**IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

RICHARD GOODEN, ANDREW JONES, and EKEYESTO DOSS, Plaintiffs, v. NANCY WORLEY, in her official capacity as Alabama Secretary of State; NELL HUNTER, in her official capacity as Jefferson County Voter Registrar; and ANITA GIBSON, WALTER LONG, and MOLLY MEADOWS in their official capacities as Houston County Voter Registrars, Defendants.	Civil Action No. 2:05-cv-2562

PLAINTIFFS' SECTION 5 ENFORCEMENT ACTION BRIEF

I. INTRODUCTION

More than four decades after the passage of the Voting Rights Act of 1965, in clear contravention of the requirements that it places on Alabama, Defendant voting officials are implementing policies and procedures for voter registration that are required to be, but have not been, "precleared" under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as amended. Specifically, while Alabama has duly enacted and precleared a provision that denies the vote *only* to those citizens convicted of felonies involving moral turpitude, Defendant Secretary of State, Alabama's chief election official, has unlawfully instructed voter registrars throughout the State to refuse registration to *all individuals with felony convictions*, including those presently eligible

citizens convicted of felony offenses *not involving moral turpitude*.[1] Defendants have not obtained, nor even sought, preclearance to implement this change in voting registration procedure. Defendants' failure to comply with the preclearance procedures that Section 5 of the Voting Rights Act mandates has resulted in the unlawful denial of the right to vote to Plaintiffs and a substantial but undetermined number of similarly situated Alabama citizens.

However, this limited Section 5 enforcement action seeks only to enjoin the Defendants' impermissible implementation of voter registration procedures for which they have failed to obtain the required preclearance. If left unchecked, the Defendants' violation of Section 5 will continue to permit state and local officials to deny the vote to eligible citizens of Alabama.

II. FACTUAL BACKGROUND

From Reconstruction until the passage of the Voting Rights Act of 1965, the State of Alabama employed virtually every state instrument of disfranchisement available to suppress the Black vote, including terror and violence, literacy tests, poll taxes, a "grandfather clause," good character tests, and white-only primaries. As a result of its

---

[1] In *Ex parte McIntosh*, 443 So.2d 1283, 1284 (Ala. 1983), the Alabama Supreme Court cited C. Gamble, *McElroy's Alabama Evidence*, § 145.01(7) (3d ed. 1977):

> The Supreme Court of Alabama has defined the term "moral turpitude" on many occasions and the following are the most commonly found definitions. Moral turpitude signifies an inherent quality of baseness, vileness and depravity. It is immoral in itself, regardless of the fact that it is punished by law. Therefore, an offense for conviction of which a witness' credibility is lessened must be *mala in se* and not *mala prohibitum.*

For a list of crimes that have been held by Alabama appellate courts to involve (or not to involve) moral turpitude, *see* Appendix A to this brief.

long history of discrimination against Blacks in voting, the entire State of Alabama is covered by Section 5 of the Voting Rights Act of 1965 pursuant to Section 4 of that statute and the Attorney General's designation. *See* 28 C.F.R. pt. 51, app. (2004). Indeed, following the 1982 renewal of Section 5 of the Voting Rights Act of 1965, the Supreme Court recognized in *Hunter v. Underwood*, 471 U.S. 222 (1985), that Alabama, in violation of the Equal Protection Clause of the Fourteenth Amendment, intentionally used its disfranchisement law to disfranchise Blacks and to maintain and reinforce white supremacy.

In 1995, the Alabama Legislature adopted, and the people subsequently ratified, Act 95-443, which proposed a constitutional amendment to repeal Article VIII of the Constitution of Alabama of 1901 regarding voting, and replace it with Section 177. Doc. 21 (Stip.) ¶ 2. The Alabama Constitution, Article VIII, Section 177 (Recompiled), provides in pertinent part:

> (a) Every citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence. The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting. The Legislature shall, by statute, prescribe a procedure by which eligible citizens can register to vote.
>
> (b) *No person convicted of a felony involving moral turpitude*, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability.

Doc. 21 (Stip.) ¶ 3 (emphasis added).

Pursuant to Section 5 of the Voting Rights Act of 1965, the State of Alabama submitted Act No. 95-443 to the Attorney General of the United States for preclearance.

In a June 24, 1996 letter the U.S. Assistant Attorney General for Civil Rights interposed no objection to Alabama's revised voting law. Doc. 21 (Stip.) ¶ 4. Accordingly, Act No. 95-443 was precleared. *Id.*

In the 2003 Second Special Session, the Alabama Legislature adopted Act 2003-415, *codified at* Ala. Code § 15-22-36.1 (Supp. 2005), a law requiring members of the Alabama Board of Pardons and Paroles to provide a procedure for the restoration of voting rights — by issuing a Certificate of Eligibility to Register to Vote ("Certificate of Eligibility") — to individuals with felony convictions who satisfactorily complete each of the terms and conditions of their sentences. Doc. 21 (Stip.) ¶ 22.

In the course of discharging its statutory duties, the Alabama Board of Pardons and Paroles determined that there is public confusion about the scope of the State of Alabama's felon disfranchisement law, and that the Secretary of State and Defendant Registrars are misapplying Alabama's law, thereby creating confusion which deprives eligible citizens of their right to register to vote and exercise the franchise. To facilitate compliance with Ala. Code § 15-22-36.1 (Supp. 2005), and to determine which felonies require the issuance of a Certificate of Eligibility as a prerequisite to registering to vote, William Segrest, Executive Director of the Alabama Board of Pardons and Paroles, requested that Troy King, Attorney General for the State of Alabama, set forth which felonies do not involve moral turpitude under state law. In response to Segrest's request, the Attorney General issued an opinion (the "Opinion") which explained that "[i]f a person has been convicted of a felony that does not involve moral turpitude, that person remains eligible to vote and is therefore ineligible to apply [to the Alabama Board of

Pardons and Paroles] for a Certificate of Eligibility to Register to Vote." *See* Ala. Op. Atty. Gen. No. 2005-092 (March 18, 2005), 2005 WL 1121853 (Ala. A.G.). Doc. 21 (Stip.) ¶ 30.

In the Opinion, the Attorney General did not "provide an exhaustive list of every felony involving moral turpitude," but listed a number of illustrative crimes that have been determined by Alabama courts not to involve moral turpitude, including "violation of liquor laws" and "driving under the influence." *Id*. at 2 (citing *Parker v. State*, 280 Ala. 685, 198 So. 2d 261 (1967); *Finley v. State*, 661 So. 2d 1321 (Ala. Crim. App. 1995)). Thus, if "a person is convicted solely of a felony that does not involve moral turpitude, that person remains eligible to vote." *Id.* at 3.[2]

Notwithstanding the efforts of the Alabama Board of Pardons and Paroles and the Attorney General to notify Alabama's citizens about the correct application of the State's law through a press release, *see* Doc. 21 (Stip.) ¶ 32, registrars throughout the State, under the advice and instruction of the Secretary of State, the chief election official, are

---

[2] The Attorney General also opined that each crime listed as an exception to the Certificate of Eligibility procedure is a crime of moral turpitude. No Alabama court has held that these crimes are crimes of moral turpitude. Nor did the State notify the Justice Department that the listed crimes would be considered crimes of moral turpitude. The failure to make such a disclosure in the submission is fatal to any contention that the Justice Department has precleared the use of the list as a (partial or full) definition of "moral turpitude." As the District Court said eight years ago:

> It has long been the law that in order to successfully obtain preclearance of a voting change from the Attorney General, the State submitting the change must "in some *unambiguous* and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the [Voting Rights] Act." *See Allen [v. State Board of Elections]*, 393 U.S.[544] at 571, 89 S.Ct. [817] at 834-35 [(1969)] (emphasis added).

Ward v. Alabama, 31 F.Supp.2d 968, 971 (M.D. Ala. 1998) (3-judge court).

employing practices and procedures that are inconsistent with Alabama's Act No. 95-443, which was properly precleared under Section 5. Doc. 21 (Stip.) ¶ 25.[3] The Secretary of State has given written and oral advice to registrars to continue the pre-1966 practice of disfranchising all felons. Doc. 21 (Stip.) ¶¶ 34, 35, 67.

These contrary procedures have not themselves been submitted for preclearance, in violation of Section 5 of the Voting Rights Act.

The effect of these practices is to deny the vote to Plaintiffs and to a substantial but undetermined number of similarly situated citizens across the State of Alabama.

III. ARGUMENT

DEFENDANT SECRETARY OF STATE AND DEFENDANT REGISTRARS HAVE VIOLATED SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973C, AS AMENDED, BY ADMINISTERING VOTING PRACTICES AND PROCEDURES THAT HAVE NOT BEEN, BUT ARE REQUIRED TO BE, PRECLEARED PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT

Because of its long history of discrimination against Blacks in voting, Section 5 of the Voting Rights Act covers the entire State of Alabama, *see* 42 U.S.C. § 1973c, pursuant to Section 4 of that statute and the designation by the Attorney General. *See* 42 U.S.C. § 1973b; *see also*, 28 C.F.R. pt. 51, app. (2004); *Connors v. Bennett*, 202 F.Supp.2d 1308, 1317 (M.D. Ala. 2002) (3-judge court). As a result of this coverage, the State of Alabama is prohibited by Section 5 from "enact[ing] or seek[ing] to administer

[3] Since the filing of the state court suit, some registrars have shifted their practices. Doc. 21 (Stip.) ¶¶ 26-27. The Secretary of State has also proposed a change in the voter registration forms so that the statement of qualifications to register will say that the applicant has not been convicted of a "disqualifying felony" rather than a "felony." *Cf.* Doc. 21 (Stip.) ¶ 13; Doc. 21 (Stip.) ¶ 66.

. . . any *standard, practice, or procedure* with respect to voting different from that in force or effect on November 1, 1964" until the State obtains either judicial or administrative preclearance from the federal government. *Id.* (emphasis added); *see also, Young v. Fordice*, 520 U.S. 273, 276 (1997); *Boxx v. Bennett*, 50 F.Supp.2d 1219, 1223 (M.D. Ala. 1999) (3-judge court). Accordingly, no new voting standard, practice or procedure is enforceable in the State of Alabama unless and until the State has sought, and successfully obtained, preclearance. *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996); *see also, Clark v. Roemer*, 500 U.S. 646, 652-653 (1991); *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981).

Under Section 5, the role of this three-judge court is sharply circumscribed to the following three-part inquiry: (1) whether state or local officials are administering a standard, practice or procedure that constitutes a "change" of Alabama Constitution, Art. VIII Section 177 that is subject to preclearance under Section 5 of the Voting Rights Act; (2) if the standard, practice or procedure constitutes a voting change (and is thus subject to preclearance), whether the requirements of Section 5 were satisfied; and (3) if the requirements were not satisfied, what remedy is appropriate to cure that wrong. *See Henderson v. Graddick*, 641 F.Supp. 1192, 1198 (M.D. Ala. 1986) (3-judge court); *see also, Lopez*, 519 U.S. at 23 ("The three-judge district 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."); *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983) ("In granting the injunction . . . [a]ll [the district court] could do was determine (i) whether a change was

covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate."); *United States v. Bd. of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977) ("the inquiry of a local district court in a § 5 action against a State or political subdivision is limited to the determination whether a voting requirement is covered by § 5, but has not been subjected to the required federal scrutiny.") (internal quotations and citations omitted); *Brooks v. Ga. State Bd. of Elections*, 997 F.2d 857, 867 (11th Cir. 1993) (same). The Supreme Court has held that an action under Section 5 seeking to enjoin voting procedures that have not been precleared merely aims to "preserv[e] the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change." *Young*, 520 U.S. at 285 (1997).

Given the Voting Rights Act's aim of preventing "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," the Supreme Court has broadly construed what constitutes a "change" under Section 5. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501-03 (1992) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)). Voting changes covered under Section 5 "may be informal as well as formal changes," *see Foreman v. Dallas County*, 521 U.S. 979, 980 (1997), may alter an election law in only "a minor way," *see Presley*, 502 U.S. at 501, and they may even include "an administrative effort to comply with a statute that had already received preclearance" or legislation passed "in an attempt to comply with provisions of the Act." *Foreman*, 521 U.S. at 980. "Nor does

it matter for the preclearance requirement whether the change works in favor of, works against, or is neutral in its impact upon the ability of minorities to vote. It is *the change that invokes the preclearance process*; evaluation of that change concerns the merits of whether the change should in fact be precleared." *Young*, 520 U.S. at 285 (emphasis added); *see also*, *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (holding that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5 . . . [since] [t]hat section reaches informal as well as formal changes, such as a bulletin issued by a state board of elections.").

In applying these well-established principles to the instant case, the facts show that the Defendant Secretary of State violated Section 5 of the Voting Rights Act by failing to submit for preclearance her official advice to registrars throughout the State of Alabama to refuse to register eligible voters.

1. Defendant Secretary of State's Advice and Instruction to Registrars Throughout the State of Alabama to Refuse Registration to All People with Felony Convictions Constitutes A Change in Practice or Procedure that is Required to Be, But Has Not Been, Precleared Pursuant to Section 5 of the Voting Rights Act.

As discussed *supra*, Article VIII, Section 177, of the Alabama Constitution was adopted by the people and precleared by the Department of Justice in 1996. Accordingly, Section 177 is the law of Alabama with respect to felon disfranchisement in the State and constitutes the benchmark for Section 5 purposes.

Contrary to the established benchmark for voting practices and procedures in the State of Alabama, the Defendant Secretary of State has advised and instructed registrars

to refuse to register *any* individual with a felony conviction — without regard to whether or not such felony involved moral turpitude — without a Certificate of Eligibility. As a result, registrars throughout Alabama, pursuant to the advice of the Secretary of State, are employing practices and procedures that are both inconsistent with precleared Section 177 and have not themselves been submitted for preclearance, in violation of Section 5 of the Voting Rights Act.

The effect of the Secretary of State's practice is to deny the vote to Plaintiffs, and to a substantial but undetermined number of other similarly situated citizens of Alabama.[4] This practice is covered under Section 5 of the Voting Rights Act.

The District Court's ruling in *Henderson v. Graddick*, 641 F.Supp. 1192 (M.D. Ala. 1986), is particularly instructive. In *Henderson*, a three-judge panel of the District Court considered whether the Alabama Attorney General, a candidate for the Democratic Party's nomination for governor, violated Section 5 of the Voting Rights Act when, without preclearing his actions, he "advised voters" who had voted in the State's Republican primary to participate in the Democratic gubernatorial runoff in violation of the Democratic party rules prohibiting cross-over voting. *Id.* at 1194.

In looking first at the Democratic Party's anti-crossover voting rule, the District Court recognized that "[p]ursuant to Section 5's commands, this rule was submitted to the Attorney General of the United States and was approved, i.e., 'precleared' by him . . .

[4] The Alabama Board of Pardons and Paroles, for example, has identified 330 individuals from across the State of Alabama who applied for a Certificate of Eligibility but were found to be already eligible to vote because they had been convicted of felonies not involving moral turpitude. Doc. 21 (Stip.) ¶¶ 63-64.

for enforcement as a valid, nondiscriminatory provision of Alabama law." *Id.* at 1195. The anti-crossover rule, the District Court continued, "is thus enforceable and may not be modified or voided without first obtaining approval" from the Attorney General of the United States or from a three-judge court in the District of Columbia. *Id.* "Once a law has been precleared it may be enforced whenever violated, and any change in the law or any practice inconsistent with the law must itself be precleared or be in violation of Section 5." *Id.* at 1201.

Focusing next on the Attorney General's actions, the Court, recognizing the Attorney General as the "chief legal officer of the State of Alabama," noted that he, through his advice and encouragement to voters, "*made every effort to get voters to violate the [precleared] anti-crossover rule*." *Id.* (emphasis added). As a result, the Court concluded:

> Since this rule was clearly authorized by Alabama statute and since the rule had been precleared by the Attorney General of the United States in 1980, we hold that the Attorney General's actions effected a change in procedure with respect to voting. This change was not "precleared" as required by the Voting Rights Act. The Act has, therefore, been violated.

Id.

In this case, the Defendant Secretary of State, like the Attorney General in *Henderson*, has advised registrars throughout the State of Alabama to refuse to follow Alabama's precleared law. Like the Attorney General's advice to voters in *Henderson*, the Defendant Secretary of State's advice to registrars effected a change in practice and procedure with respect to voting that is subject to Section 5. Further, that the Defendant Secretary of State's actions constitute a voting change is clearly demonstrated by the

unlawful vote denial that is resulting from the registrars' implementation of the Defendant Secretary of State's advice.

The Alabama Code declares the Secretary of State to be the "chief elections official" in the State of Alabama who "*shall* provide uniform guidance for election activities." Ala. Code § 17-1-8 (Supp. 2005) (emphasis added). The Alabama Code also provides that the "Secretary of State may promulgate rules for the receipt of applications for voter registration and the expedient administration of those applications." Ala. Code § 17-4-136 (Supp. 2005).

As the chief elections official, the Secretary of State is required to follow and facilitate, not undermine, the implementation of Alabama's Constitution and laws. Here, notwithstanding the plain language of precleared Act No. 95-443, the Secretary of State has advised registrars throughout the State of Alabama to refuse to register persons, including Plaintiffs, who are currently eligible to register to vote under the law, in violation of Section 5. *See* Doc. 21 (Stip.) ¶¶ 33-35. The Secretary of State's advice to registrars throughout the State of Alabama not to register *any* people with felony convictions substantially departs from — and, in fact, ignores — the precleared Act No. 95-443, and triggers Section 5's preclearance requirement. *See Ritter v. Bennett*, 23 F.Supp.2d 1334, 1340 (M.D. Ala. 1998) (3-judge court) (suggesting that "the broad dissemination of misleading information . . . could constitute a change within the meaning of § 5."). Accordingly, the Secretary of State's advice to registrars is clearly a voting practice and procedure that contradicts, enlarges and frustrates Act No. 95-443 and

constitutes a voting change within the meaning of Section 5. The Secretary of State's action must be precleared pursuant to Section 5 before it may legally take effect.

2. The Defendant Secretary of State and Defendant Registrars Have Failed to Satisfy the Requirements of Section 5 of the Voting Right Act.

The second part of this Court's sharply circumscribed inquiry, after finding that the voting change in the instant case is covered under Section 5, is whether the Defendants have satisfied the requirements of Section 5. *See Henderson*, 641 F.Supp. at 1198. Because Defendants have not sought preclearance for their change in practice or procedure, Defendants simply cannot satisfy the second part of this Court's inquiry. Indeed, in an effort to distract this Court's attention from the fact of the clear violation of Section 5 in this case, the Defendant Secretary of State asserts that she does not have "the authority under state law to 'direct' county registrars' decision [sic] to grant or refuse individual applications to register to vote." *See* Doc. 7 (Def. Sec. of State's Answer to Pls.' Compl.) ¶ 32.

Defendant Secretary of State's assertion is not supported by Defendant Jefferson County Registrar, who "[a]dmitted" that it had been "directed by the Secretary of State not to register people with any felony conviction — whether or not the felony involved moral turpitude — without a Certificate of Eligibility." *See* Doc. 9 (Def. Jeff. Co. Regist.'s Answer to Pls.' Compl.) ¶ 32; *see also* Doc 9 ¶ 41 (Admitting that "Defendant Jefferson County Registrar informed the Board of Pardons that the Defendant Secretary of State had directed them not to register individuals with felony convictions who had not

obtained a Certificate of Eligibility, without regard to whether or not such felony convictions involved moral turpitude.").

The precise language used to define the Defendant Secretary of State's conduct, whether it is identified as "directing," "advising," "providing guidance" or "encouraging," is not as significant as the manner in which it is being received, and acted upon, by the registrars to the detriment of Plaintiffs and other similarly situated citizens in the State of Alabama. *See Hampton County*, 470 U.S. at 178 (holding that because the form of a change in voting procedure is irrelevant to a Section 5 coverage determination, administrative changes can trigger the preclearance requirement). Indeed, as a practical matter, the fact that the Secretary of State has the authority to remove registrars makes the Defendant Secretary of State's inquiry into the precise nature of her authority over registrars largely academic in nature. *See* Ala. Code § 17-4-151 (Supp. 2005) ("The registrars appointed under this article may be removed for cause by the Secretary of State at any time before the end of their term of office, upon submitting written reasons therefore to the registrar removed and the members of the appointing board.").

3. The Defendant Secretary of State's Continuing Violation of Section 5 of the Voting Rights Act Must Be Enjoined.

The final prong of this Court's narrow inquiry, after finding that the voting change in the instant case is covered under Section 5 and that the requirements under Section 5 have not been satisfied, requires a determination of the appropriate remedy. *See Henderson*, 641 F.Supp. at 1198. In fashioning its remedy for the violation of Section 5, the Court in *Henderson* noted that its objective was "only to vindicate the requirement

that no change may be effected governing the rules for the conduct of elections unless such change is precleared pursuant to the commands of Section 5," and not, as the plaintiffs urged the court, to act "as a contest committee of the Democratic Party to determine the winner of the election." *Id.* at 1204. In addition to ordering the drastic remedy of a runoff election, the three-judge panel in *Henderson* also enjoined the Attorney General and his successors "from seeking any change in the Democratic Party rule affecting crossover voting without following the procedures for effecting such change prescribed by Section 5 of the Voting Rights Act." *Id.*

Like the plaintiffs in *Henderson*, the Plaintiffs in this case urge this Court to enter a declaratory judgment that Defendant Secretary of State's actions violate Section 5 of the Voting Rights Act of 1965. *See* Pls.' Compl., ¶ 60. Plaintiffs also request that this Court enter a declaratory judgment that Defendant Secretary of State and Defendant Registrars lack the authority, unless and until Defendants obtain preclearance for such practices and procedures after submitting those practices and procedures for preclearance, as required by Section 5 of the Voting Rights Act, to preclude individuals convicted of felonies not involving moral turpitude from registering to vote under Alabama law. *Id.*

As the Court in *Henderson* made clear, this relief is appropriate, given the facts of the instant case, under Section 5. *See Lopez*, 519 U.S. at 24 ("The goal of a three-judge district court facing a § 5 challenge must be to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible."); *see also*, *Young*, 520 U.S. at 291 (court ordered remedy for Mississippi's failure to preclear voting practices was to enjoin use of State's unprecleared

changes). Finally, Plaintiffs request the award of reasonable attorneys' fees, expenses, and costs under 42 U.S.C. §§ 1973*l*(e) and 1988, and such other, further, and different relief as the facts and circumstances may warrant. *See* Pls.' Compl., ¶ 61-62.

IV. ADDITIONAL ISSUES

At the Status and Scheduling Conference ("Status Conference") on March 7, 2006, this Court requested briefing as to several specific issues, in addition to the core issues discussed above. It is to those additional issues raised by this Court that we now turn.

1. *Hunter v. Underwood* and the "Felonies That Involve Moral Turpitude" Classification.

During the Status Conference, this Court questioned whether the Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), implicitly upheld the State of Alabama's use of the classification of "felonies that involve moral turpitude" for purposes of voting. Conf. Tr. 9:10-22.

As an initial matter, the Plaintiffs in this action are not challenging the State of Alabama's "felonies that involve moral turpitude" classification as ambiguous, but rather are challenging the Secretary of State's continuing advice and encouragement to registrars throughout the State of Alabama to deny registration to all people with felony convictions, without regard to whether such offenses involve moral turpitude, which is a voting practice or procedure that contradicts, enlarges and frustrates Act No. 95-443, and is thus subject to preclearance under the Voting Rights Act.

In any event, however, the Supreme Court in *Hunter* did not address — either implicitly or explicitly — the propriety of the "moral turpitude" classification itself.

Rather, *Hunter* struck down the prior provision of the Alabama constitution that disfranchised those convicted of misdemeanors listed in the Alabama Constitution because that provision was enacted with a racially discriminatory motive. *See Hunter*, 471 U.S. at 230.[5] Indeed, the Supreme Court in *Hunter* explicitly stated that it rendered its opinion "[w]ithout deciding whether § 182 [which disfranchised those convicted of any crime involving moral turpitude] would be valid if enacted today without any impermissible motivation." *Id*. at 233.

2. Laches is Not A Defense to A Section 5 Preclearance Claim.

The Court also questioned whether laches is recognized as a defense to a Section 5 preclearance claim. Conf. Tr. 10:23-25. There are three reasons the Court need not take up the laches question.

First, laches is an affirmative defense, and the Defendants have not pled it. Fed. R. Civ. P. 8(c). It is therefore waived. *See Moore v. Tangipahoa Parish School Bd.*, 594 F.2d 489, 495 (5th Cir. 1979).

Second, the weight of authority is that laches is not a cognizable defense to private suits seeking injunctive relief under Section 5. *Henderson*, 641 F.Supp. at 1200 ("laches is not a defense to a Section 5 claim"); *Dotson v. City of Indianola*, 514 F.Supp. 397, 400-401 (N.D. Miss. 1982) ("laches is not available for a private action for injunctive

[5] Although the decision begins by stating the case is about crimes of moral turpitude, *Hunter*, 471 U.S. at 223, it later states more accurately, "The case proceeded to trial on two causes of action, including a claim that the misdemeanors encompassed within § 182 were intentionally adopted to disenfranchise blacks on account of their race and that their inclusion in § 182 has had the intended effect." *Hunter*, 471 U.S. at 224.

relief brought under Section 5 of the Voting Rights Act"), *aff'd mem.*, 456 U.S. 1002 (1982); *but see, Lauderdale County Sch. Dist. v. Enterprise Consol. Sch. Dist.*, 24 F.3d 671, 692 (5th Cir. 1994) ("The doctrine of laches . . . may prevent a plaintiff from enjoining [voting] changes effected without preclearance as required by the Voting Rights Act of 1965"). In light of the absence of controlling precedent from the Supreme Court or the Eleventh Circuit, this Court should follow the rulings in *Henderson* and *Dotson* and hold that that laches is not a cognizable defense in this case.

Third, even assuming the availability of a laches defense, there is no factual basis for the equitable laches defense in the instant case. A defense of laches requires: (i) a lack of diligence by the party against whom the defense is asserted; and (ii) prejudice to the party asserting the defense. *AMTRAK v. Morgan*, 536 U.S. 101, 121 (2002). Plaintiffs demonstrated diligence in filing their state court action on September 29, 2005, less than one week after learning of Defendants' illegal conduct. Plaintiffs amended their state court complaint and filed a complaint in this case on December 19, 2005. Moreover, there is no evidence that Defendants have suffered any prejudice, as required under the Supreme Court's test in *AMTRAK*. Indeed, on the facts presented here, recognition of a laches defense would only serve to shield the intentional vote denial that is resulting from Defendants' acts.

3. The Plaintiffs' Race Is Not Relevant to This Court's Finding That Defendants' Actions Violate Section 5 of the Voting Rights Act.

During the pretrial conference, this Court questioned whether the Plaintiffs' race was relevant to this action. Specifically, this Court questioned whether there was an

underlying race claim in this case, and whether such a claim was necessary to the case. Conf. Tr. 10:23-25.

The Plaintiffs do not assert any race-based claims in their Complaint in this action. Indeed, that there is no requirement that Plaintiffs do so to secure an injunction against enforcement of the Secretary of State's illegal conduct is made obvious by the circumscribed nature of the three-judge court's inquiry. Specifically, as discussed *supra*, the three-judge court is only permitted to consider the question of "coverage": (i) whether the practice or procedure is a voting change and thus subject to Section 5's preclearance requirement; and (ii) whether it has in fact been precleared. *Allen*, 393 U.S. at 561. These questions are distinct from the substantive questions of whether, on the merits, the challenged voting practice or procedure has the purpose or effect of denying the vote on account of race or color. *Id.*; *Perkins v. Matthews*, 400 U.S. 379, 385 (1971); *see also Young*, 520 U.S. at 285 ("Nor does it matter for the preclearance requirement whether the change works in favor of, works against, or is neutral in its impact upon the ability of minorities to vote."). As such, while the three-judge court need not and should not "close its eyes" to the Congressional purposes behind Section 5, it is in fact prohibited from substantively considering whether the challenged practice has a racially discriminatory purpose or effect. *Perkins*, 400 U.S. at 385-86; *see also*, *Lopez*, 519 U.S. at 24 (1996) ("On a complaint alleging failure to preclear election changes under § 5, [the three-judge district] court lacks authority to consider the discriminatory purpose or nature of the changes."). As the three-judge court is in fact precluded from considering claims that the

voting change is racially discriminatory, it follows that Plaintiffs need not plead or raise such race-based claims in order to secure injunctive relief under Section 5.

V. CONCLUSION

For the reasons set out above, the Plaintiffs respectfully request that this Court find that the Defendant Secretary of State's advice to registrars throughout the State of Alabama to deny registration to all people with felony convictions qualifies as a voting practice or procedure that constitutes a voting change within the meaning of the Voting Rights Act, which must be precleared pursuant to Section 5 before it may legally take effect.

Dated: Birmingham, Alabama
April 7, 2006

Submitted by,

/s/ Edward Still

Ryan Paul Haygood
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York NY 10013
phone 212.965.2235
fax 212.226.7592
email rhaygood@naacpldf.org

Edward Still
2112 11th Avenue South
Suite 201
Birmingham AL 35205-2844
phone: 205-320-2882
fax: 877-264-5513
email: Still@votelaw.com

CERTIFICATE OF SERVICE

I certify that on 7 April 2006 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

Margaret L. Fleming, Esq.
John J. Park, Jr. Esq.
Assistant Attorney General
Office of the Attorney General of Alabama
11 South Union Street
Montgomery AL 36130-0152

Bart Gregory Harmon, Esq.
Kendrick E. Webb, Esq.
Webb & Eley, P.C.
Post Office Box 240909
Montgomery AL 36124

Jeffrey M. Sewell, Esq.
T.A. Lawson, II, Esq.
Assistant County Attorney
Jefferson County
280 Jefferson County Courthouse
716 Richard Arrington Jr. Blvd. N.
Birmingham AL 35203

/s/ Edward Still

Exhibit A

Crimes involving moral turpitude

Forgery Moton v. State, 13 Ala.App. 43, 69 So. 235 (Ala.App.1915).

Murder. Cormack v. State, 23 Ala.App. 368, 125 So. 902 (1929); Terry v. State, 25 Ala.App. 135, 148 So. 157 (1932); Brimer v. State, 27 Ala.App. 75, 165 So. 788 (1936); Vaughn v. State, 235 Ala. 80, 177 So. 553 (1937); Johnson v. State, 265 Ala. 360, 91 So.2d 476 (1956); Harbin v. State, 397 So.2d 143 (Ala. Civ. App.), cert. denied, 397 So.2d 145 (Ala.1981).

Manslaughter in the first degree Johnson v. State, 357 So.2d 162 (Ala.Crim.App.1978), certiorari denied 357 So.2d 166.

Malicious shooting. (analogous to proof of a conviction of an assault with intent to murder) Smith v. State, 40 Ala.App. 393, 114 So.2d 295 (Ala.App.1959).

Assault with intent to murder. See Matthews v. State, 51 Ala.App. 417, 286 So.2d 91 (1973); Harris v. State, 343 So.2d 567 (Ala.Crim.App.1977).

Assault in the second degree Johnson v. State, 629 So.2d 708 (Ala.Crim.App.1993), affirmed 629 So.2d 714.

Rape. See Matthews v. State, 51 Ala.App. 417, 286 So.2d 91 (Ala.Crim.App.1973).

Crimes against nature. (sexual relations between persons of the same sex, or with beasts or between persons of different sex in an unnatural manner, whether denominated specifically as sodomy, buggery, bestiality, cunnilingus or otherwise) Williams v. State, 55 Ala.App. 436, 316 So.2d 362 (Ala.Crim.App.1975).

Bigamy. The offense of bigamy must be considered as involving moral turpitude. Lawson v. State, 33 Ala.App. 343, 33 So.2d 388 (Ala.App.1948).

Burglary. See Orr v. State, 225 Ala. 642, 144 So. 867 (1932); Matthews v. State, 51 Ala.App. 417, 286 So.2d 91 (1973); Chunn v. State, 402 So.2d 1139 (Ala.Crim.App.1981).

Robbery. See Garvin v. Robertson, 289 Ala. 60, 265 So.2d 602 (1972); Matthews v. State, 51 Ala.App. 417, 286 So.2d 91 (1973); Timmons v. State, 487 So.2d 975 (Ala.Crim.App.1986)

Grand larceny Timmons v. State, 487 So.2d 975 (Ala.Crim.App.1986).

Larceny (now known in the Alabama Code as theft), petit or grand,. Ex parte Bankhead, 585 So.2d 112 (Ala.1991), on remand 585 So.2d 133.

Grand larceny. See Taylor v. State, 62 Ala. 164 (1878); Orr v. State, 225 Ala. 642, 144 So. 867 (1932); Vaughn v. State, 235 Ala. 80, 177 So. 553 (1937); Millhouse v. State, 235 Ala. 85, 177 So. 556 (1937); Ragland v. State, 238 Ala. 587, 192 So. 498 (1939); Matthews v. State, 51 Ala.App. 417, 286 So.2d 91 (1973).

Petit larceny. See Sylvester v. State, 71 Ala. 17 (1881); Smith v. State, 129 Ala. 89, 29 So. 699 (1901); Caldwell v. State, 282 Ala. 713, 213 So.2d 919 (1968); Matthews v. State, 51 Ala.App. 417, 286 So.2d 91 (1973).

Burglary and grand larceny. Edmonds v. State, 380 So.2d 396 (Ala.Crim.App.1980).

Conspiracy to commit fraud G.M. Mosley Contractors, Inc. v. Phillips, 487 So.2d 876 (Ala.1986).

Desertion from military duty in time of war. Nelson v. State, 35 Ala.App. 179, 44 So.2d 802 (Ala.App.1950)

Income tax evasion. Meriwether v. Crown Inv. Corp., 289 Ala. 504, 268 So.2d 780 (Ala.1972).

The unauthorized sale of a controlled substance. Ex parte Bankhead, 585 So.2d 112 (Ala.1991), on remand 585 So.2d 133.

Selling marijuana Jones v. State, 527 So.2d 795 (Ala.Crim.App.1988).

Possession of marihuana for resale Ex parte McIntosh, 443 So.2d 1283 (Ala.1983), on remand 443 So.2d 1286.

The sale of marihuana Gholston v. State, 338 So.2d 454

(Ala.Crim.App.1976).

Selling cocaine. See Pippin v. State, 197 Ala. 613, 73 So. 340 (Ala.1916).

Crimes not involving moral turpitude

Assault and battery Hall v. State, 375 So.2d 536 (Ala.Crim.App.1979).

Assault with dangerous weapon Savage v. State, 380 So.2d 375 (Ala.Crim.App.1980).

Attempting to dispose of mortgaged property Liberty Truck Sales, Inc. v. Fountain, 381 So.2d 646 (Ala.Civ.App.1980).

Mere sale or conveyance of personal property in which another has interest without intent to defraud is not inherently immoral. Liberty Truck Sales, Inc. v. Fountain, 381 So.2d 646 (Ala.Civ.App.1980).

Violations of liquor laws Whitman v. State, 41 Ala.App. 124, 124 So.2d 275 (1960); Parker v. State, 280 Ala. 685, 198 So.2d 261 (1967).

Public drunkenness Parker v. State, 280 Ala. 685, 198 So.2d 261 (Ala.1967).

Drunkenness or disorderly conduct. Grammer v. State, 239 Ala. 633, 196 So. 268 (Ala.1940).

The mere possession of marihuana McIntosh v. State, 443 So.2d 1283 (Ala.1983); Neary v. State, 469 So.2d 1321 (Ala.Crim.App.1985).

Aiding prisoner to escape. McGovern v. State, 44 Ala.App. 197, 205 So.2d 247 (Ala.App.1967).

Absence without leave (or absence over leave) Cox v. State, 50 Ala.App. 339, 279 So.2d 143 (Ala.Crim.App.1973).

Speeding. Dean v. Johnston, 281 Ala. 602, 206 So.2d 610 (Ala.1968).

Trespass to land. United States Lumber & Cotton Co. v. Cole, 202 Ala. 688, 81 So. 664 (Ala.1919).

Attempted burglary Hall v. State, 375 So.2d 536 (Ala.Crim.App.1979).

Desertion from military duty in time of peace. Nelson v. State, 35 Ala.App. 179, 44 So.2d 802 (Ala.App.1950)