

August 28, 2009

Christopher Coates
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
1800 G Street, N.W.
Room 7254 - NWB
Washington, DC 20006

RE: Comment under Section 5 of the Voting Rights Act, Submission No. 2008-5243

Dear Mr. Coates:

As you know, the Lawyers' Committee for Civil Rights Under Law, MALDEF, the Voting Rights Project of the ACLU, attorney Brian Spears, and the firm of Debevoise & Plimpton represent plaintiffs in the pending Section 5 enforcement action regarding the State of Georgia's illegal implementation of the voter verification program for registration data to which the Attorney General interposed a Section 5 objection on May 29, 2009. *Morales v. Handel*, No. 1:08CV3172 (N.D. Ga.). We submit this comment letter to urge the Attorney General to now deny the Secretary of State's August 11, 2009 request that the Attorney General reconsider and withdraw this objection, and to urge the Attorney General to interpose a new Section 5 objection to the modified voter verification program that the Secretary has submitted as part of her reconsideration request.

1. The Request for Reconsideration Should Be Denied

The Secretary of State's reconsideration request should be promptly denied. The Secretary has not presented any basis on which the Attorney General could or should alter his prior analysis and conclude that the objected-to voter verification program does not have a discriminatory purpose or effect. 28 C.F.R. § 51.48(b). The Secretary's request does not include any new facts or law relating to the objected-to program, and does not contend that the Attorney General in any manner wrongly construed the facts and law upon which the Attorney General relied in the objection letter.

What the Secretary of State has included in her "reconsideration request" is an entirely new Section 5 submission seeking preclearance for a modified voter verification program, a program that targets fewer people but still is discriminatory. In other words, the Secretary of State no longer is seeking preclearance for the objected-to program but, instead, is requesting preclearance for a different (albeit similar) verification program that would replace the objected-to program. The Attorney General's uniform practice is to treat the submission of a post-objection replacement change as a new Section 5 submission, and that is how the State's August 11 submittal should be handled. *See Blanding v. Dubose*, 454 U.S. 393, 399 (1982) (the purpose of the "reconsideration request" procedure is to allow covered jurisdictions to seek preclearance

for the “very [voting change] to which the Attorney General earlier had made a timely objection”).¹

Still, we believe it would be appropriate for the Attorney General to respond to the Secretary’s August 11 submittal, in part, by denying the reconsideration request (rather than informing the Secretary that a proper request has not been made). This will ensure that it is crystal clear to all involved that the May 29, 2009 objection remains in force, and that the State of Georgia is prohibited from enforcing the verification program that is the subject of that objection.

2. The Attorney General Should Interpose An Objection to the Modified Voter Verification Program for Registration Data

The Attorney General should interpose an objection to the modified voter verification program because it essentially would have the same retrogressive effect as the objected-to program. The Secretary of State also has failed to show that the modified program is free of discriminatory purpose.

As described below, the modified verification program would retain the key discriminatory features of the objected-to program, and would continue to disproportionately burden minority voters. The principal difference between the two programs is that the modified version would affect fewer voters, but since the smaller group of burdened voters remains overwhelmingly disproportionately minority, this revision does not render the program nondiscriminatory and unobjectionable. The Secretary also has not advanced any nondiscriminatory justification for her modified program and, in fact, the modified program appears to be even more arbitrary and irrational than its objected-to predecessor.

a. The modified citizenship verification program is discriminatory.

The modified citizenship verification program continues to include the very features of the objected-to program that led the Attorney General to interpose the objection. It relies on the same Department of Driver Services (“DDS”) matching system and citizenship information to flag putative non-citizen registrants, and the flagged voters still would be denied the opportunity (available to all other registration applicants) to register to vote in a single action at the applicant’s convenience.

The Attorney General concluded that the objected-to citizenship verification program is retrogressive based on three interrelated findings. First, the Attorney General determined that the matching process used to access the DDS citizenship information, and the DDS citizenship information itself, do “not produce accurate and reliable information and that thousands of citizens who are in fact eligible to vote under Georgia law have been flagged.” *Id.* at 3.²

¹ For example, the submission of a new redistricting plan that would replace a plan to which the Attorney General objected is uniformly considered by the Attorney General to be a new Section 5 submission, even if the new plan almost entirely uses the same district lines as the objected-to plan.

² The objection letter noted that according to the data provided by the State, more than half of the individuals flagged as non-citizens have provided proof that they are, in actuality, U.S. citizens. These errors occur, in part,

Second, the Attorney General found that “[t]he impact of these errors fall disproportionately on minority voters.” *Id.* at 4.³ Third, the Attorney General concluded that the additional burdens imposed on flagged individuals in order to register to vote are “real,” “substantial,” and “erroneous.” *Id.*⁴

The modified citizenship verification program suffers from the same three defects:

- First, since the non-citizen flag will be generated in exactly the same manner, the State proposes to continue to rely on the same inaccurate and unreliable information which, in turn, will result in numerous citizens being flagged who in fact are eligible to register and vote in Georgia.⁵
- Second, the impact of the misidentification errors will fall even more disproportionately on minority applicants, as shown by the data provided by the Secretary of State in her

because the DDS information is not updated to reflect the fact that thousands of Georgia residents become U.S. naturalized citizens each year. See our May 19, 2009 comment letter regarding this submission, at 4-5. In addition, for reasons that the State has yet to explain, the DDS matching system mistakenly flags as potential non-citizens a significant number of individuals who are native-born citizens.

³ The Attorney General compared the racial percentages of persons flagged as possible non-citizens to both the racial composition of all registered voters in the State and the racial composition of newly registered voters. The State’s data indicated that at least 7,007 individuals have been flagged as potential non-citizens pursuant to the objected-to program. Of those racially identified (6,759), 32.5% are black, 17.5% are Hispanic, and 17.9% are Asian, for a total minority percentage for these three groups of 67.9%; only 28.4% are white. The Attorney General found that, using either statistical benchmark, “applicants who are Hispanic, Asian or African American are more likely than white applicants, to statistically significant degrees, to be flagged for additional scrutiny.”

⁴ Under the benchmark registration system in Georgia, citizens may register to vote in “a single action, which can be accomplished at the applicant’s convenience.” Objection Letter, at 2. Under the objected-to system, flagged individuals were required to take the additional step of forwarding documentary proof of citizenship to their local registrar, and to do this within a limited time frame. Under pre-existing state law, it also was possible that the applicant would be required to appear at the registrar’s office, on a weekday, during normal business hours, with just three days notice, to provide the documentation. O.C.G.A. § 21-2-228.

⁵ The Secretary’s submission may offer, somewhat indirectly, at least a partial explanation as to why the DDS matching system mistakenly flags native-born citizens. The Secretary failed to explain this error in her prior submission and does not directly attempt to explain it in the current submission. However, the Secretary’s description of how the flagging system operates, set forth in Exhibit R to the August 11 submission, may indicate at least one reason why native-born citizens are being flagged. Exhibit R strongly suggests that the Secretary is using partial matches between individuals’ identifying information in the Statewide Voter Registration Database (“SVRD”) and the DDS identifying information to assign DDS citizenship information to individual registration applicants. Specifically, individual applicants may be assigned the citizenship information contained in a particular DDS database record even though other identifying information contained in the individual’s SVRD record (first name, last name, date of birth, and/or driver’s license or identification card number) does not match up with the information in that DDS record. Partial matches may generate false positives (i.e., SVRD records matched to the wrong individuals in the DDS database), and the “partial match” system that the Secretary apparently is using is fairly crude and would likely produce many such errors. This, in turn, could easily result in native-born applicants being matched with individuals in the DDS database who are foreign born non-citizens. If indeed this is what the Secretary is doing, it is both a poor design on its own terms and contradicts her statement in the August 11 submission that the use of “near matches” . . . defeats the intent of Congress in mandating the matching process to start with and undermines the reliability of the State’s voter registration list.” Aug. 12, 2009 letter, at 3.

submission. According to the Secretary, the State's prior registration history indicates that, using the modified program, approximately 28.8 percent of the flagged individuals (who are racially identified) will be black, 25.0 percent will be Hispanic, and 24.4 percent will be Asian, while 16.3 percent will be white. These percentages are even more disproportionately minority than the individuals flagged by the objected-to verification program (who were 32.5% black, 17.5% Hispanic, and 17.9% Asian, with 28.4 percent white). And, as compared to the racial percentages of all registered voters in the State (as of August 1, 2009), the affected individuals are clearly disproportionately minority – the white percentage of all registered voters in Georgia is 62.2, while blacks are 29.9 percent, Hispanics a mere 1.5 percent, and Asians a mere 1.3 percent. Accordingly, the fact that the modified program would affect fewer individuals does not render the program non-retrogressive as compared with the benchmark registration system.

- Third, the burdens the Secretary of State proposes to impose on flagged applicants still are real, substantial, and erroneous. As before, the flagged individuals would be required to take the extra step of providing citizenship documentation to their local registrar, and generally would be required to provide the documentation within 30 days of receiving a notice from the registrar.⁶ If the documentation is not provided within this time period, the registration application would be automatically rejected.⁷ While the modified program would allow applicants to provide the documentation by mail or other remote means, that option also was available under the prior objected-to program and, in any event, this does not obviate the significance of flagged applicants having to engage, erroneously, in a two-step registration process.

In sum, just as was the case with the objected-to program, its modified successor would be a “flawed system [which] frequently [would] subject[] a disproportionate number of African-American, Asian, and/or Hispanic voters to additional, and more importantly, erroneous burdens on the right to register to vote. These burdens are real, are substantial, and are retrogressive for minority voters.” Objection Letter, at 4.

Moreover, the manner in which the Secretary of State proposes to reduce the number of individuals subject to citizenship verification is inconsistent with the Secretary's asserted need to

⁶ The only exception to the 30-day time limit is if the notice is received within 30 days of an election. In that case, the applicant would be allowed to present the documentation when voting.

⁷ In her submission, the Secretary of State attempts to justify this automatic rejection procedure by citing to O.C.G.A. § 21-2-220(d). However, this section, on its face, does not apply to the situation where an applicant is flagged as a possible non-citizen by the DDS matching system. Section 21-2-220(d) addresses those instances in which a registration applicant omits information that the applicant is required to write in on the registration application; when this occurs, the registrar is required to notify the applicant in writing of the missing information, and if the applicant does not provide the information within 30 days the application is then automatically rejected. The State's stratagem for importing this section into its modified citizenship verification program is to label an applicant's citizenship information as “missing” when the applicant is identified by DDS as a non-citizen. But this clearly is not accurate: in this situation, the applicant has not omitted any information from the application (and, in fact would have provided the required citizenship information); instead, what is occurring is that the State is asserting that the information the applicant wrote on the form is contradicted by the citizenship information contained in the DDS database.

ensure that persons registering to vote in Georgia are, in fact, U.S. citizens. The Secretary would exclude from verification all registration applicants who seek to register other than by mail, all registration applicants who seek to register by mail who previously have voted in Georgia, and all first-time voters who register by mail and who happen to provide identification (conditionally required of them by both HAVA and state law) that says nothing about whether the individual is a U.S. citizen.⁸ The Secretary of State does not explain why there is a need to only verify the U.S. citizenship of first-time voters who register by mail and who omit identification that is citizenship neutral, while permitting all other registrants to meet the benchmark registration requirements of swearing or affirming on their application that they are U.S. citizens. This scheme appears to be nonsensical and simply arbitrary.⁹

Finally, the Secretary's justification for her continuing reliance on the DDS citizenship information is without merit. The Secretary acknowledges that the modified procedure does not remedy the DDS matching and database problems (Aug. 12 letter, at 3), but claims that that she "has no option but to rely on the DDS database" because Congress allegedly mandated this in HAVA. But this simply repeats the same inaccurate claim which the Attorney General rejected in the May 29, 2009 objection letter, and which is contradicted by the Eleventh Circuit's ruling in *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1172 (2008), and by the three-judge court's ruling in *Handel*. Oct. 27, 2008 Order, at 17-18. What the Secretary refuses to acknowledge (or perhaps understand) is that, as indicated by these court rulings, HAVA does not, substantively, mandate that database matching be used to verify citizenship information, although it does, as a procedural matter, require that certain database matching be undertaken.

Based upon the Secretary of State's failure to articulate a rational explanation or justification for the modified citizenship verification procedure, and the procedure's discriminatory effect, the Attorney General should conclude that the Secretary has failed to meet her burden of showing that the modified procedure is not retrogressive and also that she has failed to show that the procedure is free of discriminatory purpose.

⁸ First-time voters who register by mail, with certain exceptions, are required to provide one of the following forms of identification: "a current and valid photo identification," or "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. 42 U.S.C. § 15483(b)(2). See also O.C.G.A. § 21-2-220(c). These forms of identification typically will not indicate whether or not the bearer is a U.S. citizen.

⁹ In contrast, a new state law supposed to go into effect on January 1, 2010, but not yet precleared, establishes a statutory citizenship verification procedure that would apply to all new registration applicants, regardless of the means by which they seek to register. O.C.G.A. § 21-2-216(g). (We are continuing our review of the statutory procedure to assess whether, notwithstanding its application to all new registrants, it complies with federal law.)

- b. The modified R1 verification program is discriminatory.

The Secretary of State's modified R1 voter verification program would disproportionately burden minority registration applicants and violates both HAVA and state law. The Secretary, in her submission, provides the data that show the modified program's disproportionate effect. She does not seem to recognize – or at least, does not acknowledge – that her proposal violates federal and state law, and does not offer any justification for the violation. Because the modified R1 program is retrogressive and because the Secretary has not met her burden of providing a nondiscriminatory reason for the change, the Attorney General should interpose an objection to it.

Under both HAVA and state law, individuals who have not previously voted in Georgia and who seek to register by mail generally must satisfy a special identification requirement. 42 U.S.C. § 15483(b); O.C.G.A. §§ 21-2-220(c), 21-2-417(c). Both federal and state law specify that a first-time by-mail applicant may provide the requisite identification in one of four ways: 1) the applicant may enclose the identification with the mail-in registration application; 2) if the applicant does not enclose the requisite identification, the State may attempt to match the applicant's registration record with another existing identification record (i.e., a DDS record or a Social Security Administration (SSA) record) that has the same license or SSA number, name, and date of birth; 3) if the identification is not enclosed and the matching is unsuccessful, the applicant may provide the requisite identification when he or she goes to vote for the first time; and 4) if none of the above occurs, the applicant may cast a provisional ballot and then provide the requisite identification after the election within the time allotted by state law. *Id.* In addition, if the identification is not provided with the registration application and if the DDS/SSA matching process does not obviate the need to provide identification, Georgia counties (at the direction of the Secretary of State) follow the common sense approach of giving voters the additional option of providing the identification after the registration application is filed but prior to the election. See Attachment 1 (sample letters from four counties, and letter from Fayette County noting that its letter “is very similar to the letter provided to all 159 Counties by the Secretary of State's Elections Division”).

Under the procedure submitted by the Secretary of State, the permitted identification options for first-time voters who register by mail would be significantly abbreviated. Options one and two would remain the same. However, options three and four would be eliminated. More specifically, instead of first-time by-mail applicants being allowed to present the requisite identification at the time they vote, or after they cast a provisional ballot, those who do not comply by using one of the first two options would, instead, generally be required to provide the requisite identification (or information that would allow the State to do a successful DDS or SSA match) within 30 days after receiving notice from the local registrar that this information must be produced.¹⁰ Failure to provide this information within the 30-day period would result in a notice

¹⁰ The only exception, again, would be if the notice is received within 30 days of an election, in which case the applicant would be allowed to present the identification when voting. The State also, again, attempts to justify the creation of the 30-day identification period by citing to O.C.G.A. § 21-2-220(d). That section, as described above, deals with those situations in which a voter registration applicant omits information that is required to be written on the registration application. While the State is correct (this time) in characterizing the omitted identification as “missing,” what the State unaccountably chooses to ignore is that section 21-2-220(d), by its own terms, does not apply to the situation where the identification document is not provided with the application (the section applies

