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

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

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

The United States respectfully submits this memorandum as *amicus curiae* on the issues presented under the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C 1973c ("Section 5"). For the reasons set forth below, the United States concurs with the Plaintiff that a preliminary injunction is appropriate and necessary in this matter. As explained below, however, the United States does not fully endorse the remedy in the Plaintiff's proposed Order.

**STATEMENT**

The State of Georgia is a jurisdiction covered by Section 5 of the Voting Rights Act for voting changes enacted or sought to be implemented after November 1, 1964. *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 33 n.2 (1978), 30 Fed.Reg. 9897 (1965). By the clear terms of its text, Section 5 applies to all changes of "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" adopted or sought to be implemented by covered jurisdictions, and the Act defines the term "voting" very broadly. 42 U.S.C. 1973c, 1973*l*(c)(1). The Supreme Court has made clear that, in covered jurisdictions, "all changes in voting must be precleared." *Presley v. Etowah County Com'n*, 502 U.S. 491, 501 (1992); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969) ("Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way").

At the time of the enactment of the Help America Vote Act, 42 U.S.C. 15301 *et seq*. ("HAVA") on October 29, 2002, Georgia's voter registration applications required applicants to provide their full nine-digit social security numbers. Although Section 303(a)(5) of HAVA requires the collection of driver license numbers or the last four digits of social security numbers from voter

registration applicants and attempts to verify those numbers, Georgia believed itself to be exempt from that requirement based on an exemption in HAVA for those few states that were entitled to request applicants' full nine-digit social security numbers. 42 U.S.C. 15483(a)(5)(D). Therefore, in 2002, Georgia did not have any system in place at that time to collect or attempt to verify voter registration information against the state driver license or federal social security databases.

Moreover, at the time of HAVA's enactment, Georgia was litigating a long-running case, brought by private plaintiffs, alleging that the state's request for the full nine-digit social security numbers on voter registration applications violated the federal Privacy Act. *Schwier v. Cox*, Civil Action No. 1:00-cv-02820-JEC (N.D. Ga.). The *Schwier* plaintiffs eventually prevailed, and the Court left to Georgia's discretion how it would comply with the Court's order to cease reliance on full nine-digit social security numbers for voter registration purposes. *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005) ("The Court leaves the responsibility for redrafting the forms and their instructions to defendant"), *aff'd*, 439 F.3d 1285 (11th Cir. 2006). Thereafter, Georgia and the *Schwier* plaintiffs entered into a consent decree, approved by this Court on June 27, 2006, which

provided that Georgia would adopt the HAVA system of requesting driver license numbers or the last four digits of social security numbers. *See* Docket #2, Exhibit 4.

In the spring of 2007, Georgia changed its voter registration forms to request a driver license number or the last four digits of a social security number. It also entered into agreements with the state driver license agency and the federal Social Security Administration ("SSA") for purposes of attempting to verify the information provided on applications. *Id.* The state thereafter adopted procedures for verifying voter registration information and for advising county election officials how to use information obtained through this verification process. These changes included procedures for: identifying what registrations (new and existing) would proceed through the automated verification process; flagging persons as potentially ineligible to vote (based on non-citizenship or other grounds); and determining how such potentially ineligible persons could prove their eligibility (such as through proof of citizenship). See Docket #21, Exhibit 4. Georgia did not submit any of these changes in its voter registration and voter verification procedures for preclearance under Section 5 when they were adopted.

The questions regarding the state's changes to its voter registration and

verification procedures arose in recent weeks, after Georgia issued guidance to its counties regarding challenges to voters based on lack of verification of citizenship and after counties notified voters of challenges to their voter registration based on non-verification of citizenship. Morever, the SSA subsequently notified the Department of Justice that Georgia has conducted an exceptionally high number of voter verification transactions with SSA, nearly two million, over the last fiscal year. This figure far exceeds the number of voter verification transactions between SSA and any other state and indeed, it constitutes approximately 25% of all such transactions in the entire country. These statistics are particularly noteworthy given that SSA's HAVA contract with states provides such verification checks may only be run on new registrants. *See* Docket #21, Exhibits 2-C, 2-D.

Upon learning this information, the United States asked Georgia to submit its voter verification program for review under Section 5. *See* Docket #21, Exhibit 3. The United States also has worked diligently in recent weeks with counsel for the both parties, both before and after this case was filed, to try to gather and analyze the highly complex facts surrounding this matter. While it is clear that numerous discretionary voting changes that have the potential for discrimination have been implemented without Section 5 preclearance, and while it also is clear

that there is significant confusion in Georgia surrounding the state's voter verification procedures, the Department of Justice still is in the process of ascertaining the complete scope or effect of the voting changes that have been implemented in Georgia.

**LEGAL STANDARDS IN SECTION 5 ENFORCEMENT ACTIONS**

The legal standards to be applied in Section 5 cases have been well established by the Supreme Court. Congress enacted the Voting Rights Act to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Section 5 was an integral part of the Act, designed "to shift the advantage of time and inertia from the perpetrators of the evil to its victim[s], by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (citations omitted). Section 5 "automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension," "pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 334-35.

The Voting Rights Act sets forth a unique statutory scheme for resolving

issues that arise under the preclearance provisions. The Act provides for a clear division of jurisdiction between "'substantive discrimination' questions" and "'coverage' questions." *Allen*, 393 U.S. at 559 (1969). "Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General ... the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). Thus, the Attorney General and the United States District Court for the District of Columbia have "exclusive authority," *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (*Lopez I*), to make the substantive preclearance determination of "whether a proposed change actually discriminates on account of race," *United States v. Bd. of Supervisors of Warren County*, 429 U.S. 642, 646 (1977). Such a determination is "foreclosed" to any other court. *Perkins*, 400 U.S. at 385. Pursuant to Sections 5 and 14(b) of the Voting Rights Act, 42 U.S.C. 1973c, 1973l(b), covered jurisdictions seeking preclearance of a new voting change have a choice of filing a declaratory judgment action in the District Court for the District of Columbia, or making an administrative submission to the Attorney General, who then has 60 days to act on a completed submission. *Morris v. Gressette*, 432 U.S. 491, 501-02, 504 n.19, 505

n.21 (1977).

Pursuant to Sections 12(d) & (f) of the Voting Rights Act, 42 U.S.C. 1973j(d) & (f), the United States and/or private plaintiffs can bring coverage actions to enjoin enforcement of unprecleared changes. Such coverage actions are heard by three-judge federal district courts convened in jurisdictions covered by Section 5. Such courts may consider only "coverage" questions, determining "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Allen*, 393 U.S. at 559-60. In coverage cases, a court "lacks authority to consider the discriminatory purpose or nature of the changes." *Lopez*, 519 U.S. at 23-24. The Supreme Court has held repeatedly that there are only three issues to be decided in a coverage action, "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*, 519 U.S. at 23-24. *See also McCain v. Lybrand*, 465 U.S. 236, 251 n. 17 (1984) (same); *City of Lockhart v. United States*, 460 U.S. 125, 129 n. 3 (1983) (same). This three-part test must be applied in a Section 5 enforcement action such as the present case.

**HAVA'S REQUIREMENTS**

This case implicates several HAVA provisions that apply in elections for federal office. Section 303 of HAVA, 42 U.S.C. 15483, requires that states implement a statewide computerized voter registration list of all voters that is defined, maintained and administered by the State. As part of the database requirements, Section 303(a)(5)(A)(i) & (ii) of HAVA provides, for non-exempt states, that applications for voter registration "may not be accepted or processed" unless the application includes a driver license number (for applicants who have a current and valid driver license) or the last four digits of the applicant's social security number (for applicants who do not have a driver license but do have a social security number). Section 303(a)(5)(A)(iii), provides that the "State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law." Section 303(a)(5)(B) & (C) further provides that the state's chief state election official shall enter into an agreement with the state driver license agency, and the state driver license agency shall enter into an agreement with the federal Social Security Administration, for purposes of attempting to "verify the accuracy" of the "information provided" regarding "applications for voter registration". 42 U.S.C.

15483(a)(5)(B)(i) (driver license information), 42 U.S.C. 15483(a)(5)(B)(ii) (social security information); 42 U.S.C. 405(r)(8) (social security information).

Section 302 of HAVA, 42 U.S.C. 15482, provides that individuals who present themselves to vote but do "not appear on the official list of eligible voters for the polling place" or for whom "an election official asserts that the individual is not eligible to vote,""shall be permitted to cast a provisional ballot" and that ballot "shall be counted as a vote in that election in accordance with State law" where the relevant state or local election official "determines that the individual is eligible under State law to vote."

HAVA provides that states have discretion how they go about satisfying its mandates. Section 305 of HAVA, 42 U.S.C. 15485, notes that the "specific choices on the methods of complying with the requirements" of HAVA, such as the database requirements, "shall be left to the discretion of the State." Section 304 of HAVA, 42 U.S.C. 15484, provides that the database and other HAVA requirements, are "minimum requirements" and that states can establish requirements that are "more strict" than those in HAVA "so long as such State requirements are not inconsistent" with federal law.

Moreover, Section 906 of HAVA, 42 U.S.C. 15545, contemplates that

actions taken to comply with HAVA may trigger Section 5 coverage, stating that "nothing in this Act may be construed to authorize or require conduct prohibited under ... or to supersede, restrict, or limit the application of" the Voting Rights Act and other federal statutes. It also notes that no action by the federal government in providing federal grants to States under HAVA, and no action taken by a State, "will have any effect on requirements for preclearance" under Section 5 of the Voting Rights Act.

**THE CHANGES IMPLEMENTED BY GEORGIA TO COMPLY WITH HAVA REQUIRE SECTION 5 PRECLEARANCE**

Georgia's voter verification programs plainly require preclearance under Section 5. As explained above, Georgia is a jurisdiction covered by Section 5 for voting changes after November 1, 1964. *Dougherty County*, 439 U.S. at 33 n.2, 30 Fed.Reg. 9897 (1965). The procedures Georgia has adopted regarding voter verification are a *change* from the State's benchmark procedures previously in force or effect, where at the time of HAVA's enactment, the State had neither an automated system for verifying information from voter registration applicants, nor uniform standards for the operation of such a system.

The Supreme Court's unanimous decision in *Young v. Fordice*, 520 U.S.

273 (1997), held that discretionary aspects of a covered state's attempt to comply with a federal law mandate (in that case the National Voter Registration Act of 1993 or "NVRA") were subject to review under Section 5.[1] Notably, the State's brief in the instant case does not even cite *Young*, which is the controlling Supreme Court precedent.

As described above, HAVA, like the NVRA at issue in *Young*, includes language that specifically states that it does not authorize or require conduct prohibited by the Voting Rights Act, nor supersede, restrict, or limit the application of the Act. 42 U.S.C. 15545. See *Young*, 520 U.S. at 284. HAVA is even more clear than the NVRA about the discretion it affords to states in its implementation, since HAVA itself, in Sections 304 and 305, confirms that states have discretion in how they implement HAVA's requirements. HAVA also references discretionary determinations that must be made by states pursuant to state law including

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[1] *Young*, 520 U.S. at 284 ("This Court has made clear that minor, as well as major, changes require preclearance. ... This is true even where, as here, the changes are made in an effort to comply with federal law, so long as those changes reflect policy choices made by state or local officials.") (citations and internal quotations omitted). Likewise, voting changes adopted as part of a consent decree, such as the *Schwier* consent decree, are subject to Section 5 review, *McDaniel v. Sanchez*, 448 U.S. 1318 (1980), since they reflect the policy choices of the jurisdiction.

determinations on whether the information provided by voter registration applicants is sufficient. It is precisely this discretion that HAVA affords to states that triggers coverage under the preclearance requirements of Section 5 of voting changes adopted by covered states in an effort to comply with HAVA. So, while a state does not have to seek Section 5 preclearance for the federal mandates in HAVA *per se*, it does have to seek preclearance for all of its discretionary decisions in how it goes about attempting to implement those federal mandates.

Clearly, Georgia had discretion in implementing in its voter verification program under HAVA. The state's discretionary decisions in implementing a voter verification process under HAVA, include, among other things:

1) the design of the voter registration application to collect the new relevant driver license number and/or social security number information,

2) how decisions are made regarding what will trigger a rejection of the application based on the information provided on the face of the application,

3) what type of notice is provided to voter registration applicants of the types of things that may trigger mis-matches (i.e., registering to vote after becoming a citizen without updating driver license information),

4) which voter registration applicants are subjected to the automated verification process (only new applicants who have not previously registered to vote in the state, or some or all applicants who are already on the voting rolls but make some change in their voter registration status),

5) what changes in voter registration status, if any, for any existing applicants will trigger the automated voter verification process,

6) how the state sets up the voter verification process in terms of the elements of the voter registration form that it seeks to validate and the level of matching that it applies to such verification process,

7) how the state reports the results of the verification process to local election officials,

8) how decisions are made regarding what effect the results of the voter verification process have on the registration status of voter registration applicants (accepted, provisional, rejected, etc.)

9) what type of notice, if any, is provided to voter registration applicants of any mis-matching in the verification process (by letter, by challenge notice, by phone),

10) what opportunity voter registration applicants are given to correct

any mis-matching of voter registration information (before the registration deadline, on election day, after election day), and,

11) what type of proof will be acceptable to demonstrate eligibility (the type of documents, whether they must be presented in person, whether originals or copies are necessary), among many other discretionary aspects.

Since HAVA neither mandates nor precludes state attempts to verify a voter registration applicant's citizenship, it is a discretionary choice for a state to try to verify this information, and we are aware of few states that undertake this complex effort. Virtually every state subject to these HAVA requirements has made discretionary decisions to apply them in strikingly different ways, and the consequences of these exceptionally complex decisions by states on the ability of persons to register and vote can be profound.

Based upon an extensive review of the facts and circumstances, including extensive discussions with the counsel for all the parties prior to the time this case was filed, the Attorney General determined that the changes challenged here are subject to coverage under Section 5, and has so informed the State by letter dated October 8, 2008. See Docket #2, Ex. 1. This determination is wholly consistent with the Department's notice, issued more than five years ago, advising Georgia

and all other states covered by Section 5 that preclearance was required for the discretionary aspects of its HAVA program.[2] See Attachment to U.S. Motion for Leave to Participate (Letter of March 17, 2003). Covered states, including Georgia, have submitted numerous HAVA (and NVRA) changes to the Department for review under Section 5 in recent years, and the Department can recall no instance since *Young* was decided where a covered state has contested the coverage of such changes.

**GEORGIA HAS NOT OBTAINED PRECLEARANCE**

The Attorney General has determined, based on a review of his records, that the voting changes challenged in this action were not submitted to the District Court for the District of Columbia or the Attorney General for preclearance prior to this action being filed. The Attorney General has advised Georgia that these changes have not yet been precleared. *See* Docket # 2, Exhibit 1. On October 14, 2008, Georgia submitted a number of these challenged changes to the Attorney

[2] The Supreme Court has observed that the Attorney General's interpretation of Section 5 is entitled to deference. *Lopez v. Monterey County*, 525 U.S. 266, 281 (1999) (*Lopez II*) ("Subject to certain limitations ... we traditionally afford substantial deference to the Attorney General's interpretation of § 5 in light of her 'central role ... in formulating and implementing' that section", *quoting*, *Dougherty County*, 439 U.S. at 39-40).

General for review under Section 5, and that submission is now pending before the Department of Justice as File Number 2008-5243, which has a 60-day deadline for a response by the Attorney General of December 15, 2008. *See* Docket # 21, Exhibit 4.

**THE APPROPRIATE REMEDY**

The text of Section 5 is unambiguous: "unless and until" preclearance for a new voting practice is obtained from the United States District Court in the District of Columbia or the Attorney General, "no person shall be denied the right to vote for failure to comply with such" practice. 42 U.S.C. 1973c. The U.S. Supreme Court has aptly described this as the "guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5." *Allen*, 393 U.S. at 557.

As such, the Supreme Court has repeatedly held that a voting change which has not been precleared cannot legally be implemented. The application of Section 5 in this regard is set forth in the Supreme Court's unanimous decisions in *Lopez v. Monterey County*, 519 U.S. 9 (1996) (*Lopez I*) and *Clark v. Roemer*, 500 U.S. 646 (1991). "A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change." *Lopez*, 519

U.S. at 20. "A voting change in a covered jurisdiction 'will not be effective as la[w] until and unless cleared' pursuant to one of these two methods." *Clark*, 500 U.S. at 652, *quoting*, *Connor v. Waller*, 421 U.S. 656 (1975). "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'" *Clark*, 500 U.S. at 652, *quoting*, *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).

In *Clark*, the Supreme Court held that a federal court cannot allow a covered jurisdiction to hold elections in which unprecleared voting changes will be implemented: "faced [with] the ex ante question whether to allow illegal elections to be held at all. ... § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election." Clark, 500 U.S. at 654.[3] In *Lopez*, the Supreme Court held that a federal court cannot order, under its equitable remedial authority, a covered jurisdiction to hold an election that will implement unprecleared changes. *Lopez*, 519 U.S. at 22 ("It was, therefore, error for the District Court to order elections under that system before it had been

[3] In *Clark*, the U.S. Supreme Court held that a federal district court had erred by failing to enjoin elections for judgeships to which the Attorney General had interposed Section 5 objections. To correct the error, the Court granted an injunction pending appeal which halted elections for the unprecleared judgeships only four days prior to their scheduled date. *Clark*, 498 U.S. 953 (1990), *order modified*, 498 U.S. 954 (1990); *see also Clark*, 500 U.S. at 651.

precleared....").[4] "If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." *Lopez*, 519 U.S. at 20. See also *Clark*, 500 U.S. at 652-53; *Allen*, 393 U.S. at 571-72. The issuance of such temporary injunctions is mandatory.[5]

In this case, the United States believes this Court should issue a temporary Section 5 injunction that ensures that individuals are not denied the opportunity to vote on election day. Such injunction would remain in effect unless and until preclearance is obtained for the state's voter verification matching procedures.

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[4] In *Lopez*, the Supreme Court held that a federal district court had erred in ordering a covered jurisdiction to hold an election using an unprecleared at-large election plan for judicial positions. To correct this error, the Court granted an injunction pending appeal, halting elections roughly one month before their scheduled date. *Lopez*, 516 U.S. 1104 (1996); see also *Lopez*, 519 U.S. at 19.

[5] See, e.g., *Morris*, 432 U.S. at 495-96 (Attorney General's objection to state reapportionment act, "standing alone, would have justified an injunction against enforcement of the Act"); *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers) (granting emergency injunction under Section 5 pending appeal to stop an unprecleared election one day before it was scheduled); *United States v. Louisiana*, 952 F. Supp. 1151, 1159 (W.D. La. 1997) (three-judge court) (there is "no persuasive authority for the proposition that the traditional preliminary injunction test applies to claims for injunctive relief in the face of a § 5 preclearance violation"), *aff'd*, 521 U.S. 1101 (1997); *Busbee v. Smith*, 549 F. Supp. 494, 523 (D.D.C. 1982) (three-judge court) (Section 5 provides for an "automatic injunction" against "any election using the new procedure"), *aff'd*, 459 U.S. 1166 (1983).

To protect against having voters wrongly turned away from the polls because of the state's voter verification procedures, the injunction should require the Secretary to take all necessary actions, working in consultation with the Department of Justice, to accomplish the following:

1) Consistent with federal law, ensure that no voter is permanently deleted from the voter registration list, and no voter registration application is permanently denied, based upon information flowing from the automated voter registration matching process, unless the voter now admits to election officials his/her present ineligibility.

2) Consistent with state and federal law, ensure that all eligible voters, including those who have been flagged as potentially ineligible by the state's matching procedures, have the opportunity to vote in the upcoming November election at least by a provisional ballot procedure (Ga. Code 21-2-419). This shall require the state to issue uniform and clear guidance to all counties explaining HAVA's provisional balloting requirements. This also shall require the state to provide timely notice to voters who are provided provisional ballots of *precisely* what steps they must take to provide any needed proof of eligibility, and when these steps must be taken, to have their provisional ballot counted.

3) Notify every voter whose voter registration presently remains flagged as potentially ineligible under the automated matching procedures of *precisely* what information has raised a question regarding the voters' eligibility (e.g., the Department of Driver Services (DDS) driver license records indicate the voter is not a citizen), and *precisely* what the voter can do to remedy that situation (e.g., delivering a document demonstrating proof of citizenship to a county voter registration office in person or by facsimile, bringing a copy of such document to the polls with them for inclusion in a provisional ballot, or bringing a copy of such document to a registration office on election day or within a certain number of days after election day).

4) Consult with the Department of Justice to determine whether there are additional actions that can be taken prior to the November election to ensure that persons who are actually eligible to vote, but whom the state's matching system has wrongly flagged as potentially ineligible, are allowed to vote a regular ballot in the November election.

A temporary injunction of this nature would meet the compelling interest of complying with Section 5's mandate in ensuring that no eligible voter be denied the right to vote for failure to comply with an unprecleared voting

practice. Furthermore, our proposed remedy also would address the State's compelling interest in complying with HAVA in ensuring that no ineligible voter casts a ballot that cannot be later adjudged ineligible, since there will be an opportunity for voters to provide additional information as to their eligibility on election day or after the election, as well as an opportunity for election officials to review this information and make a reasoned determination on provisional ballots after the election. It ensures that no eligible voter is denied the right to cast a vote that can be counted later, and that no ineligible voter is allowed to cast a ballot that cannot be discounted later. Such a remedy will avoid irreparable harm to the interests of both voter access and voter integrity, and avoid irreparable harm to voters and the State. We submit that this is "a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions," as well as with the least offense to the requirements of HAVA. *Clark*, 500 U.S. at 660.

**CONCLUSION**

For the reasons set forth above, the United States submits that the challenged voting changes are covered by the preclearance requirement of

Section 5, that these voting changes have not received the required preclearance, and thus that these voting changes should be enjoined to the extent described by the United States herein, unless and until preclearance is obtained. Hence, Plaintiff's motion for a preliminary injunction should be granted in the manner outlined above.

Respectfully submitted,

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Date: October 21, 2008

**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/ H. Christopher Coates*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 21, 2008, I caused the foregoing document to be served by first-class mail, postage pre-paid, and by electronic mail, to the following counsel of record for all parties:

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March 17, 2003

The Honorable Cathy Cox
Secretary of State
State Capitol, Room 214
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Dear Secretary Cox:

The Help America Vote Act of 2002, Public Law 107-252, 42 U.S.C. 15301-15545 ("HAVA"), was signed into law by the President on October 29, 2002. This landmark legislation, a copy of which is enclosed, seeks to improve the administration of elections throughout the United States.

Under §401 of Title IV, the Attorney General has enforcement authority for the uniform and nondiscriminatory election technology and administration requirements that apply to the States under Sections 301, 302, and 303 of Title III. Responsibility for this task has been delegated to the Civil Rights Division of the Department of Justice, and I have assigned primary responsibility within the Division to the Voting Section, which will coordinate with the Disability Rights Section on HAVA's disability provisions. The Division stands ready to assist you in your efforts to implement HAVA.

Title III of HAVA applies to all 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands. We are aware that States have been concerned whether federal funding would be available under Titles I and II to assist in complying with Title III. As you are probably aware, Congress passed an omnibus budget bill for fiscal year 2003 on February 13th that included $1.5 billion for election reform. In any event, regardless of whether States choose to accept federal funding when it becomes available, each State must comply with Title III in its entirety, absent a state-specific exemption in the law.

We encourage States to begin their preparations now because several provisions must be implemented by January 1, 2004, when States will begin holding primary elections for federal office. What follows is a brief summary of Title III's provisions, their implementation time line, and their exemptions, as well as several other significant provisions.

Section 301, which applies to all States, establishes standards for voting systems to be used in federal elections, including alternative language accessibility. It is effective on January 1, 2006. Under the Section 301 standards, each voting system must be accessible for persons with disabilities, including persons who are blind or have low vision. Specifically, each polling place must have at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities so that the individuals can vote independently and privately. The Election Assistance Commission ("EAC") set up under HAVA will eventually issue voluntary voting guidelines and guidance as to what constitutes an accessible voting system. Until that guidance is adopted, the voluntary guidance of the Federal Election Commission on Voting System Standards can be used to determine the accessibility of voting machines. (These can be found at www.fec.gov/pages/vss/vss.html at section 2.2.7 of the Voluntary System Standards).

Section 302(a) sets forth standards for provisional voting in federal elections for voters who assert they are registered and eligible voters in the applicable jurisdiction where they are attempting to vote. This requirement applies to all States, but States exempt from the National Voter Registration Act ("NVRA") may comply by using voter registration procedures established under state law. Section 302(b) sets forth standards for voter information to be posted at each polling place for each federal election and also applies to all States. Section 302(c) sets out new rules for all States for voters who cast votes after polls close as a result of Federal or state court or other orders. The effective date of all of these requirements is January 1, 2004.

Section 303(a)(1) requires States to create, for use in federal elections, a single, uniform, centralized, and interactive computerized statewide voter registration list, containing registration information and a unique identifier for every registered voter. This applies to all States, except those that do not presently require voter registration for federal elections. Section 303(a)(2) requires States to maintain the list according to specific standards. For example, names must be removed from the list in accordance with the NVRA (as amended by §903 of HAVA), and the list must be coordinated with State agency records on felony status and death. These requirements apply to all States, except those exempt from the NVRA, which "shall remove the names of ineligible voters from the computerized list in accordance with State law."

Section 303(a)(5) provides that States may not accept or process any type of voter registration application for federal elections unless it includes the applicant's driver license number or, if the applicant has no driver license number, the last four digits of the applicant's social security number. If the applicant has neither, then the State must assign an identifying number. The State must also verify the statewide voter registration database information against state driver license databases and federal social security number databases. These requirements apply to all States, but are optional for States permitted under Section 7 of the Privacy Act (5 U.S.C. 552a note) to ask, and which actually do ask, registrants for a complete social security number on registration applications.

The effective date of all the registration list requirements of Section 303(a) is January 1, 2004, but can be extended until January 1, 2006 if a State certifies to the EAC, when it is constituted, that, for good cause, it cannot meet the original deadline.

Under Section 303(b), certain categories of individuals who register to vote by mail for the first time must provide specific identification documents or verifying information, either at the time of registration or the first time they vote. It also requires changes in the content of the national NVRA mail-in registration form, including a citizenship question. Individuals who register to vote by mail for federal elections after January 1, 2003 must submit identification materials that meet the new requirements in the first federal primary or general election in which they vote after January 1, 2004. There is information about the effective date of this provision on the Voting Section's website (www.usdoj.gov/crt/voting). I encourage States to take steps now to conform their mail-in forms to Section 303(b) standards, to advise registrants of the new identification requirements, and to verify information for new mail-in registrants, even though these steps are not required until 2004. These efforts will reduce the need for voters to present identification during the 2004 elections.

Section 304 notes that Title III sets "minimum requirements," and that nothing prevents a State from establishing standards that are "more strict" so long as such requirements are not inconsistent with federal law.

Section 305 provides that the specific choices on the methods of complying with Title III shall be left to the discretion of the State.

Section 402(b) requires "nonparticipating" States (i.e., States that do not give notice during 2003 that they intend to seek Title I or II funding) either to certify by January 1, 2004, to the EAC that they have established an administrative grievance procedure under Section 402(a) to hear complaints from private individuals about possible violations of Title III, or to submit a compliance plan to the Department of Justice describing how they intend to comply with Title III. Nonparticipating States that do not do one of the above will be deemed out of compliance with Title III. Because there is little reason, however, for States not to seek funding under HAVA, we do not expect to receive many compliance plans for review.

Section 261 establishes a grant program authorizing the Secretary of Health and Human Services to provide funds for improving physical access to polling places for voters with disabilities, including persons who are blind or have low vision. Funds accepted under Section 261 must be used to make polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities, and to provide individuals with disabilities with information about the accessibility of polling places. In addition, a State may use funds obtained under Section 101(a) of HAVA to improve the accessibility and quantity of polling places, including providing physical access for individuals with disabilities.

Section 906 provides (with one specific exception) that nothing in HAVA may be construed "to authorize or require conduct prohibited under" or "supersede, restrict, or limit the application of" six other laws enforced by the Civil Rights Division.

You should also be aware of the relationship between HAVA and two provisions of the federal Voting Rights Act (VRA). The obligation of state officials to comply with Section 5 of the VRA when implementing HAVA is similar to that of States under the NVRA when it was passed by Congress in the early 1990s. See *Young v. Fordice*, 520 U.S. 273 (1997) (when discretion is granted to state officials in the manner in which they implement federal legislation, covered jurisdictions must comply with preclearance provisions of Section 5). There are 16 states covered at least in part by the preclearance requirement in Section 5. For voting changes occasioned by implementation of HAVA and requiring preclearance, covered jurisdictions should seek Section 5 review as soon as possible from the Attorney General or the U.S. District Court for the District of Columbia, i.e., after the changes are final, but before they are implemented. If you choose to submit changes to the Attorney General rather than to the Court, please include for our reference, if possible, copies of your state plans under Title II, funding applications under Title I, and any information on actions taken on those applications. However, states need not seek preclearance of funding applications or state plans submitted to the GSA or the EAC. Any action taken by other federal agencies on state plans or state funding requests will not affect preclearance review.

There are 31 states covered in full or in part by the minority language assistance provisions in Sections 203 and 4(f)(4) of the VRA. Minority language issues will arise, for example, when designing new voting systems under Section 301, provisional ballots and voter information posters under Section 302, and voter registration and list maintenance materials under Section 303. Covered jurisdictions should bear in mind the continuing need to make these election materials accessible to covered language minorities as required by law.

Should you have any questions concerning HAVA, please contact Hans A. von Spakovsky (202-305-9750), Counsel to the Assistant Attorney General, or Chris Herren (202-514-1416) and Brian Heffernan (202-514-4755), who are attorneys in the Voting Section. If you have any questions about the disability provisions of HAVA, please contact Lucia Blacksher (202-514-1947), an attorney in the Disability Rights Section. In addition, the Voting Section will be posting on its website the names of other staff members who will be acting as points of contact for designated States.

We look forward to working with you as you take steps to implement HAVA.

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General

Enclosure

cc: Governor Sonny Perdue
Attorney General Thurbert E. Baker
Elections Division Director Linda Beazley