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

JOSE MORALES, *et al*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	1-08-CV-3172-JTC
KAREN HANDEL,	)	
in her official capacity as	)	
Georgia Secretary of State,	)	
	)	
Defendant.	)	
	)	

RESPONSE OF *AMICUS CURIAE* UNITED STATES TO THE COURT'S QUESTIONS IN APRIL 30, 2010 ORDER

On April 30, 2010, this Court entered a Scheduling Order: 1) setting a hearing date of May 24, 2010, on Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment [#88] and Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief [#89]; and 2) directing the parties to file by May 10, 2010, supplemental briefs addressing questions posed by the Court. As ordered by the Court, the response of *amicus curiae* United States to the Court's questions are set forth below.

1. **The current status of the State's request for Section 5 preclearance of its citizenship verification program for voter registrants, which is the subject of this lawsuit. This question includes the status of any revised procedures submitted to the Department of Justice ("DOJ").**

On May 29, 2009, the Department of Justice interposed an objection under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to, among other things, the State's automated program of verifying citizenship for voter registration applicants [#88-9]. The objection followed a substantial period of interaction between the Department of Justice and the State, which began about a month prior to the State's October 14, 2008 submission of its citizenship verification program under Section 5, and included the Department's December 15, 2008 request to the State for more information [#89-16], the State's March 24, 2009 response to that request [#89-19], as well as numerous discussions between the Department and the State during the pendency of the review of the initial submission.

In its May 29, 2009 objection letter, the Department determined that the State had not met its burden of showing that the State's proposed citizenship verification program had neither the purpose nor will have the effect of denying or abridging the right to vote on the basis of race, color or membership in a language

minority group. However, the Department in its letter also indicated that it believed that there were alternatives available that could mitigate or eliminate this discriminatory impact, and reached out to the State to engage in further discussion concerning these alternatives in an effort to resolve the Section 5 issues that had been raised.

Subsequent to further discussions between the Department and the State, on August 12, 2009, the State submitted to the Department a request that it reconsider and withdraw its previous May 29 objection, while at the same time submitting a substantially revised verification program [#89-20]. On October 13, 2009, the Department responded to this request of the State [Exhibit 1]. In that response, the Department advised the State that, in light of the fact that the State's August 12 letter did not provide any additional information or arguments to support its reconsideration request, the Department of Justice would not withdraw its previous objection to the original verification program. In addition, the Department advised the State that, because the revised verification program which was the subject of the State's August 12 letter contained "significant" alterations to the originally objected-to program, it in fact constituted a new change submitted under

Section 5 for preclearance. Treating the request as a new submission, the Department indicated that it needed additional information, set forth in the letter, in order to complete its review of the State's revised program. Also in that letter, the Department reiterated its willingness to meet with the State to attempt to resolve outstanding issues.

On December 14, 2009, representatives of the Department of Justice, including the Assistant Attorney General for the Civil Rights Division, Thomas Perez, met with Georgia Attorney General Thurbert Baker and members of his staff, and engaged in a productive discussion in an attempt to move towards possible resolution of issues surrounding the State's verification program. Following this meeting, as requested by the Georgia Attorney General, the Department expedited the review and preclearance of certain of the State's voter registration forms and procedures. Then, on December 22, 2009, Attorney General Baker advised the Department by letter, following his discussion of the matter with then-Georgia Secretary of State Karen Handel, that the Secretary had decided not to provide any further information to the Department, and that the Secretary requested a Section 5 determination of the State's verification program

based on the State's previous submissions [Exhibit 2].

On February 22, 2010, having received no further information from the State, the Department sent a letter to the State reiterating its previous decision declining to withdraw the Department's May 29, 2009 objection to the State's original submission [Exhibit 3]. With regard to the State's revised verification program, the letter noted that the State had not provided information responsive to the Department's October 13, 2009 request for the information that was necessary for the Department to make a determination on the State's submission. The letter also noted that Georgia Senate Bill 86 ("SB 86"), requiring proof of citizenship for voter registration (with an effective date of January 1, 2010), and recently adopted implementing rules, had not yet been submitted to the Department for Section 5 review. Thus, the Department advised the State that, due to the related nature of SB 86 and its implementing rules and the State's revised citizenship verification program, the Department could not make a determination on the revised program until the State had submitted SB 86 and implementing rules, and the revised citizenship verification procedures that the state intended to implement under SB 86, for review under Section 5 and the submissions could be reviewed

simultaneously. The Department in the letter also repeated its willingness to renew discussions with the State aimed at reaching a resolution of outstanding issues. The State has not responded to the Department's letter.

2. **Do the State and DOJ remain in discussion regarding the State's citizenship verification program? If not, has the State filed suit or does it intend to file suit and seek judicial review in the United States District Court for the District of Columbia?**

At the present time, the State and the Department are not engaged in discussions concerning this matter. On April 22, 2010, the Department was provided by the Georgia Attorney General's office with a copy of a letter sent that date by Georgia Attorney General Thurbert Baker to new Georgia Secretary of State Brian Kemp [Exhibit 4].[1] In the letter, which was reported in the news media, Attorney General Baker advised Secretary Kemp that, in his view, the prospects for resolution of outstanding issues in this matter – both regarding the State's verification program and the newly enacted SB 86 and implementing regulations - would best be achieved through administrative submission of the

[1] Former Georgia Secretary of State Karen Handel resigned her office as of the end of 2009. Brian Kemp has been appointed by Governor Perdue as the new Secretary of State.

statute, regulations and verification procedures to the Department of Justice and to continuing our discussions. Attorney General Baker's letter further advised Secretary Kemp that his previous meeting with the Department had led Attorney General Baker to believe that the Department was "sincere in its desire to assist the State of Georgia in getting both the verification process and SB 86 precleared." In light of this view, Attorney General Baker informed Secretary Kemp in this letter that he was declining to initiate Section 5 litigation in the United States District Court for the District of Columbia to preclear the verification process, including newly enacted SB 86 and related regulations, and left it to Secretary Kemp to determine if he wanted to initiate such litigation on his own. Attorney General Baker also indicated in the letter that his office had been ready "since January" to submit administratively to the Department of Justice under Section 5, the State's verification program as well as SB 86 and its implementing regulations, and remained ready to do so. Were the State to make such a submission, it would be the first time that the Department would have the State's entire verification program before it to review.

As indicated above, in the Department's letters to, and in conversations with,

the Georgia Attorney General's Office, the Department has expressed a willingness to attempt to resolve these matters through further discussion and through an administrative submission by the State to the Department under Section 5 of all related voting changes simultaneously (including SB86, the related administrative rules, and the verification procedures). The State has thus far not responded. As of this date, the State has not provided the additional information requested in the Department's letter of October 13, 2009, or made a new submission under Section 5 of all related changes as requested on February 22, 2010. Nor has the State filed a Section 5 declaratory judgment action in federal district court in Washington, D.C. concerning this matter. The United States at this time does not know the State's plans in this regard, aside from what is set forth in Attorney General Baker's April 22, 2010 letter and subsequent news reports.

3. **What is the effect, if any, upon this case of the State's enactment of Senate Bill 86, Act 143 (2009) and the adoption of related administrative rules, which require proof of citizenship for voter registration?**

As indicated above, at the present time, SB 86 and its implementing administrative rules have not been submitted to the Department for review under Section 5, nor has the State initiated a Section 5 declaratory judgment action in the

United States District Court for the District of Columbia seeking preclearance of the same. Thus, neither the statute nor the rules can be enforced because they have not received the necessary Section 5 preclearance. As the United States has noted, however, in its most recent February 22, 2010 letter to the State and in previous correspondence, the Department views SB 86 and its implementing rules as related to the State's revised verification program and, in our view, their enactment has a "significant" impact on the Department's determination under Section 5 concerning that submission. As we indicate below, we believe that this interrelatedness should factor into this Court's decision on the injunctive relief to be granted at this time.

4. **Provide a timeline showing all upcoming election dates in Georgia during 2010 that an injunction in this case will impact.**

The United States does not have complete information in this regard, and submits that the State of Georgia is in the best position to answer this inquiry of the Court.

5. If the three judge panel enters final judgment and a permanent injunction in this case, what are the appropriate terms of such an injunction? What objections does any party have to the proposed permanent injunction requested by Plaintiffs?

The United States agrees with Plaintiffs that, in light of the fact that the State's automated voter registration citizenship verification program, as originally submitted to the Department of Justice for Section 5 preclearance in October 2008, and as subsequently revised and submitted in August 2009, is subject to and has not been precleared under Section 5, such program cannot be implemented by the State, and is properly the subject of an injunction under Section 5. The United States does not believe that a permanent injunction should be entered at this time. Rather, as discussed below, the United States believes that this Court should, as a prudential matter, maintain the status quo under the October 27, 2008 preliminary injunction, pending further attempts to resolve important issues related to this matter.

6. **If the three judge panel denies both parties' Motions for Summary Judgment, should the existing preliminary injunction remain in effect? If not, how should the three judge panel modify the preliminary injunction?**

The United States submits that the Court's October 27, 2008 preliminary injunction should remain in effect to allow the State to take action possibly obviating the necessity for a permanent injunction in this case.

There have been numerous constants in the United States' dealings with the State concerning its citizenship verification program since its submission in October 2008, all of which bear upon the remedy in this case. The United States has repeatedly indicated to the State its view that Section 5 does not prohibit Georgia from taking steps to ensure that only qualified individuals who are citizens are registered to vote. Rather, under Section 5, the State must ensure that the discretionary manner in which the State does so does not violate the substantive non-discrimination requirements of Section 5. The United States has thus raised concerns as to the State's citizenship verification program not because of what the State was doing, but rather how it was doing it. This is reflected in the Department's requests of the State for clarification and additional information, that began well before December 2008 and continued through our most recent contact

with the State in February 2010. These requests have been made in good faith and express the Department's desire to find answers to lingering questions about the State's at-times confusing and ever-changing verification procedures, in an attempt to reach a resolution of this matter in an efficient and timely manner. The Department's efforts in this regard have not gone unnoticed, as reflected in the April 22, 2010 letter of Georgia Attorney General Baker to the Georgia Secretary of State. Further, the Department has continually pointed out to the State the relatedness to this process of the enactment of SB 86 and its implementing rules, beginning with its May 29, 2009 letter, and continuing through our letters of October 13, 2009 and February 22, 2010.

As indicated above, the United States does not know the State's intentions regarding seeking preclearance for its voter registration citizenship verification procedures. The United States remains ready to work cooperatively with the State in discussing its remaining questions regarding the verification procedures under Section 5, as well as to consider under Section 5 any submission by the State of SB 86 and its implementing regulations. We would note that SB 86, and the recently adopted sets of rules implementing it, set forth procedures for verification of

citizenship data of voter registration applicants that build more definition into the State's verification program than appears to have existed in the past, and appear to address some of the concerns expressed by the Department in its dealings with the State on this matter. At present, however, nothing is before the United States for review.

In light of the above, we believe it is now up to the State as to how this matter should proceed. As stated above, the Department of Justice remains ready to begin discussions anew with the State concerning an administrative submission of whichever version of its verification procedures it now proposes to use, in conjunction with the submission of SB 86 and its implementing regulations, if the State determines to follow this path. The Department continues to believe that such a procedure has the potential to avoid additional litigation. Of course, the State may choose to seek preclearance through a declaratory judgment action in federal court in Washington, D.C. In any event, given the interrelatedness of the various measures and their inevitable impact on the State process challenged herein, we believe that this Court should maintain its preliminary injunction in this case, and direct the State to take action to seek Section 5 preclearance (either from

the Department of Justice or the D.C. District Court) of all processes involved in verifying citizenship of voter registration applicants, within a prescribed time period; e.g., 30 days. If, at the end of that time, the State has not taken such action, it should be required to show cause to this Court why a permanent injunction should not issue prohibiting the State from utilizing any system for verification of citizenship different than its benchmark system unless and until it has been precleared. If, however, the State does take such action, the preliminary injunction should remain in effect so as to prevent both eligible voters from being denied the right to vote and to prevent ineligible voters from casting votes that cannot be discounted, pending a decision on the State's preclearance request. If such procedures are precleared, there would appear to be no need for a permanent injunction based on Section 5. If such procedures are ultimately not precleared, plaintiffs should be entitled to a permanent injunction requiring the State to use its benchmark procedures for verifying citizenship pending preclearance of any new State verification procedure.

7. **Plaintiffs also raise claims under Section 8 of the National Voter Registration Act and Section 303 of the Help America Vote Act, which are outside the jurisdiction of the three judge panel. Should the Court resolve these claims prior to resolution of the Section 5 claim that is before the three judge panel?**

The United States continues to maintain, consistent with its position in its Second Memorandum as *Amicus Curiae* [#95], that, so long as the State's citizenship verification procedures have not been precleared under Section 5 of the Voting Rights Act, they are not legally enforceable, and challenges to those procedures under other legal theories, such as under the NVRA and HAVA, remain premature. *Connor* v. *Waller*, 421 U.S. 656 (1975) (where voting changes were unprecleared under Section 5, it was error for district court to proceed to consider constitutional challenges to those voting changes). Thus, the United State believes that the Court should hold the Plaintiffs' NVRA and HAVA claims in abeyance pending resolution of the Section 5 preclearance issues.

Respectfully submitted,

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Northern District of Georgia

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May 10, 2010

LOCAL RULE 7.1D CERTIFICATION

As required by Local Rule 7.1D, the undersigned counsel certifies that this brief was prepared in Times New Roman, 14-point font, in compliance with Local Rule 5.1B.

/s/ T. Christian Herren, Jr.

T. CHRISTIAN HERREN, JR.
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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2010, I caused the foregoing document to be served by first-class mail, postage prepaid, or by electronic mail via the Court's ECF system, on counsel of record for all parties:

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MORALES V. HANDEL
1:08-CV-3172-JTC
UNITED STATES EXHIBIT 1
MAY 10, 2010

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 13 2009

Dennis R. Dunn, Esq.
Deputy Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

Dear Mr. Dunn:

This refers to the establishment of the revised 2009 verification program for voter registration application data, including citizenship status, only for individuals registering to vote by use of the mail-in application who do not provide identification listed in Section 303(b) of the Help America Vote Act [HAVA] with their application; this also refers to your request that the Attorney General reconsider and withdraw the May 29, 2009, objection interposed under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission and your request for reconsideration on August 11, 2009.

With regard to the request that the Attorney General reconsider his May 29, 2009 objection, we have reviewed the state's August 11 letter which, by the state's own admission, "proposes significant changes in the verification process." That review confirms that the information contained in the state letter is focused on the revised 2009 verification procedure, rather than providing any additional information or arguments to support its request that the objection as to the original voter registration verification program should be withdrawn. Indeed, the alterations to the original program to which the Attorney General interposed an objection on May 29, 2009, are so significant as to constitute a submission of a new change affecting voting that the state desires to implement. *Blanding* v. *Dubose*, 454 U.S. 393, 399 (1982). In light of these considerations, I remain unable to conclude that the State of Georgia has carried its burden of showing that the original voter registration verification program has neither a discriminatory purpose nor a discriminatory effect. *Georgia* v. *United States*, 411 U.S. 526 (1973). Therefore, on behalf of the Attorney General, I must decline to withdraw the May 29, 2009, objection. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.52.

With regard to the proposed 2009 revised voter registration verification process for individuals registering to vote by use of the mail-in post card form who do not provide HAVA-approved identification with their application, our analysis indicates that the information sent is

insufficient to enable us to determine that the proposed changes have neither the purpose nor will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. Describe whether the revised 2009 verification process will apply to all persons applying to register to vote by mail (as the state's cover letter suggests) or just persons applying to register to vote for the first time in Georgia by mail (as Exhibit R suggests). If it is the latter, please explain how persons who have previously registered to vote in Georgia will be identified and exempted from the verification process.

2. Please provide the rationale and describe in detail what verification steps (for verification of both citizenship and identity information), if any, will be used for all applicants for voter registration other than mail-in applicants who do not provide the HAVA-approved identification, in other words, what verification steps will be taken for all applicants that are not covered by the revised 2009 verification program described in the state's August 11 letter. Explain whether the State will undertake the verification attempt contemplated by Section 303(a)(5) of HAVA to applicants other than mail-in applicants who do not provide the HAVA-approved identification.

3. Describe the effect that the revised 2009 verification program will have on the ability of individuals registering to vote by use of the mail-in application who do not provide HAVA-approved identification with their application or within 30 days after their application is received to: a) complete their registration and vote a regular ballot by providing identification when he or she votes for the first time in an election (303(b)(2)(A) of HAVA); or b) cast a provisional ballot that would be counted by providing identification after the election within the time permitted by state law (Section 303(b)(2)(B) of HAVA).

4. Indicate how the revised 2009 process will permit county registrars to review the qualifications of an individual identified on the R1 or R2 report and independently verify that the individual in question is qualified to register to vote. Clarify whether persons who appear on the R1 and R2 reports due to a non-match based on a database comparison can prove their qualifications based solely on submission of HAVA-approved identification after their appearance on those reports.

5. Please describe any efforts the state intends to make to inform the public, and in particular the minority community, of the voter registration verification program and the instances in which it applies, including notice on voter registration applications that the information being provided will be verified against other databases.

6. Describe the basis for the state's determination that the 2009 process will result in a more accurate identification of non-citizens registering to vote and attempting to vote than did

the original verification process. Describe the consideration, if any, that was given to the fact that citizenship information maintained by DDS may, in some cases, be up to several years old, and whether the R2 report could be cross-referenced with a list of recently naturalized citizens or any other database with more updated information. In that regard, please detail the steps that the state has taken to ameliorate the effect of the impact of the confirmation procedures on newly naturalized citizens and minority voters.

7. Your August 11 letter indicates that the state "has prepared a detailed set of instructions for local voter registrars, giving specific and detailed guidance as to how the [verification] process is to be conducted." Provide a copy of any such guidance, whether formal or informal, that has been or will be given to county elections registrars on these issues. In particular, please indicate whether this guidance will cover the following issues: a) whether or not registrars may challenge the registration status of individuals who are flagged on the R1 report but not on the R2 report; and b) whether or not registrars may share registration information with other county departments and officials, including the district attorney. If no guidance has been given to date, please indicate whether the state intends to do so and, if so, a brief description of the guidance that will be provided, the manner in which it will be provided, and an approximate date such guidance will be disseminated.

We also note that the state has enacted legislation codifying a requirement for proof of citizenship for voter registration, which includes a requirement for the adoption of new regulations implementing such legislation. This legislation and accompanying regulations, when submitted for Section 5 review, may have a significant impact on the analysis of the voter verification program that is currently before us and our resulting determination as to whether the program complies with Section 5. In fact, the state has informed the court in *Morales* v. *Handel*, Civil Action 1:08-CV-3172-JTC (N.D. Ga.), that any claims concerning the original voter verification program are moot because Senate Bill 86, Act 143, 2009 Ga. Laws 712, contains an effective date of January 1, 2010. Defendants' Brief in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment (filed September 4, 2009) at 24. We welcome the state's views as to what it believes the impact of that legislation to be on the revised 2009 verification process, which is currently before us for review, including an identification of those aspects of the process that will be changed or will no longer be in effect.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. 28 C.F.R. 51.37. However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. 28 C.F.R. 51.40 and 51.52(a) and (c). Changes that affect voting are legally unenforceable unless and until the appropriate Section 5 determination has been obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Please inform us of the action the State of Georgia plans to take to comply with this request. In that regard, the Department believes it to be appropriate and desirable to continue to discuss this matter with the state.

Because the Section 5 status of these changes is before the Court in *Morales* v. *Handel*, we are providing a copy of this letter to the Court and counsel of record. If you have any questions concerning this letter, please call Robert S. Berman, a Deputy Chief in the Voting Section, at 202/514-8690.

Sincerely,

Thomas E. Perez
Assistant Attorney General

cc: Court & Counsel of Record

MORALES V. HANDEL
1:08-CV-3172-JTC
UNITED STATES EXHIBIT 2
MAY 10, 2010

Department of Law
State of Georgia

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December 22, 2009

Honorable Thomas E. Perez
Assistant Attorney General
Civil Rights Division
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Georgia HAVA and Citizenship Verification Processes,
DOJ File Nos. 2008-5243 and 2009-3122.

Dear Mr. Perez:

First of all, I would like to thank you and your colleagues for meeting with me and my staff on December 14, 2009, to discuss these submissions on behalf of the State of Georgia. I appreciate the effort and commitment this shows towards resolving this matter. I note that this meeting produced positive results with the preclearance of the current voter registration application materials for both the Secretary of State and the Department of Driver Services (DOJ File No. 2009-3149).

My office, of course, informed both the Secretary and the Department of Driver Services (DDS) of the determinations made by your office. The Department of Driver Services appreciates the preclearance of its materials. The Secretary of State continues to be concerned about the remaining outstanding submissions dealing with the State's compliance with the Help America Vote Act (HAVA) and the State's efforts to verify the U.S. citizenship of voter registration applicants. The Secretary has asked that her concerns be communicated to you and they are described below.

The HAVA compliance issue deals with the verification of a voter registrant's first name, last name, driver's license number, date of birth, and last four numbers of the social security number with information on file with DDS; this verification process results in the SSVRZ791R1 report to county registrars (the "R1 Process"). The second issue concerns the State's verification of a voter registrant's United States citizenship with information on file with the Georgia Department of Driver Services; this verification process results in the SSVRZ791R2 report to county

registrars (the "R2 Process"). Although the data matching, as mandated under Section 303 of HAVA, for both the R1 and R2 processes are conducted in the same manner, the Secretary requests a determination as to each process separately.

As we discussed at our meeting, the Secretary believes that sufficient information has been provided to the Department to require the preclearance of both of these processes. Under the State's proposed administrative process, only those applicants who are first-time registrants by mail who do not otherwise present "HAVA approved" identification would have their registration data reviewed or compared with DDS records. Therefore for purposes of Section 5 review, there is no change from the previous voter registration process and voting for individuals unless they have registered to vote for the first time by mail and do not at the time of registration present HAVA approved identification.

The Secretary has requested that the Department separately preclear the R1 and R2 processes by the end of the year. In the meantime, my office will continue to consult with the Secretary of State's office on other matters requiring preclearance on behalf of the State of Georgia.

Sincerely,

Thurbert E. Baker

THURBERT E. BAKER
Attorney General

TEB/me

CC: Karen C. Handel, Secretary of State
Christopher Herren, Esq.

MORALES V. HANDEL
1:08-CV-3172-JTC
UNITED STATES EXHIBIT 3
MAY 10, 2010

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

FEB 22 2010

Dennis R. Dunn, Esq.
Deputy Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

Dear Mr. Dunn:

This refers to your December 22, 2009, letter concerning the revised 2009 verification program for voter registration data, including citizenship status, only for individuals registering to vote by use of the mail-in application who do not provide identification listed in Section 303(b) of the Help America Vote Act with their application; this also refers to your apparent request that the Attorney General reconsider and withdraw the May 29, 2009, objection interposed under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your correspondence on December 22, 2009.

To the extent that your December 22 letter may be intended as a request that the Attorney General reconsider and withdraw the May 29, 2009, objection, we have reconsidered our earlier determination based on the information and arguments you have advanced in support of your request. That review indicates that the state has not provided any additional information or arguments related to the original voter registration verification program to which an objection was interposed, to support its request that the objection to the original program should be withdrawn. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.52. In light of these considerations, I remain unable to conclude that the State of Georgia has carried its burden of showing that the original voter registration verification program has neither a discriminatory purpose nor a discriminatory effect. *Georgia* v. *United States*, 411 U.S. 526 (1973). Therefore, on behalf of the Attorney General, I must decline to withdraw the May 29, 2009, objection.

With regard to the revised 2009 verification program for voter registration data, we note that your December 22, 2009, letter does not address the questions set forth in our October 13, 2009, letter that identified information we determined was necessary to complete our review of your submission of the revised program. In a number of conversations with your office, we have discussed at some length why this information is necessary to complete our review.

Likewise, you have advised us that the State of Georgia has enacted S.B. 86, Act 143 (2009), which requires proof of citizenship for voter registration purposes, and which has an effective date of January 1, 2010. You have also advised us of the adoption of two additional sets of related administrative rules. We understand that the State Board of Elections has approved Rule 183-1-6-.06, entitled "Verification of United States Citizenship of Applicants for Voter Registration," on December 10, 2009, and that the Secretary of State adopted Rule 590-8-1-.02 entitled "Verification of Voter Registration Information," on December 10, 2009. In each of our previous letters to you on this matter, and in our discussions with your office, we have identified the state's enactment of S.B. 86 and adoption of implementing regulations as having a significant impact on our determination under Section 5.

Although the legislation's effective date has now passed and the state has adopted the necessary implementing regulations, our records do not indicate that these changes affecting voting have been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965. Accordingly, it is necessary that these changes either be brought before that federal district court or submitted to the Attorney General for a determination that they have neither the purpose nor will have the effect of discriminating on account of race, color, or membership in a language minority group. Changes that affect voting are legally unenforceable unless and until the appropriate Section 5 determination has been obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.10.

Because these unsubmitted changes and the revised 2009 verification program for voter registration data are directly related, they must be reviewed simultaneously. Accordingly, it would be inappropriate for the Attorney General to make a determination on the revised 2009 verification program until the related changes have been submitted for Section 5 review, and until the information we have previously identified in our October 13, 2009 letter has been provided. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.22(b) and 51.35.

Should you elect to make a submission to the Attorney General for administrative review, rather than seek a declaratory judgment from the United States District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the Procedures. At that time we will review all changes simultaneously; however, any documentation previously provided need not be resubmitted.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Georgia plans to take concerning these matters. If you have any questions please call Robert S. Berman (202-514-8690), a deputy chief in the section. Refer to File Nos. 2009-3122 and 2010-0535 in any response to this letter so that your correspondence will be channeled properly. As our prior letters have indicated, and as we have discussed with your office on a number of prior occasions, the Department believes it to be appropriate and

desirable to continue to discuss this matter with the state. We are prepared to promptly arrange a meeting with your office and the office of the Secretary of State to discuss the remaining issues.

Sincerely,

Thomas E. Perez
Assistant Attorney General

MORALES V. HANDEL
1:08-CV-3172-JTC
UNITED STATES EXHIBIT 4
MAY 10, 2010

Department of Law
State of Georgia

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April 22, 2010

Honorable Brian P. Kemp
Secretary of State
214 State Capitol Building
Atlanta, GA 30334-1300

Re: Preclearance Pursuant to Section 5 of the Voting Rights Act of 1965 of Citizenship Verification Activities by the Secretary of State and of Act No. 143 (S.B. 86) (2009).

Dear Secretary Kemp:

I have carefully reviewed your letter of April 6th, as well as that of Governor Perdue dated April 7th, requesting that I file a lawsuit against the U.S. Department of Justice rather than pursue an administrative submission in order to achieve preclearance of Georgia's citizenship verification process as well as Act No. 143 (S.B. 86) and regulations related thereto.

As the State's chief legal officer I have repeatedly advised that in my legal opinion the State would be better served by pursuing preclearance administratively. I strongly believe that submitting this directly to the Department of Justice would achieve the desired result more quickly and economically. My reasons for concluding this were outlined in my letter to you dated March 19, 2010, and your response to that letter has not changed my view that pursuing an administrative remedy is the appropriate legal course of action to take. My office has been prepared to file an administrative submission since January and still stands ready to file that submission today.

As noted in my March 19th letter, this office has historically sought preclearance of countless matters following the more cost-efficient administrative route. Pursuing outright litigation as the first option is the rare exception. Indeed, the State has not pursued preclearance through litigation in more than nine years. That case, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C.), *vacated and remanded*, 539 U.S. 461 (2003), involved the 2000 reapportionment legislation and this Office pursued litigation in that case based on my legal analysis, accepted by the Governor and legislative leadership, that there was not a realistic likelihood that the Department of Justice would preclear all three reapportionment plans. The litigation ultimately proceeded to the United

States Supreme Court because the General Assembly specifically included a directive in subsequent legislation that a "final determination" of the constitutionality of the Act in question be obtained. The *Ashcroft* case involved substantial discovery and pretrial proceedings, a trial before a three-judge court and an appeal to the U.S. Supreme Court. This office retained outside counsel in that case, which you are likewise requesting that we do now, that ultimately cost the State more than a million dollars. I have estimated that legal costs in the current matter would likely exceed $250,000.

In your letter you also cite the Department of Justice's delay in preclearing the voter verification process as a justification for immediately filing suit. That delay, however, was in large part created as a result of changes to the process that evolved over time under your predecessor, resulting in the Department of Justice's questioning whether the process they were reviewing was the "final" process or whether it would change again, especially with the implementation of SB 86. After the last round of changes, both you and your predecessor refused to submit additional information requested by the Justice Department, thus explaining their unwillingness to preclear those changes. With respect to SB 86 and the rules related thereto, I note that despite the bill's effective date of July 1, 2009, the bill has not been submitted and there was a delay between the passage of the bill and the adoption of the rules of almost six months. The Department of Justice cannot be blamed for this delay on the State's part.

I believe that the statements made in your correspondence to me and to the media suggesting that the Department of Justice cannot be trusted to perform their duties in accordance with the law are ill advised and counterproductive. As I have previously stated, my personal meeting with the head of the Civil Rights Division at the Department of Justice has led me to believe that the Department is sincere in its desire to assist the State of Georgia in getting both the verification process and SB 86 precleared. Litigation against the United States is not a minor matter to be engaged lightly, especially when the costs of such litigation will be substantial and Georgia is otherwise cutting essential funding in core areas such as education, public safety and transportation.

In spite of the legal advice I have given, you have insisted that a costly and time-consuming lawsuit be instituted against the Department of Justice. I cannot justify such an action and for the reasons given herein and in prior correspondence and communications with you and your office, I must decline to pursue such litigation.

As you are aware, my refusal to initiate this litigation against the federal government permits the Governor to appoint counsel for the limited purpose of pursuing litigation to seek preclearance of the voter verification process, SB 86 and the related rules. Although I reiterate my readiness to

immediately submit the matters administratively, if you are determined to ignore my advice in favor of litigation, I would advise that you consult with the Governor's Office about proceeding further.

Sincerely,

Thurbert E. Baker

THURBERT E. BAKER
Attorney General

TEB/jm

cc: Honorable Sonny Perdue