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

COMMON CAUSE and the GEORGIA STATE CONFERENCE OF THE NAACP, Plaintiffs, v. BRIAN KEMP, individually and in his capacity as the Secretary of State of Georgia, Defendant.	Civil Action No. 1:16-cv-452-TCB

STATEMENT OF INTEREST OF THE UNITED STATES

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit. This case presents an important question of statutory interpretation of the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. § 20501 *et seq.*, and the Help America Vote Act of 2002 (HAVA), 52 U.S.C. § 20901 *et seq.* Congress gave the Attorney General broad authority to enforce both the NVRA and HAVA on behalf of the United States. *See* 52 U.S.C.

§§ 20510, 21111. Accordingly, the United States has a strong interest in ensuring that both statutes are fully and uniformly enforced.

The NVRA requires states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists" of registered voters, a process often referred to as "purging." 52 U.S.C. § 20507(a)(4). HAVA does the same. 52 U.S.C. § 21083(a)(4)(A). Such a program must be uniform and nondiscriminatory and in compliance with the Voting Rights Act. 52 U.S.C. § 20507(b)(1). Among other grounds, the NVRA and HAVA require removal of voters who have become ineligible by virtue of a change of residence, pursuant to a designated purge process. Both statutes, however, also expressly forbid purging voters merely for not voting. 52 U.S.C. §§ 20507(b)(2), 21083(a)(4)(A).

This case asks whether, consistent with federal law, a state may consider a registered voter's failure to vote to be reliable evidence that the voter has become ineligible to vote by virtue of a change of residence, thus triggering the designated NVRA purge process. Defendant argues that it can. In fact, it cannot. Accordingly, the United States submits this Statement of Interest to address proper NVRA and HAVA standards. The United States respectfully submits that Defendant's motion to dismiss should be denied.

II. BACKGROUND

A. Georgia's Current Purging Procedures

Georgia's purging procedures for voters who may have changed residence are as follows: First, at the start of each odd-numbered year, the Secretary of State prepares a list of voters who have had "no contact" with election officials in the past three years.[1] D's Mot. to Dismiss at 8-10; Ga. Code § 21-2-234. At the Secretary's discretion, he may also include voters who have provided a change of address to the U.S. Postal Service through its National Change of Address (NCOA) program. *Id.;* Ga. Code Ann. § 21-2-233. Second, the Secretary must send these voters a notice asking them to confirm whether they still reside at their current address. *Id.*; Ga. Code Ann. §§ 21-2-233(c); 21-2-234(a). Next, if the voter does not return the notice confirming her residence within 30 days, she is moved to the "inactive list." *Id.*; Ga. Code Ann. §§ 21-2-233(c); 21-2-234(g). Finally, if the voter continues to have "no contact" with election officials through and including

[1] "No contact" is a statutorily defined term under state law meaning that the voter "has not filed an updated voter registration card, has not filed a change of name or address, has not signed a petition which is required by law to be verified by the election superintendent of a county or municipality or the Secretary of State, has not signed a voter's certificate, and has not confirmed the elector's continuation at the same address during the preceding three calendar years." Ga. Code Ann. § 21-2-234(a).

the second federal general election after the notice was mailed, the registration record will be cancelled. *Id.*; Ga. Code Ann. § 21-2-235. Any voter whose registration record is cancelled is ineligible to vote in state and federal elections in Georgia until the voter submits a new registration form. Ga. Code Ann. § 21-2-235(b).

B. Georgia's Prior Purging Procedures and Preclearance

In 1993, Congress enacted the NVRA. In 1994, Georgia enacted its first post-NVRA purging procedures, Ga. Code Ann. §§ 21-2-234; 21-2-235. Georgia submitted those purge procedures to the Department of Justice for preclearance review under Section 5 of the Voting Rights Act. The Department objected, based on a determination that those procedures violated the NVRA by using non-voting alone to trigger the purge process. Letter from Deval Patrick, Asst. Att'y Gen'l (USDOJ), to Dennis R. Dunn, Sr. Asst. Att'y Gen'l (Ga.) (Oct. 24, 1994) (Attached as Ex. 1 to P's Compl.).

In 1997, Georgia submitted a slightly revised version of its purge procedures, functionally similar to the procedures currently in Section 21-2-234, for preclearance review under Section 5. The Department did not object to that submission, but this lack of objection did not reflect or imply any finding regarding

compliance with the NVRA.[2] To the contrary, consistent with prevailing law and Department regulations, however, the Section 5 determination letter expressly indicated that the non-objection did not bar subsequent litigation to enforce the NVRA. Letter from Isabelle Katz Pinzler, Acting Asst. Att'y Gen'l (USDOJ), to Dennis R. Dunn, Sr. Asst. Att'y Gen'l (Ga.). (July 29, 1997) (Attached as Ex. 1 to Br. in Supp. of D's Mot. to Dismiss).[3]

III. LEGAL STANDARD

A. The National Voter Registration Act of 1993

The NVRA governs how covered states conduct voter registration and voter list maintenance for federal elections.[4] Congress enacted the NVRA in part to

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[2] Earlier that same year, the Supreme Court decided *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997). *Bossier Parish* held that a violation of Section 2 of the Voting Rights Act could not independently support an objection under Section 5 of the Act. Based on that Supreme Court decision, the Department of Justice determined that a state statute's violation of another federal statute, such as the NVRA, was an insufficient basis to support an objection under Section 5.

[3] Georgia is no longer covered by the preclearance requirement of Section 5 of the Voting Rights Act, by virtue of the decision of the Supreme Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

[4] A state is covered under the NVRA unless it either has no voter registration requirement for federal elections or has allowed voter registration at the polling place for federal elections continuously since August 1, 1994. 52 U.S.C. § 20503(b). Georgia is a state covered by NVRA requirements. Coverage under the NVRA is distinct from coverage under the preclearance requirement of Section 5

"increase the number of eligible citizens who register to vote" while protecting "the integrity of the electoral process" by ensuring that "accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b).

Section 8 of the NVRA addresses state voter list maintenance procedures for federal elections. 52 U.S.C. § 20507. Among other things, it prescribes the conditions under which voters may be purged and the procedures states must follow before making those purges. 52 U.S.C. § 20507(a).

In Section 8, Congress set forth two new bedrock requirements for state purging programs. First, programs to maintain accurate and current voter registration lists must be "uniform" and "nondiscriminatory." 52 U.S.C. 20507(b)(1). Second, states may not purge voters based on not voting:

> Any State program or activity … ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office-- … *shall not result* in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office *by reason of the person's failure to vote*….

52 U.S.C. § 20507(b)(2) (emphasis added).

The statute does delineate, however, conditions under which states may properly purge registered voters. Those conditions include when the registrant

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of the Voting Rights Act, and is in no way implicated by the Supreme Court's decision in *Shelby County*.

requests to be removed from the list, or when reliable information reveals that the voter has become ineligible to vote due to death, criminal conviction, mental status, or changed residence. 52 U.S.C. § 20507(a)(3), (a)(4). As to this last category, the NVRA requires states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of … a change in the residence of the registrant…." 52 U.S.C. § 20507(a)(4). To do so, states must follow specific NVRA procedures. First, the state must gather reliable evidence that the voter has become ineligible based on a change of residence. One such process for gathering this evidence, involving use of the U.S. Postal Service's National Change of Address (NCOA) database, is described in Section 8(c). Second, the state must notify the voter and provide an opportunity to confirm (or rebut) the apparent address change, by means of a specific forwardable confirmation mailing and waiting for two federal general elections, before cancelling a voter's registration, as described in Section 8(d).

1. Evidence of a Change of Residence

Section 8(c) of the NVRA cites the NCOA database as an objective and reliable source for identifying voters who may have become ineligible to vote by moving outside the jurisdiction. 52 U.S.C. § 20507(a)(4), (c). The NCOA is

basically a safe harbor method of gathering address-change information; it is not the only such source, and use of the NCOA is not mandatory. 52 U.S.C. § 20507(c). Likewise, an entry in the NCOA database is not by itself a sufficient basis to purge; for example, the entry may reflect an error, or it may indicate an individual's desire to forward mail, unconnected to a change in voting residence. As the NCOA information on potential address changes is second-hand and does not come directly from the voter, the NVRA requires that states follow the specific process in Section 8(d) to provide the voter with the opportunity to confirm or rebut the evidence of the move.

2. The Notice, Waiting Period, and Cancellation Process

Once a jurisdiction has reliable evidence that a voter has moved, Section 8(d) of the NVRA describes in detail the process that election officials must follow to give that voter the opportunity to confirm or rebut evidence of a possible change of residence that would render the voter ineligible to vote in the jurisdiction (referred to here as the Section 8(d) notice and cancellation process). Election officials must send the voter a detailed notice by forwardable mail, designed to reach the voter wherever she may be, asking the voter to confirm whether she has in fact moved outside the registrar's jurisdiction. 52 U.S.C. § 20507(d). The voter may affirmatively confirm ineligibility in writing (and may then be purged). *Id.*

Alternatively, the voter may rebut the evidence of ineligibility either by declaring that she still resides within the jurisdiction or by appearing to vote. *Id.* If the voter does not respond to that notice and does not vote or appear to vote at or before the second federal general election following mailing of the notice, only then may the state properly purge that voter from the voter rolls based on change of residence. *Id.*

B. The Help America Vote Act of 2002

HAVA, which was enacted in 2002, imposes certain minimum standards for states to follow in federal elections. For instance, Section 303 requires that covered states adopt a computerized statewide database for voter registration purposes. 52 U.S.C. § 21083. But HAVA leaves the NVRA and other federal voting protections intact. HAVA makes clear that states must not undertake list maintenance activities under the statewide database—including purging voters for failure to vote—that are forbidden by the NVRA. Section 303(a)(2)(A)(i) provides that if an individual is to be removed from a state's voter registration list, the voter "shall be removed in accordance with" the NVRA. 52 U.S.C. § 21083(a)(2)(A)(i). And the statute restates the core principle that "no registrant may be removed solely by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A).

Section 903 amended the NVRA to clarify that states may use the Section 8(d) notice, waiting period, and cancellation process as part of a general program to purge voters for whom there exists reliable second-hand evidence of a change in residence (such as the NCOA database described in Section 8(c)). 52 U.S.C. § 20507(b)(2).[5]

And Section 906 addresses HAVA's effect on other laws. 52 U.S.C. § 21145(a). It cautions that HAVA neither authorizes nor allows states to do

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[5] The relevant text of Section 8(b) of the NVRA, with the portion added by HAVA in underline, is as follows:

(b) Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office …

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, <u>except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--</u>

<u>(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then</u>
<u>(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.</u>

52 U.S.C. § 20507(b)(2) (emphasis supplied)

anything prohibited by the NVRA or other federal voting statutes, and that nothing in HAVA repeals, replaces, or limits the protections of those statutes. *Id*.[6]

IV. ARGUMENT

A. Using Failure to Vote to Trigger a Section 8(d) Purge Process Violates Section 8 of the NVRA.

The NVRA and HAVA prohibit using non-voting as a basis to purge registered voters. 52 U.S.C §§ 20507(b)(2), 21083(a)(4)(A). This is, in part, a reaction to the purge practices of the past. *See* S. Rep. 103-6 at 17-19 (1993) (explaining that at the time the NVRA was passed, "many States continue[d] to penalize such non-voters by removing their names from the voter registration rolls" even though that practice was "inefficient and costly" and some believe that it tended to "disproportionately affect persons of low incomes, and blacks and other minorities").

The NVRA rejected this historical practice, and instead offered a balanced approach to registration rolls that better reflect the eligible electorate. It ensured that voters could be validly removed from the rolls upon reliable evidence of their

[6] Section 906 includes only one exception to this general rule, not applicable here: it changes some requirements of the NVRA to establish an identification requirement for first-time voters who register by mail. 52 U.S.C. § 21145(a); *see also id.* § 21083.

ineligibility. But it also established firm procedures to ensure that eligible voters would not be removed from the rolls merely for inactivity, without more.

Sections 8(b), 8(c), and 8(d) help supply this balance. Election officials must establish a general program that makes a reasonable effort to purge the registration records of individuals who have moved out of the jurisdiction. 52 U.S.C. § 20507(a)(4)(B). However, the NVRA provides a two-step process for such purges, to minimize error. First, the jurisdiction must have some reliable evidence that the voter has become ineligible due to a change of residence. Election officials need not use the NCOA database. But Congress's explicit endorsement in Section 8(c) of the NCOA process as a safe harbor for identifying changes of residence, paired with the ban on purging based on non-voting in Section 8(b), signals Congress' intent to ensure that any method states use to trigger the Section 8(d) notice and cancellation process must be based upon objective and reliable information of potential ineligibility due to a change of residence that is independent of the registrant's voting history. *Id.*; *see also Welker v. Clarke*, 239 F.3d 596, 599 (3rd Cir. 2001) (noting in dicta that the NVRA "strictly limited" removals based on changes of address, and that evidence of moves must be "reliable" information such as the NCOA). Then, and only then, is it appropriate to institute the Section 8(d) process: notifying the voter that there is

some evidence of ineligibility, and allowing the voter an opportunity to either confirm or rebut that evidence.

Without reliable evidence of a move to trigger the Section 8(d) notice and cancellation process, voters might be purged based purely on inactivity rather than actual ineligibility. Both the NVRA and HAVA clearly state that once registered, an eligible voter's decision not to vote (e.g., based on dissatisfaction with the candidates on offer in particular elections) cannot suffice to place his or her constitutional right to vote in jeopardy. Yet that is precisely the result Defendant advocates in this case. Reliance on non-voting to trigger the Section 8(d) notice and cancellation process—rather than independent, objective, and reliable evidence of a changed residence—means that an eligible voter can be purged solely for declining to participate.

Wilson v. United States, the sole court decision interpreting Section 8(b)(2) of which we are aware, supports that view. *See* Order Granting in Part and Denying in Part Plaintiffs Voting Rights Coalition and United States' Motion for Further Relief, *Wilson v. United States*, No. C 95-20042 at 5 (N.D. Cal. Nov. 2, 1995), as modified by Joint Stipulation to Substitute Language (N.D. Cal. Nov. 13, 1995) (attached as Exhibit 1). In *Wilson*, the Court considered a challenge to California's then-existing purging procedures. Under those procedures, a voter

who had not voted in the previous six months was sent an initial non-forwardable postcard to confirm his residency. *Id.* at 5 (as modified by joint stipulation). *Only if* the U.S. Postal Service returned this initial non-forwardable postcard as undeliverable would California send a subsequent Section 8(d) forwardable notice and begin the cancellation process. *Id.* The *Wilson* court found the California procedure complies with the NVRA specifically because the Postal Service returning the initial postcard as undeliverable provides objective and reliable evidence, independent from the voter's activity or inactivity, that the voter had in fact moved. *Id.* And even though such evidence is not itself dispositive, it is sufficient to trigger the Section 8(d) process. *Id.*

The process ratified by the *Wilson* court stands in stark contrast to a purge procedure triggered solely by a voter's inactivity, and which does not rely on any objective and reliable evidence that the voter has in fact moved (such as NCOA information or returned undeliverable mail). A purge premised on inactivity alone violates the NVRA's ban on purging voters for non-voting. *See id.* ("Since the State receives a card which states that the card is undeliverable and then the addressee fails to vote in subsequent elections, [California's purging procedure] does not violate the NVRA.").

In 1997, after *Wilson* was decided, the Department of Justice authorized lawsuits against Alaska and South Dakota under facts similar to those at issue here. *See* Exhibits 2 and 3. Each state had adopted purging procedures that used non-voting to trigger the Section 8(d) notice and cancellation process. The Department notified each state that its purging procedures violated Section 8's ban on purging for non-voting. The states subsequently agreed to stop using non-voting as the trigger for beginning the Section 8(d) notice and cancellation procedure, and instead adopted an undeliverable non-forwardable initial notice trigger similar to that approved by the *Wilson* court. *See* Ak. Stat. 15.07.130(a),(b); S.D. Codified Laws § 12-4-19. The position is consistent with the guidance on the NVRA that the Department of Justice has given after the enactment of HAVA.[7]

[7] The Department of Justice guidance stresses that a general program under Section 8 to purge voters who may have moved away should be triggered by reliable second-hand information indicating a change of address outside of the jurisdiction, from a source such as the NCOA program, or a general mailing to all voters. Dep't of Justice, The National Voter Registration Act of 1993 (NVRA) Questions and Answers at ¶¶ 34-35 (available at https://www.justice.gov/crt/national-voter-registration-act-1993-nvra); *see also id.* at ¶ 33 (giving examples of reliable, objective alternatives to the USPS NCOA database); *id.* at ¶ 29 (reiterating that list maintenance must be uniform, non-discriminatory, and in accordance with the NVRA); *cf.* at ¶ 30 (discussing situations where notice and waiting period is required, and using returned mail as an example of second-hand information that triggers the notice and waiting period process before purging).

Defendant argues that the NVRA does not require states to use the NCOA database to determine that a voter has moved. Br. in Supp. of D's Mot. to Dismiss at 6-7; Reply Br. in Supp. of D's Mot. to Dismiss at 9-10. That is true but beside the point. While the NCOA database is the one source Congress specifically mentioned for determining that a voter has moved away, states are free to use analogous information sources and methodologies as long as they yield objective and reliable evidence of a voter's changed residence that is independent of voting history. But states may *not* purge voters based on an impermissible assumption derived solely from a registrant's choice not to vote.[8]

Defendant also incorrectly suggests that because Section 8(d) permits voters to correct erroneous confirmation mailings, states may use any means, including non-voting, to determine which voters have moved away. Reply Br. in Supp. of

[8] Because the NVRA's plain text prohibits using non-voting to trigger the purging process, the court need not review the statute's legislative history. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n. 3 (2010). But that history underscores Defendant's error here. Congress designed the NVRA to "ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction," recognizing that "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. 103-6 at 17 (1993). To protect this right, Congress intended states to use reliable evidence such as the NCOA database *rather than* failure to vote as a trigger for purging. *See* H.R. Rep. 103-9 at 15-16 (1993).

D's Mot. to Dismiss at 8-9. Although Section 8(d) provides a way for voters to correct inadvertent errors resulting from the targeting process, it does not obviate a state's duty *ab initio* to use a reliable, objective process to target for removal only registrants for whom there is evidence of ineligibility, and in no way allows what the NVRA explicitly forbids: using failure to vote alone to trigger the Section 8(d) notice and cancellation process.

Alternatively, Defendant argues that Georgia's purge procedures are triggered by "no contact," as defined by state statute, and not by a registrant's failure to vote. Br. in Supp. of D's Mot. to Dismiss at 12; Reply Br. in Supp. of D's Mot. to Dismiss at 11, n. 7. This misses the mark. Under Georgia law, the definition of "no contact" for purposes of triggering the purge process is that a voter has not voted, appeared to vote, signed a petition, or otherwise contacted election officials. *Id.*

The absence of these activities is in no way evidence of ineligibility. A voter's decision not to vote or otherwise interact with the political process or election officials says nothing reliable about whether a voter has become ineligible by having moved away. And Congress' intent to protect a citizen's right not to vote surely also encompasses the right not to appear to vote, or sign a petition, or contact an election official if a voter elects not to do so. *See* S. Rep. 103-6 at 17

(1993). Purge procedures therefore violate the NVRA regardless of whether they use non-voting or Georgia's definition of "no contact" to trigger the process for purging voters without any reliable evidence of ineligibility.

B. HAVA's Amendment to the NVRA Does Not Allow States to Target Non-Voters for Purging Absent Reliable Evidence They Have Changed Residence.

Defendant argues that Congress authorized a purge triggered by nonvoting when it amended Section 8(b)(2) of the NVRA as part of HAVA's enactment in 2002. *See* Br. in Supp. of D's Mot. to Dismiss at 4-6; Reply Br. in Supp. of D's Mot. to Dismiss at 3-5. He is incorrect. HAVA's amendment has no effect on the NVRA's prohibition against targeting non-voters for purging.

The language on which Defendant relies, added by Section 903 of HAVA, is neither a substantive expansion nor restriction of the pre-existing procedures. Rather, by its own terms, it is merely a rule of construction: "except that nothing in this paragraph [prohibiting purging for failure to vote] *may be construed* to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters . . . ." 52 U.S.C. § 20507(b)(2) (emphasis added).

The best reading of this provision is as a clarification of the NVRA's pre-existing requirements. The principle in Section 8(b)(2) that registrants may not be

purged based on a failure to vote might possibly have been seen as in tension with the procedures of Section 8(d) during the waiting period after the notice. After all, Section 8(d) states that registrants for whom there exists reliable evidence of change of residence and who do not respond to a notice of potential ineligibility *may be purged if they do not vote for two election cycles*. So the HAVA proviso clarified that there is no conflict: *after* states have identified voters who may have moved based on reliable, objective, independent evidence, and sent the Section 8(d) notice of their potential ineligibility, states are free to purge if the voter does not appear to vote for two election cycles. That language does not address the core issue here: whether a state may use non-voting to *trigger* the Section 8(d) notice and cancellation process specifically referenced by the 2002 HAVA amendments.

Defendant correctly notes that the amendment clarifies "that states could and should remove voters from their registration lists, pursuant to a list maintenance program, where a voter both failed to return a postage prepaid forwardable notice and then also failed to vote for two additional federal election cycles." Br. in Supp. of D's Mot. to Dismiss at 5-6; Reply Br. in Supp. of D's Mot. to Dismiss at 3. We agree with this description of the process to the extent it describes the Section 8(d) notice and cancellation process. But the question here is whether Georgia may use non-voting as evidence of ineligibility, i.e., as the *trigger* for

beginning the Section 8(d) notice and cancellation process. The answer was "no" in 1993. It remains "no" after the 2002 HAVA amendment.

As originally enacted, the NVRA forbids purging registrants based on non-voting. Pub. L. 103-31, 107 Stat. 77, § 8(b)(2). HAVA did not change that. In fact, it reiterated that "no registrant may be removed solely by reason of a failure to vote." 52 U.S.C. § 21083(a)(4)(A).

But even if the amended language of Section 8(b)(2) were unclear, Section 906 of HAVA rules out Defendant's interpretation. It specifies that, other than Section 303(b)'s changes to registration requirements for first-time voters registering by mail, nothing in HAVA may be read to authorize conduct otherwise forbidden by the NVRA.[9] 52 U.S.C. § 21145. And the legislative history of Section 903 of HAVA (the NVRA amendment), makes clear that Congress intended to keep the NVRA's protections against improper purging in place:

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[9] Section 906 of HAVA provides: "Except as specifically provided in section 21083(b) [amending Section 6 of the NVRA's requirements for registrants by mail] …, nothing in this chapter may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws:

…

(4) The National Voter Registration Act of 1993…"

52 U.S.C. § 21145(a).

> The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act (NVRA). The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this Act. Accordingly, H.R. 3295 leaves NVRA intact, and does not undermine it in any way.

H.R. Conf. Rep. No. 107-730, pt. 1, at 81 (2002). Congress's intent that the 2002 amendment not weaken any NVRA protection—including the bar against using non-voting to trigger confirmation and removal procedures—is plain.

Defendant's cites to large swaths of HAVA's legislative history are unavailing. They merely restate that the NVRA permits purging some voters who, per objective and reliable evidence, may be ineligible, after the requisite notice and waiting period. In fact, that legislative history reiterates the fundamental, and for Defendant, fatal point that nothing in HAVA was intended to lessen the NVRA's protections. *See Statement of Sen. Dodd*, cited in Br. in Supp. of D's Mot. to Dismiss at 13. Thus, if a state's use of non-voting to *trigger* the Section 8(d) notice and cancellation process is not "consistent with the NVRA," *see id.*, it is perforce inconsistent with HAVA.

C. HAVA Does Not Require States to Target Non-Voters for Purging Absent Reliable Evidence They Have Changed Residence.

Defendant also appears to suggest that HAVA *requires* procedures that purge nonvoters after a two-cycle waiting period. *See* Br. in Supp. of D's Mot. to

Dismiss at 3-8. There is no such requirement. Just as Section 903 of HAVA merely clarifies and approves what the NVRA previously allowed, Section 303 of HAVA's statewide database list maintenance provisions only permits action that is consistent with the NVRA. *See* 52 U.S.C. § 21083(a)(2),(4).

Yet, Defendant seems to argue that HAVA and the NVRA compel its purge procedures because states must "both register all eligible applicants *and* [] remove *all* ineligible registered voters from the registration lists." Br. in Supp. of D's Mot. to Dismiss at 5 (second emphasis added). This misreads the law. But more to the point, procedures for determining "ineligibility" based on a change in residence are fatally flawed if the basis for establishing ineligibility is a failure to vote. The NVRA simply does not permit *ad hoc* guesswork about a voter's residence to presume that voter's ineligibility to vote. To the contrary, objective and reliable evidence (such as that derived from the NCOA database or an analogous source) is required. Thus, while a state may seek to purge all ineligible voters from its voter registration list, it may do so only after making reliable voter eligibility determinations that comply with the NVRA. Neither the NVRA nor HAVA permit a state to assume a voter has moved away from the jurisdiction (and thus become ineligible) merely because that voter declined to vote. 52 U.S.C. §§ 20507(b)(2), 21083(a)(4)(A).

D. The Attorney General's Preclearance of Georgia's 1997 Purging Procedures Indicates Nothing About Their Validity Under the NVRA.

Defendant argues that the Department of Justice's preclearance under Section 5 of the Voting Rights Act of Georgia's purging procedures in 1997 after objecting to a similar submission in 1994 signifies that those procedures were legally compliant in all respects. Defendant is incorrect about the legal effect of Section 5 preclearance.

That the Attorney General precleared the 1997 law, but not its 1994 predecessor, merely reflects intervening Supreme Court authority clarifying that objections to voting changes under Section 5 of the Voting Rights Act cannot be based on substantive violations of other laws. *See Bossier*, 520 U.S. at 471. The 1997 preclearance thus signified nothing more than that the 1997 Georgia statute complied with Section 5: under the available evidence, the state had met its burden under Section 5 of showing that the statute had neither a discriminatory purpose nor a retrogressive effect based on race or language minority status. Indeed, the Attorney General's Section 5 procedures specifically note that "preclearance by the Attorney General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5…" 28 C.F.R. § 51.49. Likewise, the Attorney General's Section 5 preclearance

letters, such as the 1997 preclearance letter to Georgia, explain that Section 5 itself provides that preclearance does not preclude a subsequent challenge to the change (including a challenge by the Department or private parties under the NVRA).[10] *See* Ex. 1 to Br. in Supp. of D's Mot. to Dismiss. Hence, Defendant's argument that the Department's preclearance under Section 5 of Georgia's 1997 state purging law reflects a determination that the law complied with the NVRA is simply incorrect.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully submits that Defendant's interpretation of the NVRA and HAVA is incorrect and that this Court should deny Defendant's motion to dismiss.

[10] Section 5 of the Voting Rights Act provides "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 52 U.S.C. § 10304(a).

Date: May 4, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is submitted in 14 point Times New Roman font, as required by the U.S. District Court for the Northern District of Georgia in Local Rule 5.1(C).

Date: May 4, 2016

/s/ Gabriel A. Mendel
GABRIEL A. MENDEL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served this day on all counsel of record through the ECF Filing System.

Date: May 4, 2016

/s/ Gabriel A. Mendel
GABRIEL A. MENDEL
Assistant United States Attorney

EXHIBIT

1

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETE WILSON, Governor of the State of California; STATE OF CALIFORNIA, Plaintiffs, vs. UNITED STATES OF AMERICA; JANET RENO, Attorney General; TREVOR POTTER, Chairman, Federal Elections Commission; FEDERAL ELECTIONS COMMISSION, Defendants.	Case No. C 95-20042 JW Case No. C 94-20860 JW (Related Action) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS VOTING RIGHTS COALITION AND UNITED STATES' MOTION FOR FURTHER RELIEF

I. INTRODUCTION

Plaintiffs Voting Rights Coalition, et al. and the United States of America's (collectively, "Plaintiffs") motion for further relief was heard by the Court on Friday, October 20, 1995. Robert Rubin appeared on behalf of the Coalition and Holly Wiseman appeared on behalf of the United States Department of Justice. Cyrus Rickards appeared on behalf of Governor Pete Wilson and the named state agencies. In addition, Ms. Darlene Marquez, Co-Chairperson of the Voting

Rights Coalition, appeared and testified on behalf of Plaintiffs and Mr. John Mott-Smith, Chief of the Elections Division of the Office of the Secretary of State of the State of California testified on behalf of the Governor and state agencies.

Based upon all pleadings filed to date, the testimony of the witnesses presented at the hearing and upon the oral argument of counsel, the Court GRANTS in part and DENIES in part Plaintiffs' motion, as discussed below.

II. BACKGROUND

On March 2, 1995, the Court granted Plaintiffs' motion for entry of a permanent injunction, finding that the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg is constitutional. This finding was affirmed by the Ninth Circuit Court of Appeals on July 24, 1995. Voting Rights Coalition, et al. v. Pete Wilson, et al., No. 95-15449 (9th Cir. July 24, 1995). The Court bifurcated the issue of implementation of the NVRA and ordered the State of California and Governor Wilson to submit an implementation plan to the Court for review.

On March 17, 1995, Defendants submitted a plan for implementation of the NVRA. On May 4, 1995, the Court ordered the State to implement the plan within forty-five (45) days and prohibited the removal of names from the voter rolls "in a manner inconsistent with the NVRA." The parties then met and conferred and attempted to resolve as many of the implementation issues as possible without the intervention of the Court. The parties were able to resolve all of their differences, with the exception of the issues now presented to the Court through Plaintiffs' motion for further relief.

Plaintiffs contend that the issues remaining for resolution are mandated by the NVRA and must be implemented by Defendants. The Governor and the named state agencies contend that they are properly implementing the

requirements which are set forth in the NVRA. Defendants contend that the issues set forth in Plaintiffs' motion are simply not requirements which are mandated by the NVRA nor are such issues necessary to carry out the intent of Congress. These disputed issues are set forth and discussed separately below.

III. LEGAL STANDARDS

The "starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Com'n v. GTE Sylvania, Inc., 100 S.Ct. 2051, 2056 (1980). In order to determine whether such a "clearly expressed legislative intention" exists, the Court looks to the legislative history of the statute. I.N.S. v. Cardoza Fonseca, 107 S.Ct. 1207, 1213, n. 12 (1987). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Id at 1221, quoting U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, n. 9 (1984). Applying these standards, the Court finds as follows.

IV. DISCUSSION

A. DMV Voter Registration

Pursuant to the NVRA, "[A]ny change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes." 42 U.S.C. § 1973gg-3(d). According to this section, a registrant's change of address is presumed to be for the purposes of both the DMV and voter registration, unless indicated otherwise by the applicant.

By this motion, Plaintiffs contend that the change of address form currently used by the State of California reverses the presumption established by the NVRA, so that an applicant's change of address is not presumed to be for both purposes of DMV and voter registration, unless the applicant indicates otherwise. The forms currently utilized by the California DMV facilities contains the following options:

___ I have moved to a new county and wish to update my voter record....

___ I have moved within the same county and wish to update my voter record....

As indicated by the Defendants in their implementation plan, if neither box is checked, DMV will assume that the applicant does not wish to update his or her voter record. Plaintiffs contend that such an assumption violates the purpose and intent of the NVRA. Defendants argue that it "is the informed judgment of the Secretary of State that the potential for error and harm is greater through a system of automatic updating of registration records than with the present system." (Declaration of John Mott-Smith, p. 2). However, Defendants also state that the new DMV forms, which will be available within six (6) months, will include a separate box which indicates that the applicant does not want his or her voter record updated. In the interim 6 month period, Defendants request that they be permitted to use the present forms and apply the presumption that if neither box is checked, the applicant does not want his or her address updated for voting purposes.

Based upon the clear statutory language as contained in the NVRA, the Court finds that the NVRA mandates that any change of address for DMV purposes also be presumed to be for voter registration purposes, unless the applicant "states on the form that the change of address is not for voter

registration purposes." Therefore, if the State of California chooses to utilize forms which do not provide a space within which an applicant may indicate that he or she does not wish an address change to apply for purposes of voter registration, then the State must apply the presumption that all changes of addresses apply for both DMV and voter registration purposes. Accordingly, the Court will permit the DMV to use the present forms only during the interim period between now and the time that the new forms are ready for use. If no box is checked, the State must assume that the applicant wishes to update his or her voter record.

B. Annual Residency Confirmation

The NVRA prohibits the removal of the name of any person from the list of official voters for failure to vote. 42 U.S.C. § 1973gg-6(b)(2). Through its "Annual Residency Confirmation and Outreach Procedure"("ARCOP"), the State of California sends a postcard to voters inquiring whether such voter still lives at the present address. If the card is returned as undeliverable AND the voter does not vote in two (2) subsequent federal elections, then the voter's name is purged from the list. Plaintiffs contend that this procedure violates the NVRA because it impermissibly drops registrants from the list for failure to vote. Defendants contend that the method is permissible because the voter is not dropped simply due to a failure to vote, but also because there is not a current address for such voter.

The Court disagrees with Plaintiffs that the State's procedure, although not directly based on a voter's failure to vote, results in a voter being dropped from the list for his or her failure to vote. Since the State receives a card which states that the card is undeliverable and then the addressee fails to vote in subsequent elections, the Court finds that the State's current "Residency Confirmation and

Outreach Program" does not violate the NVRA. Accordingly, the Court DENIES Plaintiffs' motion to discontinue such program.

C. California Elections Code Sections Preempted by the NVRA

Plaintiffs contend that 16 sections of the California Election Code are preempted by the NVRA and should be enjoined by the Court. The State does not argue that such sections are preempted, but requests that the Court refrain from enjoining specific statutes until all implementation issues are resolved since the State is operating under this Court's Order to comply with the NVRA and is not, therefore, implementing any state election codes which conflict with the NVRA.

The Court considers, however, that all implementation issues are now resolved as a result of this hearing. However, the Court is concerned that the statutes which Plaintiffs contend are preempted by the NVRA may contain subsections or subparts that are not preempted. Therefore, the Court orders that the parties review all Elections Code Sections and submit a list to the Court within twenty (20) days of the date of this Order indicating which specific Sections, including subsections and/or subparts, are preempted by the NVRA. Until further order of the Court, all California Elections Code Sections which are preempted by the NVRA may not be enforced by the State of California.

D. Compliance Reports

Plaintiffs finally request that the Court establish a reasonable reporting mechanism whereby it may monitor the State's compliance with the NVRA. Plaintiffs suggest that the Court require the State to submit a 30-day status report to be followed by quarterly reports as to its compliance with the implementation issues. Defendants argue that such a requirement is burdensome, expensive and unnecessary in light of the requirements of the NVRA.

At the hearing, the parties agreed to meet and confer and that the

Department of Justice would submit a list to the Court indicating exactly what type(s) of report it would like from the State to ensure compliance with the NVRA. The State then agreed to respond to the Department's list and the matter would be deemed submitted to the Court upon the State's response. The Court therefore DEFERS Plaintiffs' request for compliance reports by the State until the receipt of the State's brief. The Department of Justice shall submit a report within twenty (20) days of the date of this Order. The State shall submit a response to such report within five (5) days of the submission of the Department's report. The matter will then be deemed submitted on the papers. In the interim, the Court retains jurisdiction over any and all implementation issues in this action. If Plaintiffs discover that Defendants are not complying with the provisions of the NVRA, or of this Order, they may request emergency relief by filing an ex parte application with the Court requesting appropriate relief. Therefore, the Court DEFERS Plaintiffs' request that the State submit compliance reports on a quarterly basis.

E. Equitable Relief

Finally, Plaintiffs request that the Court enter an Order which provides equitable remedial relief on behalf of those persons who entered social service agencies between January 1, 1995 until the effective date of the Court's Order of Implementation filed on May 4, 1995 and were deprived of the right to register to vote at the agency due to the Governor's failure to timely implement the NVRA. Plaintiffs' request does not include any Department of Motor Vehicles ("DMV") since the parties entered a separate agreement regarding a remedial remedy for such agency. Plaintiffs contend that the Court should order that the Defendants send each and every person who contacted a social service agency during the relevant time period a voter registration application.

The Defendants argue that such a request is extremely costly and unwarranted given the fact that many of the people who contacted a social service agency during the relevant time period are people who continue to have contact with the agency and have since been afforded an opportunity to register to vote at the agency. Therefore, Defendants assert that they should be required only to contact those people who did not and will not return to the agency and inform such people that they may call and request that a voter registration application be sent to them.

Based upon all pleadings filed to date, as well as on the oral argument of counsel, the Court orders that the Defendants send each and every person who visited a social service agency between January 1, 1995 through June 10, 1995 AND who will not return to a social service agency again within the next six (6) months a voter registration application. Such application must be sent within sixty (60) days of the date of this Order. Defendants shall also file with the Court and serve upon Plaintiffs a copy of the list of applicants to whom a voter registration application is being sent as soon as such list is available to Defendants but no later than forty-five (45) days from the date of this Order.

V. CONCLUSION

Based upon the foregoing, the Court GRANTS Plaintiffs' motion for further relief as to the DMV Voter Registration change of address forms, the California Elections Code Sections and remedial equitable relief as set forth herein and DENIES and/or DEFERS Plaintiffs' motion for further relief as to all other issues discussed herein.

95102501.civ

IT IS SO ORDERED.

DATED: October 30, 1995

JAMES WARE
United States District Judge

This is to certify that copies of this order have been mailed to:

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DATED: 10/2/95

CLERK OF COURT

By: _____
Ronald L. Davis
Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PETE WILSON, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants,	CASE NO. C95-20042 JW CASE NO. C94-20860 JW (Consolidated) JOINT STIPULATION

JOINT STIPULATION TO SUBSTITUTE LANGUAGE

Come now all parties to the above-styled causes, by and through their attorneys, and stipulate as follows:

That the following language shall be substituted for paragraph 2 on page 5 of this Court's Order filed November 2, 1995 (which paragraph begins: "The NVRA prohibits the removal of the name of any person from the list of official voters for failure to vote."):

> The NVRA prohibits the removal of the name of any person from the list of official voters for failure to

vote. 42 U.S.C. Sec. 1973gg-6(b)(2). The United States and Voting Rights Coalition contend that the state's proposed list cleaning procedure ("RCOP," for Residency Confirmation Outreach Procedure) violates this section of the Act because the process begins by sending postal inquiries to non-voters.

As outlined in the state's implementation plan (Chapter 5, pp. 5-12), RCOP would function as follows: Approximately 6 months prior to the primary election in even-numbered years and approximately six months after the general election in odd-numbered years, county registrars would send out a nonforwardable residency confirmation postcard to those voters who had not voted within the past six months (in the case of pre-primary RCOP) or in the last general election (in the case of post general election RCOP).

If the postcard were returned as undeliverable without forwarding address information, a forwardable confirmation notice would be sent out pursuant to 42 U.S.C. 1973gg-6(d)(2) of the NVRA. If this notice were not returned and the voter did not vote in the next two federal elections, the voter would be removed from the registration list.

Respectfully submitted,

Dated: November 9, 1995

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Attorney General

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Deputy Attorney General
Attorneys for Governor
Pete Wilson, et al

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Attorneys for United States
and Janet Reno

EXHIBIT

2

U.S. Department of Justice

Civil Rights Division

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

February 11, 1997

VIA TELEFACSIMILE & FEDERAL EXPRESS

The Honorable Mark Barnett
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501-5070

Dear Mr. Attorney General:

This is to notify you that I have authorized the filing of a lawsuit against the State of South Dakota, the South Dakota State Board of Elections, and the South Dakota Secretary of State to compel compliance with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg to 1973gg-10.

As you are aware, the NVRA, which took effect January 1, 1995, requires that states follow specific procedures and protections set forth in the Act in purging registrants from the registration list for elections for federal office. In particular, the NVRA provides that a voter may not be removed from the registration list for federal elections by reason of the voter's failure to vote. 42 U.S.C. § 1973gg-6(b)(2). The Act also provides that voter removal programs for federal elections must be conducted in a manner which is uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965. 42 U.S.C. § 1973gg-6(b)(1).

Under South Dakota's voter removal procedures, which were adopted to conform state law to the requirements of the NVRA, registered voters who fail to vote within a four year period are specifically targeted for inclusion in the state's voter removal program. These procedures can have the end result of a voter being purged from the voter registration list for federal elections simply for having failed to vote. As we have made clear in correspondence

to the Secretary of State on June 19, 1995, December 7, 1995, and November 5, 1996, these procedures violate the NVRA.

Our concern is that no registered voter in the State of South Dakota be purged from the registration list for federal elections because of his or her failure to vote. Thus, we intend to move forward on this matter expeditiously. However, we are willing to delay filing the complaint for a short period of time if the State is willing to resolve this matter voluntarily and negotiate a consent decree that would be filed with the complaint.

Under these circumstances, we request that you apprise us within ten days whether the State wishes to discuss settlement of this matter. Patricia O'Beirne, an attorney in the Voting Section, will be in contact with your office. In the meantime, Ms. O'Beirne can be reached at 202-307-6264.

Sincerely,

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

EXHIBIT

3

U.S. Department of Justice

Civil Rights Division

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

February 11, 1997

VIA TELEFACSIMILE & FEDERAL EXPRESS

The Honorable Bruce M. Botelho
Attorney General
State of Alaska
450 Diamond Courthouse
P.O. Box 110300
Juneau, Alaska 99811-0300

Dear Mr. Attorney General:

This is to notify you that I have authorized the filing of a lawsuit against the State of Alaska, the Alaska Lieutenant Governor, and the Alaska Director of Elections to compel compliance with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg to 1973gg-10.

As you are aware, the NVRA, which took effect January 1, 1995, requires that states follow specific procedures and protections set forth in the Act in purging registrants from the registration list for elections for federal office. In particular, the NVRA provides that a voter may not be removed from the registration list for federal elections by reason of the voter's failure to vote. 42 U.S.C. § 1973gg-6(b)(2).

Under Alaska's voter removal procedures, which were adopted for the stated purpose of conforming state law to the requirements of the NVRA, registered voters who fail to vote within a four-year period are specifically targeted for inclusion in the state's voter removal program. These procedures can have the end result of a voter being purged from the voter registration list for federal elections simply for having failed to vote. As we discussed in our December 10, 1996 letter to Assistant Attorney General Kathleen Strasbaugh, these procedures violate the NVRA.

Our concern is that no registered voter in the State of Alaska be purged from the registration list for federal elections because of his or her failure to vote. Thus, we intend to move forward on this matter expeditiously. However, we are willing to delay filing the complaint for a short period of time if the State is willing to resolve this matter voluntarily and negotiate a consent decree that would be filed with the complaint.

Under these circumstances, we request that you apprise us within ten days whether the State wishes to discuss settlement of this matter. Patricia O'Beirne, an attorney in the Voting Section, will be in contact with your office. In the meantime, Ms. O'Beirne can be reached at 202-307-6264.

Sincerely,

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division