

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

JOHN EVANS and MARCIA BOROWSKI,

CA No.-

Plaintiffs,

v.

WILLIAM D. BENNETT, in his official capacity as  
Executive Director of the Georgia Soil and Water Conservation  
Commission, GARLAND THOMPSON, CARL E. BRACK,  
DENNIS T. BROWN, DAVID T. HAYS, AND JAMES S. SINGLETARY,  
in their official capacities as Chair and Members, respectively, of the  
Georgia Soil and Water Conservation Commission;  
DONALD L. MURRAY, DOUG DENTON, DELL MACGREGOR,  
JOHN LITTLE AND JAN DUNAWAY, in their official capacities as  
members of the Soil and Water Conservation District of DeKalb County,  
Georgia and LINDA W. LATIMORE, Director of Voter Registration  
and Elections of DeKalb County,

Defendants.

---

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THE  
MOTION FOR TEMPORARY RESTRAINING ORDER  
AND/OR PRELIMINARY INJUNCTION

Plaintiffs have moved, pursuant to Rule 65, F.R.Civ.P., for  
a temporary restraining order and/or preliminary injunction  
enjoining the defendants and those acting in concert with them  
from holding the election for members of the Soil and Water  
Conservation District of Dekalb County, said members being known  
as district supervisors, currently scheduled for September 14,

2004 and from further implementing any such election unless and until such time as defendants have complied with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

Defendants have set election dates and implemented election procedures without previously securing a declaratory judgment in the United States District Court for the District of Columbia that such procedures do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or, alternatively, without first submitting these election procedures to the Attorney General of the United States for determination of whether the procedures have such discriminatory purpose or effect, as required by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

Defendants have repeatedly selected election dates other than general primary and election dates in Georgia, resulting in minimal public awareness of the elections and minimal voter turnout.

Plaintiffs have requested the convening of a three judge court to hear this action. However, 28 U.S.C. § 2284(a)(3), authorizes a single judge to grant a temporary restraining order.

### **Introduction and Factual Background**

The State of Georgia, and all its political subdivisions, are covered by Section 5 of the Voting Rights Act. 28 C.F.R.

Part 51, Appendix - Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended; 20 Fed. Reg. 9897, Aug. 7, 1965. Accordingly, any changes in the method of electing the members of the Soil and Water Conservation District of Dekalb County are required by Section 5 to be precleared by submitting them to the Attorney General of the United States or to the United States District Court for the District of Columbia. Prior to implementing any changes in standards, practices or procedure with respect to voting, the submitting jurisdiction has the burden to establish that the changes do not have the purpose or effect of discriminating on the basis of race or color. McCain v. Lybrand, 465 U.S. 236 (1984); State of South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966).

It is clear that the setting of an election date and related matters such as qualifying periods are changes that are covered by Sec. 5. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178-80 (1985) (change in election date and qualifying period, whether done informally or formally by statute, requires preclearance); Lucas v. Townsend, 486 U.S. 1302 (1988) (Kennedy, J., in chambers, enjoining holding of referendum scheduled for the following day because election date not submitted for preclearance under Sec. 5).

There is no fixed criteria for election dates for district supervisor seats. The last three election dates set for the

Dekalb County District have been August 22, 2000, November 12, 2002 and the current September 14, 2004. The dates are set by the state commission, varying based on such things as the non-uniform expiration dates of the terms of incumbents, the dates on which an incumbent submits a nominating petition for re-election, and the date on which a local election official signs a contract to conduct the election. See Attachment A of documents submitted herewith.<sup>1</sup>

---

<sup>1</sup>In contrast, election dates set by fixed criteria are not covered changes even though the actual date of the month may vary between election cycles. For example, general election dates required to be held on the first Tuesday following the first Monday in November can range from November 2nd to November 8th. Such recurring practices which do not involve discretion do not require subsequent preclearance. See 28 CFR § 51.13; 52 Fed. Reg. 490, Jan. 6, 1987; O.C.G.A. § 21-2-540.

It is settled law that residents of the jurisdiction at issue have standing to bring a private suit to compel compliance with Section 5. Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) ("It is consistent with the broad purpose of the [Voting Rights] Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirement."). However, the role of a three-judge court in an action to enforce the preclearance provisions of Sec. 5 is a limited one. "The three-judge court may determine only 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." Lopez v. Monterey County, 519 U.S. 9, 23 (1996); City of Lockhart v. U.S., 460 U.S. 125, 129, n. 3 (1983).<sup>2</sup>

**Unprecleared Changes Affecting Voting in Covered Jurisdictions are Unenforceable and are to be Enjoined.**

---

<sup>2</sup>Though preclearance is an issue for the Attorney General or the U.S. District Court for the District of Columbia, plaintiffs note that preclearance is extremely problematic. A racially discriminatory impact is shown by a less than one percent turnout in the last election, a turnout that was 85% white in a county where a voter registration list that was 50% African American. See Attachment D of documents submitted herewith.

The Supreme Court has repeatedly held that voting changes in a covered jurisdiction "will not be effective as laws until and unless cleared pursuant to § 5." Connor v. Waller, 421 U.S. 656 (1975) (per curiam). Failure to obtain preclearance "renders the change unenforceable." Hathorn v. Lovorn, 457 U.S. 255, 269 (1982). Accord, United States v. Board of Supervisors of Warren County, 429 U.S. 642, 645 (1977). The Supreme Court stresses that "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." Clark v. Roemer, 500 U.S. 646, 652-53 (1991), citing Allen v. State Bd. of Elections, 393 U.S. 544, 572(1969); Young v. Fordice, 520 U.S. 273, 291 (1997)(remanding "with instructions for the District Court to enter an order enjoining further use of Mississippi's unprecleared changes as appropriate.") Here, the changes at issue have not been precleared. Accordingly, their further use absent preclearance should be enjoined.

#### **The Legal Standards for Granting Equitable Relief**

The closeness in time of the upcoming election is not a defense to a § 5 enforcement action. In Lucas v. Townsend, 486 U.S. 1301, 1305 (1986), Justice Kennedy as Circuit Justice entered an in-chambers opinion on Memorial Day staying a special election scheduled for the next day. (The Section 5 enforcement action had been filed the previous Friday challenging the setting

of the election without preclearance.) Justice Kennedy wrote:

The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See White v. Florida, 458 U.S. 1301, 1302, (1982) (Powell, J., in chambers); Rostker v. Goldberg, 448 U.S. 1306, 1308, (1980) (BRENNAN, J., in chambers). I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. See, e.g., Graves v. Barnes, 405 U.S. 1201, 1203, (1972) (Powell, J., in chambers). Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief. In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public. See Rostker v. Goldberg, [ ] 448 U.S. [1306,] 1308 [(1980)]; Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1304 (1974) (Powell, J., in chambers).

The substantiality of the federal questions presented by the case cannot be doubted. Section 5 provides that certain jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General. Neither statutory requirement has been met in this case.... I have concluded that four Members of the Court would likely vote to note probable jurisdiction and that there is a fair prospect that the Court would vote to reverse the judgment below.

I am further persuaded that irreparable harm likely would flow from a denial of injunctive relief. Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on respondents, such burdens can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the

date chosen for the election. On balance, I conclude that the equities favor the applicants. Today I have entered an order enjoining the election, pending the timely docketing of an appeal.  
486 U.S. at 1304-05. And see Clark v. Roemer, id.

The standards for granting preliminary relief by this Court are not substantially different from that applied by a Supreme Court Justice in reviewing denial of an injunction. Carillon Importers, Ltd. v. Frank Pesce Internat'l Group Ltd., 112 F.3d 1125 (11th Cir. 1997):

The grant or denial of a preliminary injunction is a decision within the discretion of the district court. See United States v. Lambert, 695 F.2d 536, 539 (11th Cir.1983). For preliminary injunctive relief to be warranted, the district court must find that the movant has satisfied four prerequisites: (1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant is greater than any damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, will not disserve the public interest.

112 F.3d at 1126. Though the decision is one within the discretion of the district court, the discretion is narrowly circumscribed for unprecleared voting changes. Not only does Justice Kennedy's order in Lucas v. Townsend make this clear, but violation of § 5 is a felony, 42 U.S.C. § 1973j(a), which essentially removes any equitable defense. Additionally, where a violation of voting rights has been shown, a court has not merely the power and duty to eradicate the effect of the discrimination, but it must insure that the discrimination does not continue in the future. See Louisiana v. United States, 380 U.S. 145, 154

(1965).

Under the standards set forth in Lucas v. Townsend and Carillon Importers, plaintiffs meet all four criteria for preliminary relief. It is clear that defendants are implementing an unprecleared voting change—an election set for a date that has not been precleared. NAACP v. Hampton County; Lucas v. Townsend. Thus plaintiffs are substantially likely to prevail on the merits.<sup>3</sup> Plaintiffs will also continue to suffer irreparable injury unless defendants are enjoined. The three-judge court in Clark v. Putnam County, Ga., Civ. No. 5:02-cv-262 (M.D. Ga., Order of Aug. 16, 2002), pp. 8-9 held that the white plaintiffs in that case were "registered voters who desire to participate in the electoral process and, as such, have a direct interest in ensuring that the elected officials for their County are put in office pursuant to a legal plan. Plaintiffs...would personally suffer injury as the result of an illegal proceeding."

As Justice Kennedy noted in Lucas v. Townsend, Sec. 5 was intended to shift "the burdens of inertia and litigation delay" to the perpetrators of wrongdoing. Plaintiffs have already been

---

<sup>3</sup>In Clark v. Putnam County, Ga., Civ. No. 5:02-cv-262 (M.D. Ga., Order of Aug. 16, 2002), the three-judge court enjoined an election for several school board seats scheduled four days later. The county had taken candidate qualifications while preclearance was pending. Preclearance was not forthcoming and the county announced it would not hold the elections. The court nonetheless enjoined holding the election. See order at Attachment E, 13, of documents submitted herewith.

required to file this litigation; thus the burdens of litigation have already been shifted to plaintiffs. Justice Kennedy also noted that even if an illegal election were later set aside, this favored the granting of a pre-election injunction because the effect of a set aside would be disruptive. Any impact on defendants is of their own making. And finally, there is simply no legitimate interest of defendants or on behalf of the public in permitting an election that is illegal. The public interest is served by enforcing the Voting Rights Act and the rights of plaintiffs.

**Conclusion**

For the foregoing reasons, plaintiffs respectfully pray for the entry of a temporary restraining order, or preliminary injunction, enjoining the defendants from conducting the election for members of the Soil and Water Commission of Dekalb County until such time as an election date for said election may be precleared under Section 5 of the Voting Rights Act.

Respectfully submitted,

Neil Bradley  
Ga. Bar No. 075125  
Laughlin McDonald  
Ga. Bar No. 489550

ACLU Foundation Inc.  
2725 Harris Tower  
233 Peachtree Street NE  
Atlanta, GA 30303  
(404) 523-2721

Fax: 404-653-0331

Counsel for Plaintiffs