

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

_____	)	
JOSE MORALES,	)	
on behalf of himself	)	
and those similarly situated, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:08-CV-3172-JTC
	)	
KAREN HANDEL,	)	Three-judge court (JTC, WSD, SFB)
in her official capacity as	)	
Georgia Secretary of State,	)	
	)	
Defendant.	)	
_____	)	

**SECOND MEMORANDUM OF THE UNITED STATES**  
**AS AMICUS CURIAE**

The United States respectfully submits this memorandum as *amicus curiae* on the issues presented in the recent filings of the parties.

**Section 5 Claims**

The United States has set forth previously, in its amicus brief filed on October 21, 2008, the case law describing the jurisdiction of a three-judge court such as this one convened in an action seeking to enjoin unprecleared voting changes under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. (Docket # 28-

1). In relevant part, the Supreme Court has held repeatedly that there are only three issues to be decided in a coverage action such as this one, namely, “whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate" until the change is precleared or abandoned. *Lopez v. Monterey County*, 519 U.S. 9, at 23-24 (1996). This Court considered these three questions in its October 27, 2008 Order, concluding that Georgia’s verification procedures are covered by Section 5, that these procedures have not received preclearance as required under Section 5, and that entry of a preliminary injunction under Section 5 was appropriate. (Docket # 36). That October 27 preliminary injunction remains in place today.

Subsequent to the entry of the Court’s Order, the Attorney General interposed an objection under Section 5 on May 29, 2009, to Georgia’s submission of its “R2” citizenship verification procedures, as well as to its “R1” identity verification procedures. (Docket #89-6). On August 11, 2009, the State requested that the Attorney General reconsider this May 29 objection, and, at the same time, the State submitted a revised set of verification procedures for review under Section 5, and those requests remain pending.

The Plaintiffs have now filed a request for permanent injunctive relief as to voting changes already identified by the Court as being both covered by Section 5 and unprecleared, namely, Georgia's "R2" automated process for comparing database information to verify citizenship, as well as the related procedures used by registrars for reconciling the results of that process. (Docket # 89, 92). In response to the Plaintiffs' motion, the State has argued that the Plaintiffs' Section 5 claims should be denied, since the State asserts that the challenged procedures are not discretionary and asserts the procedures are not discriminatory in substance. The State has further argued that the Plaintiffs' claims should be dismissed as moot or unripe. (Docket # 88, 91).

Respectfully, the State's arguments contravene well-established Supreme Court case law, as set forth in the United States' October 21 memorandum, and as this Court found in its October 27 Order. The State has discretion in its implementation of the challenged procedures, thus triggering coverage by Section 5. Moreover, this Court does not have jurisdiction to consider whether the challenged procedures are in fact discriminatory in violation of Section 5 – that determination can only be made by the Attorney General or the District Court for the District of Columbia. Likewise, the Section 5 claim here is far from being

moot or unripe, since the challenged procedures remain unprecleared, the State continues to implement these procedures, and the State has shown no evidence of abandoning the procedures.

Thus, as described in this Court's October 27 Order, it remains clear that these procedures are covered by Section 5, remain unprecleared, and must be the subject of an injunction under Section 5. The need for injunctive relief is made all the more clear by the Attorney General's subsequent decision to interpose an objection under Section 5 to the challenged procedures. *Morris v. Gressette*, 432 U.S. 491, 495-96 (1977) (Attorney General's objection under Section 5 "standing alone, would have justified an injunction against enforcement" of unprecleared changes).

Nonetheless, the United States believes that the Court should, as a prudential matter, maintain the status quo under the October 27 preliminary injunction for the time being, since a number of important issues related to this matter remain unresolved as of this moment. Two matters remain pending before the Attorney General under Section 5 – (1) the State's request for reconsideration of the Attorney General's May 29, 2009 objection to the State's citizenship and identity verification procedures, and (2) the State's submission of new automated

verification procedures. The Attorney General's administrative review period for these two requests expires October 13, 2009, and we cannot forecast the outcome of these pending administrative requests at this time. The State also enacted new legislation on May 5, 2009, imposing additional procedures for verifying citizenship for voter registration purposes (Act 143, S.B. 86). This legislation is to take effect just over three months from now, on January 1, 2010. We understand that the State is considering adopting additional regulations, procedures and forms related to this legislation. Neither Act 143, nor any of the other changes related to that legislation, have yet been submitted for review under Section 5. The Attorney General has previously advised the State that the submission of the new legislation and related changes could have bearing on the analysis of the verification procedures that are the subject of the May 29 objection.

The United States believes that it would be best for the Court to allow the October 27, 2008 preliminary injunction under Section 5 to remain in place, for the time being, and for the Court to defer consideration of the question of entering a permanent injunction under Section 5 until at least after January 1, 2010.

**NVRA & HAVA Claims**

The United States likewise believes that the Court should hold the Plaintiffs'

claims under the NVRA and HAVA in abeyance for now. So long as the verification procedures remain unprecleared 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 changes).

### **Conclusion**

The United States respectfully submits this Court has already determined that the challenged procedures are covered by Section 5, that they are unprecleared, and that injunctive relief is appropriate. However, the United States submits that the existing summary judgment motions should not be ruled upon for the moment, and that the question of permanent injunctive relief should be deferred for now, due to the outstanding unresolved issues related to the challenged procedures. The United States submits that this Court should require the parties to report back to the Court on January 4, 2010, and that the existing October 27, 2008 preliminary injunction under Section 5 should remain in place in the interim.

Respectfully submitted,

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LORETTA KING  
Acting Assistant Attorney General  
Civil Rights Division

*/s/ Christopher Coates*

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Date: September 25, 2009

### **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/ Christopher Coates*

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2009, I caused the foregoing document to be served by via the Court's ECF system on counsel of record for all parties.

*/s/ Christopher Coates*

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