, however, simply notes a past communication between the Attorney General and the State, and does not communicate to the Court (or the Plaintiffs) *why* the future submission of the legislative changes is relevant here.

Contrary to that Memorandum, the Attorney General's October 13, 2009 reconsideration denial demonstrates that the State's forthcoming submission of the legislative changes does not, in fact, have any bearing on the Attorney General's Section 5 review of the objected-to change. Otherwise, the Attorney General would have deferred deciding the reconsideration request pending receipt of that submission. 28 C.F.R. § 51.39(b).[7] It follows, therefore, that the forthcoming Section 5 submission of the legislative procedures has no relevance to Plaintiffs' request for permanent injunctive relief as to the objected-to change.[8]

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[7] In the October 13 letter, the Attorney General does note that the unimplemented post-objection procedure and the unimplemented legislative procedures may be related, but does not say that either one is related to the objected-to procedure. The post-objection and legislative procedures may be connected for timing reasons, since the post-objection procedure may "be changed or will no longer be in effect" once the legislative procedures are ready to be implemented. Oct. 13, 2009 letter, at 3. Although the legislative procedures, if precleared, also may supersede the objected-to procedure, that does not affect the need for injunctive relief here since the Defendant's unlawful implementation of the objected-to procedure must be remedied.

[8] As Plaintiffs previously have emphasized, the issuance of the requested injunction against implementation of the objected-to verification procedure will have no impact on the ability of the State to submit and obtain preclearance for the legislative verification procedures. Neither Defendant nor the United States claim otherwise.

2. Section 5 Does Not Allow the Secretary to Continue to Provisionally Implement the Unprecleared Citizenship Verification Procedure

Even if the Attorney General's October 13, 2009 letter is ignored and the Court credits the United States' previous statement that the submission of the legislative changes "could have [a] bearing on the analysis of the [objected-to] verification procedures" (United States Memorandum, at 5), a fundamental legal problem remains: the Supreme Court specifically has rejected the kind of provisional implementation of an unprecleared voting change that the United States apparently is willing to accept here. *Lopez v. Monterey County*, *supra*; *Clark v. Roemer*, *supra*.

In *Clark*, the Supreme Court unanimously held that Section 5 of the Voting Rights Act does not permit a covered jurisdiction to provisionally implement an unprecleared voting change, except perhaps in extreme circumstances where an election is imminent, the unprecleared status of the change is brought to the attention of the jurisdiction immediately prior to that election, and other equitable considerations are present. 500 U.S. at 654-55. *Accord*, *Lopez v. Monterey County*, 519 U.S. at 21-22. *See also Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981) (granting an injunction against further implementation of an objected-to voting change "until appellees demonstrate compliance with Section 5 of the Voting Rights Act."). The district court in *Clark*

had denied plaintiffs' request for an injunction against the State of Louisiana's implementation of elective judgeship positions to which the Attorney General had objected, thus allowing the State to hold elections for the unprecleared positions. *Id.* at 652. The Supreme Court reversed. *Id.* at 660.

The Court began its analysis by restating the core principles of Section 5. Because Section 5 requires covered jurisdictions to obtain federal preclearance before implementing any voting change, "[a] voting change in a covered jurisdiction will not be effective as law until and unless [it is] cleared." *Id.* at 652 (internal quotation marks omitted). Accordingly, "[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." *Id.* at 652-53.

The Court then applied these principles to the district court's denial of injunctive relief, and concluded that the district court had "ignored these principles altogether" and that the implementation of the unprecleared changes should have been enjoined. *Id.* at 653. In so holding, the Court observed that there might be a very narrowly defined set of circumstances in which a district court could decline to enjoin the implementation of unprecleared voting changes: "We need not decide today whether there are cases in which a district court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared

status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Id.*

In its Memorandum, the United States neither applies the principles of Section 5 set forth by the Supreme Court in *Clark*, mentions the Supreme Court's rulings in *Clark* and *Lopez*, or offers any explanation as to how the possible exception to the "injunctive relief" rule has any application to the present circumstances of this case. The United States also does not suggest (or cite any authority for the proposition) that the Supreme Court's possible exception may be expanded beyond the bounds set forth in *Clark*.

Applying *Clark's* Section 5 principles to this case, it is clear that an injunction should issue now. The unprecleared voter verification procedure is not "effective as law," *id.* at 652, and thus "plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Id*. at 653. The extreme circumstances noted in *Clark* that might serve as a limited exception to the "injunctive relief" rule are not present in this case now. The unprecleared status of the objected-to verification procedure was not brought to Defendant's attention only a few days or weeks ago, but has been known by Defendant for a year, at least since this Court's October 27, 2008 ruling that the verification procedure is subject to Section 5 preclearance. Thus, contrary to the United States' suggestion, Section

5 does not allow Defendant to continue to provisionally implement the unprecleared citizenship verification procedure.[9]

CONCLUSION

For the foregoing reasons, Plaintiffs urge this Court to reject the United States' suggestion that a ruling on the Plaintiffs' request for permanent injunctive relief be deferred, and promptly grant summary judgment to Plaintiffs and issue the requested injunction. To accept the United States' suggestion that "the Court should . . . maintain the status quo under the October 27 preliminary injunction," United States' Memorandum, at 4, would continue the implementation of an

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[9] The deferral suggested by the United States does not involve simply a deferral of a few days, and could extend well beyond the January 4, 2010 date that the United States suggests as the time when the parties should report back to the Court if the request for an injunction is deferred. The United States apparently suggested that date because the General Assembly provided that the legislative verification procedures are to go into effect on January 1, 2010. However, since these procedures have not been precleared, they currently are not "effective as law" and may not be implemented unless and until preclearance is granted. The State has not yet submitted them to the Attorney General (or the United States District Court for the District of Columbia), and it is unclear when that will occur. (It appears that the State will not make its submission until the State Election Board issues the new regulations required by the legislation, and the Board only just put its proposed regulations out for public comment on October 26, 2009. See http://sos.georgia.gov/elections/state_election_board/notices/113%20October%2026,%202009%20Summary.pdf.) Furthermore, since Attorney General responded to the State's initial submissions of both the objected-to verification procedure and the post-objection verification procedure by requesting additional information, 28 C.F.R. § 51.37, it seems that there is a reasonable possibility that this could happen with the new submission as well. Thus, a final Section 5 determination on the legislative procedures may well not be forthcomiing until mid-2010.

objected-to procedure that is factually unjustified and is in clear violation of binding Supreme Court precedent.

Respectfully submitted,

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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 30th day of October, 2009.

s/ Laughlin McDonald
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CERTIFICATE OF SERVICE

I hereby certify that on this, the 30h day of October, 2009, I electronically filed the foregoing Brief 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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