No. 07-77

IN THE

Supreme Court of the United States

Bob Riley, Governor of Alabama,
Appellant,
v.
Yvonne Kennedy, et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

MOTION TO DISMISS OR AFFIRM

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Cecil Gardner
THE GARDNER FIRM PC
Post Office Drawer 3103
Mobile AL 36652

Sam Heldman
THE GARDNER FIRM, PC
2805 31st St. NW
Washington DC 20008

Edward Still
Counsel of Record
EDWARD STILL LAW FIRM LLC
Suite 201
2112 11th Avenue South
Birmingham, AL 35205
(205) 320-2882

Amy Howe
Kevin Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER &
FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

October 22, 2007

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because appellant's notice of appeal was untimely filed.

2. Whether the Voting Rights Act requires preclearance before implementation of a judicial decision by a covered jurisdiction's highest court that forbids the continued use of an already precleared state law because that law is invalid under the state constitution.

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STATEMENT

In 1985, the Alabama legislature enacted legislation providing that vacancies on the Mobile County Commission be filled by special election rather than by gubernatorial appointment as was previously the practice. That legislation was precleared by the Attorney General, as required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and used in 1987 to fill the next vacancy that occurred on the Commission. The Alabama Supreme Court, however, subsequently held that the 1985 statute was invalid under the state constitution and, in two decisions, ordered that Mobile County return to filling vacancies by gubernatorial appointment. The district court below, relying on established § 5 principles, held that this change in practice required preclearance. Defendants did not timely appeal that judgment. Nine months later—when the district court granted a motion for further relief after the State failed either to obtain preclearance of the changes ordered by the state court or to remove the official illegally appointed to fill the most recent vacancy on the Commission—the Governor filed this appeal, challenging not the order for further relief, but the prior final judgment requiring preclearance. That appeal, in addition to being untimely, fails to raise any issue warranting plenary review by this Court.

1. Section 5 of the Voting Rights Act prohibits a covered jurisdiction—including the State of Alabama, *see* 42 U.S.C. § 1973b(b); 28 C.F.R. Pt. 51 App.—from enforcing any change in voting policy, practice, or procedure unless and until it has obtained preclearance from the Attorney General of the United

States or from the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c. Section 5's preclearance requirement extends to all voting changes, including changing the method of filling government posts such as "changing from election to appointment." 28 C.F.R. § 51.13.[1] Moreover, because the "Act requires preclearance of *all* voting changes . . . there is no dispute that this includes voting changes mandated by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) (emphasis in original) (internal citations omitted).

Voting changes may be precleared only if the jurisdiction demonstrates that the change will not have the purpose or effect of denying or abridging minority voting rights. 42 U.S.C. § 1973c. Absent preclearance, changes to voting procedures are unenforceable. *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-50 (1969).

Affected citizens may bring suit under § 5 to obtain declaratory relief that a change is subject to preclearance and to enjoin implementation of any change that requires, but has not obtained, preclearance. *Allen*, 393 U.S. at 555. Appeal in such cases is available to this Court, so long as the party files a notice of appeal within sixty days of the final judgment. 42 U.S.C. § 1973c; 28 U.S.C. § 2101(b).

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[1] In furtherance of his enforcement responsibilities under the Act, the Attorney General has promulgated regulations governing the administrative preclearance process. *See* 28 C.F.R. Pt. 51. "Given the central role of the Attorney General in formulating and implementing § 5, [his] interpretation of its scope is entitled to particular deference." *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 39 (1978).

2. When the Voting Rights Act was passed, vacancies on Alabama county commissions were filled by gubernatorial appointment, pursuant to a general state statute. J.S. App. 4a. In 1985, the Alabama legislature enacted local legislation to allow vacancies on the Mobile County Commission to be filled by special election. *See* Ala. Act No. 85-237 (reproduced at J.S. App. 4a). The State submitted the Act for administrative preclearance, which was granted by the Attorney General on June 17, 1985. Joint Stipulation of Fact, Docket No. 14, ¶ 3 & Ex. C (Jan. 13, 2006).

In 1987, a vacancy arose on the Mobile County Commission. Pursuant to Act No. 85-237, the County prepared to fill the vacancy through a special election. A county voter, Willie Stokes, filed suit, challenging the constitutionality of Act No. 85-237 on state law grounds. In particular, Stokes argued that the law conflicted with the prior general statute providing that vacancies were to be filled by gubernatorial appointment and, as a consequence, violated a state constitutional prohibition against local laws that conflict with general laws of statewide application. J.S. App. 17a-18a. The Circuit Court of Mobile County rejected that claim and allowed the special election to proceed. J.S. 7. Stokes appealed but did not obtain a stay of the election. *See id.* As a result, Sam Jones was selected by the voters of Mobile County for the post and assumed office in July 1987. J.S. App. 4a. Subsequently, on September 30, 1988, a divided Supreme Court of Alabama ruled that Act No. 85-237 violated the Alabama constitution as a local law in direct conflict with a statewide general law. *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988) (reproduced at J.S. App. 17a-24a). The result of the

decision was to require that future vacancies in Mobile County be filled by appointment. App. 4a.[2]

The State did not seek preclearance of the change in election practice ordered by *Stokes*. J.S. App. 4a. Rather, in 2004, the Alabama legislature amended the general law to allow county commission vacancies to be filled by special election when "a local law authorizes a special election." J.S. App. 5a (quoting Ala. Act No. 2004-455, amending ALA. CODE § 11-3-6).[3] The State submitted the 2004 legislation for preclearance by the Attorney General, who interposed no objection. *Id.*

The next vacancy on the Mobile County Commission arose in the fall of 2005, when Commissioner Jones was elected Mayor of Mobile, prompting him to resign from the Commission. J.S. App. 25a-26a. In anticipation of that vacancy, a group of voters (who are also the appellees in this case) filed a petition in state court seeking a declaration that a special election was required to fill the vacancy. J.S. App. 25a-26a. The Montgomery Circuit Court agreed and ordered a special election to be held. *Id.* at 26a. Governor Bob Riley, a defendant in the state-court action, appealed, arguing that a special election was not authorized under state law. In the Governor's view, the 2004 Act applied only when the legislature enacted a new "local law

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[2] The question of the validity of the 1987 election was avoided when the Governor designated Jones, the election's winner, as his appointee to the office. J.S. App. 4a.

[3] By amending the general law to allow for special elections when authorized by local legislation, the legislature sought to avoid any conflict between the general law and the local law permitting a special election in Mobile County. J.S. App. 29a.

authoriz[ing] a special election," Ala. Act No. 2004-455, after the effective date of the 2004 Act; the 1985 statute allowing special elections in Mobile County, he argued, did not qualify. The Alabama Supreme Court agreed, and once again ordered that vacancies on the County Commission be filled by appointment, rather than in accordance with the special election practice established under the 1985 Act. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005) (reproduced at J.S. App. 25a-31a).

Again, the State of Alabama did not seek preclearance of the court-ordered change in election practice. J.S. App. 5a. Instead, as it did in the aftermath of the prior *Stokes* decision, the Alabama legislature again enacted legislation to reinstate special elections as the method of filling vacancies on the Mobile Country Commission, readopting Act No. 85-237 "without change" and "reaffirm[ing] the Legislature's intention as set forth in that statute." Ala. Act No. 2006-342 § 2 (reproduced at App. 1a). The State submitted the 2006 Act to the Department of Justice for preclearance and the Attorney General interposed no objection. J.S. 6. Thus, from this point forward, all vacancies on the Mobile County Commission will be filled by special election.

After the *Riley* decision, the Governor appointed Juan Chastang to the vacant seat on the Mobile County Commission. J.S. App. 5a. On November 16, 2005, appellees filed this suit in the United States District Court for the Middle District of Alabama under § 5 of the Voting Rights Act, seeking to enjoin the appointment until the State had obtained preclearance for the use of this method to fill the vacancy on the Commission. J.S. 4. The case was

heard before a three-judge panel pursuant to 42 U.S.C. 1973c.

3. Agreeing with appellees, the district court held that preclearance was required, since the court-ordered practice of gubernatorial appointment constituted a change from the precleared practice of special elections. J.S. App. 3a-8a. The court rejected Governor Riley's assertion that there had been no "change" in election practice within the meaning of § 5. *Id.* at 7a. The court explained that "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." *Id.* at 6a-7a (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997), and *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990)). While the Governor acknowledged that Act No. 85-237 had called for special elections, had received preclearance, and had been implemented to fill the 1987 vacancy, he nonetheless argued that it could not serve as the baseline practice for determining whether there had been a change because the State Supreme Court had subsequently invalidated the statute for state-law reasons. The three-judge court disagreed: "We are required to determine the baseline 'without regard for [its] legality under state law.'" J.S. App. 7a (quoting *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983) (citing *Perkins v. Matthews*, 400 U.S. 379 (1971))). Because the decisions in *Stokes* and *Riley* ordered a practice different from that required under the precleared 1985 Act, the court held that the court-ordered changes required preclearance. J.S. App. 7a-8a.

Accordingly, on August 18, 2006, the district court ordered that "Judgment is entered in favor of plaintiffs . . . and against defendant Bob Riley" and ordered the State of Alabama to obtain preclearance in accordance with § 5. J.S. App. 9a. The court declined, however, to issue further injunctive relief at that time, providing instead that if the State failed to obtain preclearance within 90 days, "the court will revisit the issue of remedy." *Id.* The court entered final judgment, ordering that the "clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure." *Id.* at 10a.

4. Pursuant to 28 U.S.C. § 2101(b), the State had sixty days to appeal from that final judgment. It did not do so. Instead, the State sought administrative preclearance of the state court decisions. *See* Notice of Filing Preclearance Submission, Docket No. 30, Ex. A (Nov. 9, 2006). On January 8, 2007, Wan J. Kim, Assistant Attorney General for the Civil Rights Division, interposed an objection on behalf of the Attorney General. *See* Letter Denying Preclearance (reproduced at App. 2a).[4] Agreeing with the district court, the Department of Justice concluded that the appropriate baseline for § 5 purposes was the practice of holding special elections under Act No. 85-237—the last precleared voting practice to be in force and effect. *Id.* at 2. The Department then determined that the State had not met its burden of showing that the change to gubernatorial appointment was not retrogressive, finding that "[t]he transfer of electoral

[4] The Attorney General has delegated his preclearance authority to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 51.3.

power effected by *Stokes v. Noonan* and *Riley v. Kennedy* appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission." *Id.* at 3. On March 12, 2007, the Department denied the State's request for reconsideration. *See* Letter Denying Reconsideration (reproduced at App. 9a).

After failing to receive administrative preclearance, the State was entitled to seek preclearance from the U.S. District Court for the District of Columbia, but it did not pursue that option.[5] And although preclearance of the process that produced Juan Chastang's appointment had been denied, the State did not remove Chastang from office. Accordingly, appellees petitioned the district court for further relief, and on May 1, 2007, the district court entered a remedial order vacating Chastang's appointment. J.S. App. 1a. The State then filed a notice of appeal to this Court on May 18, 2007. That appeal does not seek review of the order providing further relief, but rather requests reversal of the final order requiring preclearance, issued nine months earlier. *See* J.S. i.

5. Governor Riley requested that the district court stay its order vacating Chastang's appointment pending appeal to this Court. Emergency Mot. to Stay, Docket No. 49 (May 2, 2007). The court denied the motion. Order Den. Def's Mot. to Stay, Docket No. 52 (May 17, 2007). The Governor did not seek a stay from this Court and, as a result, the County held

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[5] In its jurisdictional statement, the State asserts that it may yet attempt to seek judicial preclearance, J.S. 6, but as far as appellees can determine, it has not yet done so.

a special election to fill the vacancy on October 9, 2007. Juan Chastang, who ran as the Republican nominee to retain his appointed seat, was soundly defeated by Merceria Ludgood, the Democratic Party's candidate, who won nearly 80 percent of the vote.[6]

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act requires that a covered jurisdiction obtain preclearance of all changes to its voting laws before those changes go into effect. 42 U.S.C. § 1973c. In this case, the State of Alabama adopted legislation that provided for the use of special elections to fill vacancies on the Mobile County Commission, obtained preclearance of that legislation, and actually conducted a special election under that legislation. The subsequent decisions of the Alabama Supreme Court in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), ordering the County to abandon that practice and providing instead that commission vacancies be filled through gubernatorial appointment, constituted a change affecting voting within the meaning of § 5, and therefore required preclearance.

The Governor's objections to the contrary cannot be reconciled with the decisions of this Court. The Court has repeatedly held that because § 5 "requires preclearance of *all* voting changes . . . there is no dispute that this includes voting changes mandated

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[6] *See* Certification of Results, Special Mobile County Election (Oct. 16, 2007) (*available at* http://records.mobile-county.net/ViewImagesPDFAll.Aspx?ID=2007081288).

by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) (emphasis in original) (internal citations omitted). This is true even when a change is implemented to bring a jurisdiction's practice into compliance with state law. *See, e.g.*, *Perkins v. Matthews*, 400 U.S. 379 (1971). The consequence of those rulings—that a State may sometimes be required to conduct elections for a time pursuant to a practice that violates state law—is a necessary consequence of Congress's decision to require preclearance of all voting changes, a decision that this Court has repeatedly found to be within Congress's constitutional authority. To adopt the Governor's contrary view would undermine the basic purposes of § 5 and lead to substantial problems of administration.

While the Court could easily dispose of this appeal by summary affirmance, it ultimately lacks jurisdiction to do so because the Governor's appeal is untimely. The district court entered final judgment in favor of appellees on the question of § 5 coverage on August 18, 2006. Although the court retained jurisdiction, and left open the possibility that it might entertain a motion for further relief if the State neither obtained preclearance nor removed Chastang voluntarily, neither fact rendered the judgment nonfinal. Nonetheless, the Governor did not appeal from the final judgment within sixty days, as required by statute, but waited until the Attorney General denied preclearance and the district court entered a supplemental order of further relief. As a result, while this Court would have jurisdiction to review the district court's choice of further remedy (which appellant does not challenge), it lacks

jurisdiction to review that court's prior final judgment finding the changes subject to preclearance.

ARGUMENT

I. The Present Appeal Is Untimely And Should Be Dismissed For Lack of Jurisdiction

A direct appeal to this Court must be taken within sixty days of a final judgment. *See* Sup. Ct. R. 18.1; 28 U.S.C. § 2101(b). Here, appellant challenges solely the district court's judgment that both *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), were decisions that "constituted changes that should have been precleared before they were implemented." J.S. App. 7a-8a.[7] That judgment became final on August 18, 2006, when the court conclusively resolved the merits of the appellees' complaint, ordered the Governor to obtain preclearance, and directed that its order be entered as the final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure. *Id.* at 9a-10a. Having failed to file its notice of appeal until May 18, 2007, nine months after entry of the final judgment,

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[7] The State does not seek review of the May 1, 2007 order setting aside the appointment of Juan Chastang. To the contrary, both Questions Presented in the Governor's Jurisdictional Statement go solely to the question whether the State was required to preclear the use of gubernatorial appointment to fill vacancies on the Mobile County Commission. *See* J.S. i (asking "1. Whether the decision of a covered jurisdiction's highest court . . . must be precleared" and "2. Whether the preclearance of a trial court's ruling . . . establishes a baseline such that the reversal of that decision . . . must be precleared").

the Governor cannot seek review of that judgment now.

The fact that the district court initially declined to vacate Chastang's appointment does nothing to undermine the finality of its judgment that preclearance was required. It is enough that the court made clear that it was "end[ing] the litigation on the merits," *Catlin v. United States*, 324 U.S. 229, 233 (1945). To be sure, the court left open the possibility of a post-judgment motion for further relief if the State failed to obtain preclearance and did not remove Chastang on its own. *See* J.S. App. 9a. But it is well established that a court's retention of jurisdiction to issue further relief, should a defendant's conduct warrant it, does not delay the finality of the judgment. *See, e.g.*, *French v. Shoemaker*, 79 U.S. 86, 92-93 (1870); *United States v. Local 30, United Slate Workers Ass'n*, 871 F.2d 401, 403 (3d Cir. 1989). Moreover, the fact that the district court subsequently exercised that jurisdiction to order further relief when the State neither obtained preclearance nor vacated the illegal appointment did not provide appellant an opportunity to take an otherwise untimely appeal from the initial judgment holding that preclearance was required. *See* 15B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3916 (2d ed. 1992)) (noting that an appeal from a postjudgment order "should not extend to revive lost opportunities to appeal the underlying judgment.");[8] *cf. also Boeing Co. v. Van Gemert*, 444 U.S. 472, 476, 479 n.5 (1980).

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[8] While an appeal may lie from a subsequent order of further relief, the "scope of appeal . . . should be restricted to the questions properly raised by the post-judgment motion." 15B

To treat a judgment resolving the § 5 coverage question as non-final unless and until the court issues further relief—if and when the jurisdiction fails to obtain preclearance and fails to remedy any unlawful action taken under the unprecleared change on its own—would be inconsistent with established § 5 practice and the purposes of the statute. This Court has routinely heard appeals in cases in which the three-judge court has done nothing more or less than what the district court initially did in this case—that is, declare that a change required preclearance and order that the change be precleared before implementation or enforcement of voting changes. *See, e.g.*, *City of Monroe v. United States*, 522 U.S. 34 (1997) (per curiam); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32 (1978); *Georgia v. United States*, 411 U.S. 526 (1973). In all of these cases, it was possible that an order for further relief might be appropriate if the jurisdiction failed to obtain preclearance and insisted on an unlawful course of action. But this Court did not delay review while the jurisdiction attempted to preclear the change. Instead, the Court took jurisdiction to review the final judgment determining that preclearance was, in fact, required.

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3916 (2d ed. 1992). *See, e.g.*, *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 594 (9th Cir. 1988) (holding that the plaintiffs' ability to challenge a 1988-1989 school desegregation assignment plan did not permit them also to attack a prior order issued in 1985); *Inmates of Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196, 1199-1200 (1st Cir. 1974) (finding that, on appeal from a supplemental order implementing the judgment by compelling specified steps, "the underlying judgment is immune from attack.").

That practice is compelled by the basic purposes of § 5. In enacting that provision, Congress recognized that it is important for § 5 cases to be resolved quickly because § 5's stringent remedy can freeze a covered jurisdiction's existing electoral practices into place until preclearance is obtained.[9] Moreover, Congress also recognized that voters within covered jurisdictions are entitled to be free from discriminatory changes in election rules and that swift resolution of § 5 claims is critical to this protection.[10] For that reason, rather than using standard adjudicatory procedures, § 5 provides an expedited system, bypassing ordinary circuit court review in favor of an initial hearing before a three-judge district court followed directly by review in this Court. *See* 42 U.S.C. § 1973c. Delaying review by this Court until a plaintiff obtains further relief in light of the jurisdiction's failure to obtain preclearance would substantially delay this expedited

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[9] The tight time limits for administrative proceedings before the Attorney General—which generally require him to resolve preclearance submissions within 60 days, *see* 28 C.F.R. § 51.42—likewise reflect a congressional sensitivity to the potential impact on a jurisdiction's self-governance.

[10] This case provides a textbook example of the problem § 5 was intended to address. Even with the expedited process provided by § 5, plaintiffs were represented for nearly one and a half years by a commissioner appointed under a procedure that the Department of Justice concluded had a discriminatory effect. Moreover, between the May 1, 2007, order of further relief and the special election of October 9, 2007, the residents of District 1 were denied representation on the County Commission altogether (a result recognized by the State in its Emergency Motion to Stay, Docket No. 49 (May 2, 2007), at ¶ 7).

process.[11] Such a rule would plainly not be in the interests of covered jurisdictions that reasonably desire immediate resolution of their obligation to preclear a challenged change before undertaking the time and effort of seeking preclearance. Where the correctness of an order requiring the defendant to seek preclearance is the principal issue in dispute, it would be illogical to delay this Court's review of that decision, possibly for several years, while potentially unnecessary preclearance proceedings take place.[12]

Thus, because the final judgment on the question whether preclearance was required was entered by the district court on August 18, 2006, and the notice of appeal was not filed until May 18, 2007, the appeal

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[11] The preclearance process already can often take several years, especially when a covered jurisdiction first seeks and fails to obtain preclearance from the Attorney General and then resorts to judicial preclearance in the District of Columbia. *See, e.g.*, *Beer v. United States*, 425 U.S. 130 (1976) (approximately six years between initial submission of a plan to the Attorney General and this Court's holding that city's plan was valid); *City of Richmond v. United States*, 422 U.S. 358 (1975) (four years). And even the streamlined administrative process is anticipated to take 60 days, *see* 28 C.F.R. § 51.42, and often takes up to 120 days in complex cases, *see id*. § 51.37.

[12] Indeed, delaying review can sometimes prevent a jurisdiction from ever obtaining review of the decision requiring preclearance. In this case, for example, while this litigation has been pending, the State amended and precleared a statute curing the defects identified in the State Supreme Court's decisions in *Stokes* and *Riley*, thereby ensuring that future Mobile County Commission vacancies will be filled by special election regardless of the outcome of this appeal. *See* Ala. Act No. 2006-342. It is only the possibility of reinstating the Governor's appointment of Juan Chastang to the Commission that prevents this case from being entirely moot.

is untimely, and must be dismissed for lack of jurisdiction.

II. Alabama Was Required To Seek Preclearance For The Changes In Voting Procedures Ordered By The Decisions In *Stokes v. Noonan* And *Riley v. Kennedy*

Even if the Governor's appeal is timely, it is plainly meritless.

Section 5 requires that Alabama seek preclearance for changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. "To determine whether there have been changes with respect to voting, [this Court] must compare the challenged practices with those in effect before they were adopted." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992).[13] As the court below noted, "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a-7a. (citing *Abrams v.*

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[13] This Court has made clear that once a change from the practice in force or effect on the date of § 5 coverage (for Alabama, November 1, 1964) has been precleared, any change from the precleared practice must itself be precleared before it can take effect. *See, e.g.*, *Presley*, 502 U.S. at 495. Only when there have not been "intervening changes [does] the Act require[] [this Court] to use practices in existence on November 1, 1964 as [its] standard of comparison." *Id*. For that reason, it makes no difference that the decision in *Stokes* "returned the State to its practice on its coverage date." J.S. 16. *See also* 28 C.F.R. § 51.12 (providing that preclearance is required for any change in voting practice, even one that "returns to a prior practice or procedure").

Johnson, 521 U.S. 74, 96-97 (1997)); *see also* 28 C.F.R. § 51.54(b)(1) ("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.").

Here, it is undisputed that the effect of *Stokes v. Noonan* and *Riley v. Kennedy* was to adopt gubernatorial appointment as the method of filling vacancies on the Mobile County Commission, and that this is a change from the last precleared practice used to fill a Commission vacancy—special elections under Act No. 85-237. And for nearly forty years, it has been beyond dispute that converting offices from elected to appointed constitutes a change with respect to voting that requires preclearance under § 5. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 570 (1969); *see also* 28 C.F.R. § 51.13(i). The Governor nonetheless offers three reasons why the change from special election to gubernatorial appointment did not constitute a "change" within the meaning of § 5. None has any merit.

1. First, the Governor contends that a "decision by a covered jurisdiction's highest court that a precleared State Law is . . . invalid *as a matter of State law* is not a change that requires preclearance before it can be enforced." J.S. 12 (emphasis added). As a technical matter, it is not the court's *decision* that must be precleared; rather, it is the use of the election practice mandated by the court's decision that requires preclearance. In any event, that argument ignores this Court's decisions holding that a change in practice must be precleared even when it results from a state court order, and even when the change is required in order to bring a jurisdiction's procedures into compliance with state law.

In *Perkins v. Matthews*, 400 U.S. 379 (1971), this Court recognized that § 5 can require a jurisdiction to continue using a practice that violates state law unless and until a change is precleared. *Id.* at 394-95. In *Perkins*, the city of Canton, Mississippi, held its 1965 elections for alderman by ward—in violation of a state law that mandated at-large elections. In the next election, the city attempted to implement the at-large election scheme actually required by state law. This Court held that the use of at-large elections required preclearance, even though it was undertaken because the prior practice was illegal under state law. Whether legal under state law or not, the practice of election by ward was "in force and effect" on the coverage date and accordingly, this Court held, became the § 5 baseline. *Id.* at 395. This Court subsequently reaffirmed that principle in *City of Lockhart v. United States*, 460 U.S. 125 (1983), holding that in determining whether a change has a discriminatory effect, courts must determine the relevant baseline for comparison "without regard for the legality under state law of the practices already in effect." *Id.* at 133.

That the change to comply with state law in this case was ordered by a state court, rather than voluntarily undertaken by the jurisdiction as in *Perkins*, is of no consequence. Because the "Act requires preclearance of *all* voting changes . . . there is no dispute that this includes voting changes mandated by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) (emphasis in original) (citations omitted). Thus, for example, in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), officials in Winston County, Mississippi, declined to implement a 1964 state statute calling for election of school board

members by district, believing that the law violated the state constitution's prohibition against local legislation. *Id*. at 258. In 1979, the Mississippi Supreme Court excised the offending aspects of the 1964 legislation and ordered the County to begin holding elections by district. *Id.* at 259. This Court held that the use of districted elections required preclearance. *Id.* at 265 & n.16. The "presence of a court decree," the Court held, "does not exempt the contested change from § 5." *Id.* at 265 n.16. Moreover, it was "immaterial" that the change was required by state law or that the law predated the Voting Rights Act. *Id.* Section 5, the Court explained, "comes into play whenever a covered jurisdiction departs from an election practice that was '*in fact* in force or effect . . . on November 1, 1964.'" *Id.* (quoting *Perkins*, 400 U.S. at 395) (emphasis in original) (internal quotation marks omitted).

Abrams v. Johnson, 521 U.S. 74 (1997), cited by the Governor (J.S. 12-13), is not to the contrary. The dispute in *Abrams* arose when a federal three-judge court drew a redistricting plan to replace the legislative plan declared unconstitutional by this Court in *Miller v. Johnson*, 515 U.S. 900 (1995). Because the remedial plan was adopted by a federal court rather than the State, preclearance was not required. *Abrams*, 521 U.S. at 95; 28 C.F.R. § 51.18. Nonetheless, because this Court had previously instructed federal courts to avoid adopting plans with a discriminatory effect, it was necessary to determine whether the plan adopted in *Abrams* was retrogressive. *See* 521 U.S. at 96. In making that retrogression determination, this Court concluded that it would be inappropriate to compare the court-

ordered plan to the legislative plan held unconstitutional in *Miller*. *Abrams*, 521 U.S. at 96. Doing so, the Court noted, might "freeze in place the very aspects of a plan found unconstitutional." *Id*. at 97.

Abrams thus is irrelevant to this case for two reasons. First, *Abrams* did not even address the question presented here—what constitutes a change requiring preclearance under § 5. Because the remedial plan was developed by a federal court, preclearance was not required, *see id.* at 95, and, accordingly, there was no question before this Court regarding the scope of the preclearance requirement. Moreover, the Court said nothing to suggest that the State would not have been required to preclear any change from the unconstitutional plan, had the change been implemented by a state court or the state legislature, rather than a federal court. To the contrary, the Court reaffirmed that when a state changes its electoral system in order to remedy a constitutional violation, the change must be precleared unless the remedial plan is developed entirely by the federal court itself. *Id.*; *see also McDaniel v. Sanchez*, 452 U.S. 130 (1981); 28 C.F.R. § 51.18.

Second, and in any event, *Abrams* addressed only legislative plans that violate the *federal* constitution. *See* 521 U.S. at 97. A state plan that violates citizens' federal voting rights cannot be the benchmark for a retrogression analysis because treating the unconstitutional plan as a baseline would entrench unconstitutional practices the Voting Rights Act is designed to root out. The same is not true with respect to a practice that violates a state, but not

federal, constitutional provision, as this case demonstrates. Requiring Alabama to temporarily continue to enforce a state statute that violates the state constitution's prohibition against certain forms of local legislation in no way conflicts with the basic purposes of the Voting Rights Act.[14]

2. The Governor also cites *Young v. Fordice*, 520 U.S. 273 (1997), for the proposition that the 1985 Act mandating special elections was never in force or effect because it was "short-lived and was abandoned after its unlawfulness became apparent." J.S. at 14. But *Young* does not support that position. In *Young*, state officials sought preclearance of a *proposed* statute, but the statute was ultimately never enacted. 520 U.S. at 278-79. This Court held that the proposed statute did not constitute a baseline because "neither the Governor nor the legislature nor the state attorney general ratified the Provisional Plan." *Id.* at 282. The voting practice in *Young* was not "short-lived"—it was never born. By contrast, the

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[14] The Governor notes that a state law that violates the state constitution is "void," just like a state law that violates the federal constitution. J.S. 13. But this Court's decisions do not turn on whether the benchmark practice is "void." A county election practice is no less "void" when it violates a state statute than it is when it violates the state constitution, and this Court has repeatedly held that local practice in violation of state statutory law can be a § 5 baseline. *See Lockhart*, 460 U.S. at 132 ("The proper comparison is between the new system and the system actually in effect on [the coverage date], regardless of what state law might have required."); *Perkins*, 400 U.S. at 394-95. Whether void because of a conflict with a state statute or the state constitution, the abandonment of the illegal practice constitutes a change in a "standard, practice or procedure with respect to voting," and therefore requires preclearance. 42 U.S.C. § 1973c.

1985 Act at the center of this case, which required use of special elections to fill vacancies on the Mobile County Commission, was passed by the state legislature, signed into law by the Governor, precleared by the U.S. Attorney General, and actually implemented in the 1987 election.

That the practice was later "abandoned after its unlawfulness became apparent," J.S. 14, does not distinguish this case from *Perkins* or *Hathorn*. And, in fact, *Young* itself made clear that the "simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never 'in force or effect.'" 520 U.S. at 283. Instead, the question is whether the practice "would have been followed if the election had been held" on the date the new election practice was ordered. *Perkins*, 400 U.S. at 394. Because state statutes are presumed to be valid when enacted,[15] a statute should be deemed "in force or effect" from its effective date (or, if later, the date of preclearance) until repealed or declared invalid by a court. That Mobile County actually held a special election pursuant to the precleared 1985 statute law only serves to emphasize that the enacted statute was in force and effect prior to the decisions in *Stokes* and *Riley*.

3. The Governor further asserts that requiring preclearance of the changes instituted by *Stokes* and *Riley* "raises grave constitutional and workability concerns." J.S. 17. This assertion is also meritless.

Appellant's contention that the Department of Justice "has made State law and effectively

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[15] *See, e.g.*, *State Bd. of Health v. Greater Birmingham Ass'n of Home Builders, Inc*., 384 So. 2d 1058, 1061 (Ala. 1980).

commandeered State officials in violation of the Tenth Amendment," J.S. 17, is simply unfounded. The Department of Justice made no law in this case—it simply decided that the State had not carried its burden of demonstrating that the change from special elections to gubernatorial appointment would not have a discriminatory effect. To the extent the Governor is complaining that the State must keep in place a practice held invalid under state law, that effect is simply a consequence of § 5's preclearance requirement and the supremacy of federal law. *See* U.S. Const. art. VI, § 2.[16] "[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome v. United States*, 446 U.S. 156, 179 (1980). And this Court has repeatedly held that § 5 is a valid exercise of Congress' authority to enforce the Civil War Amendments. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999) ("[W]e have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States."); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (holding that barring changes under state law is "an appropriate means for carrying out Congress' constitutional

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[16] Alabama does not and cannot question the constitutionality of § 5 in this proceeding. Under 42 U.S.C. § 1973l(b) as interpreted in *Shaw v. Reno*, 509 U.S. 630, 637, 641 (1993), challenges to the Voting Rights Act's constitutionality must be brought before a three-judge District Court for the District of Columbia. Moreover, under 28 U.S.C. § 2403, a litigant challenging the constitutionality of a federal statute must provide notice to the Attorney General of the United States, a step not taken by Alabama here.

responsibilities and . . . consonant with all other provisions of the Constitution"); *see also City of Rome*, 446 U.S. at 178-82.

Nor does requiring state officials to conduct elections in compliance with § 5 constitute impermissible "commandeering" of state legislatures and executives as forbidden by this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Nothing in this Court's Tenth Amendment jurisprudence prevents Congress from passing a regulatory program that requires state compliance. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (internal quotation omitted). Like the statute at issue in *Condon*, § 5 "does not require the [Alabama] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. To the contrary, § 5 requires only that a state conduct elections in a way the *local jurisdiction* has chosen—the baseline practice—unless and until a change in election procedures is precleared.

Nor are the established preclearance principles applied in this case unworkable. The Governor complains that legislation may often be precleared and implemented—and therefore, any change from that practice may require preclearance—before the legislation can be declared invalid by a state court. J.S. 17. But that is simply a necessary consequence

of the legislative choice Congress made in enacting § 5 to require a state to keep in effect prior election practices unless and until any changes are precleared. The "argument that some administrative problems might arise in the future does not establish that Congress intended that §5 have a narrow scope." *Allen*, 393 U.S. at 564-65. In any event, states could minimize or avoid the problem identified by the Governor if they so chose. Many states, including Alabama, permit their state supreme courts to issue advisory opinions as to the constitutionality of a proposed bill. *See, e.g.*, ALA. CODE § 12-2-10. Or a state could delay the effective date of an act and provide for expedited judicial review of any challenge.

Even if those options were not ideal, the alternative the Governor proposes would create far greater administrative difficulties. Appellant would have this Court hold that state statutes do not become § 5 benchmarks until they are (1) duly enacted, (2) precleared, (3) subjected to state court challenge, and (4) upheld by the state supreme court. Under these criteria, few present voting practices would qualify as benchmarks. State-law challenges to election practices are not routine and are rarely brought immediately upon initiation of a voting practice. A practice may be implemented for many years before it is challenged—in *Hathorn*, for example, the state supreme court did not review the constitutionality of the Mississippi statute at issue in that case until 15 years after it was enacted, *see* 457 U.S. at 257-59. Or the practice may never be challenged at all before it is superseded, as may happen with respect to the location of polling places or election dates. In that event, the Governor provides no indication of what baseline would apply

(if any) or how the statute could effectively operate under his proposed construction. By contrast, the district court here followed a consistently applied bright line rule that has proven to be easily administrable in the federal courts: any duly enacted statute that receives preclearance becomes the baseline against which changes should be measured.

Finally, the rule established in this Court's precedents is compelled by the underlying purposes of § 5. When Congress enacted the Voting Rights Act, it recognized "that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands" of the Civil War Amendments. *Katzenbach*, 383 U.S. at 309. Section 5 in particular was enacted to address the frequent problem that successful challenges to discriminatory voting practices "merely resulted in a change in methods of discrimination." *McCain v. Lybrand*, 465 U.S. 236, 243-44 (1984); *see also Katzenbach*, 383 U.S. at 311-12 (same). Accordingly, "[f]earing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5." *Hathorn*, 458 U.S. at 268. Under the Governor's view, however, covered jurisdictions actually retained their ability to change voting practices without preclearance simply by amending state statutes or the state constitution to render the current practice invalid under state law. A state could, for example, simply repeal the state law authorizing the practice, thereby rendering the current practice void under state law and, in the Governor's view, avoiding the need to preclear the

resulting change. The Congress that enacted § 5 would never have adopted "a 'voting rights' law containing a major and obvious loophole that would . . . threaten[] to destroy in practice the very promise of elementary fairness that the Act held out." *Morse v. Republican Party of Va.*, 517 U.S. 186, 236 (1996) (Breyer, J., concurring).

4. Appellant's second Question Presented—asking "[w]hether the preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal establishes a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced," J.S. i—simply does not arise in this case. Although a state probate judge did make a submission and obtain preclearance of the date of the recent special election, J.S. 9, the federal district court in this case did not base its decision in any way on that fact—indeed, the court's opinion does not even mention it. *See* J.S. App. 4a-5a. Instead, the district court held that preclearance was required because the state court decisions ordered an election practice (gubernatorial appointment) that was different from the baseline practice established by the 1985 Act calling for special elections. J.S. App. 7a.

That determination was manifestly correct and if this Court finds that it has jurisdiction, the district court's ruling accordingly should be affirmed. [17]

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[17] The Governor's claim to have done "nothing wrong," J.S. 18, is entirely irrelevant under § 5. The question in this § 5 coverage lawsuit is whether the State's change in voting procedures required preclearance, not whether the change has a discriminatory purpose or effect. That decision is confided either to the Department of Justice or to the United States

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be affirmed.

Respectfully Submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Edward Still
Counsel of Record
EDWARD STILL LAW FIRM LLC
Suite 201
2112 11th Avenue South
Birmingham, AL 35205
(205) 320-2882

Cecil Gardner
THE GARDNER FIRM PC
Post Office Drawer 3103
Mobile AL 36652

Amy Howe
Kevin Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Sam Heldman
THE GARDNER FIRM, PC
2805 31st St. NW
Washington DC 20008

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
333 New Hampshire Ave., NW
Washington, DC 20036

October 22, 2007

District Court for the District of Columbia. *Allen v. State Bd. of Elections*, 393 U.S. 544, 558-59 (1969); *see also Perkins v. Matthews*, 400 U.S. 379, 383-86 (1971). At any rate, the results of the recent special election—in which the Governor's appointee barely managed to garner twenty percent of the vote—undermines any suggestion that the change from election to appointment did not have a discriminatory effect on voting.

ENROLLED, An Act,

Relating to Mobile County; prescribing procedure for filling certain vacancies on the county commission.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Whenever a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than 60 days and no later than 90 days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.

Section 2. The purpose of this act is to reenact Act 85-237 of the 1985 Regular Session (Acts 1985, p. 137) without change and to reaffirm the Legislature's intention as set forth in that statute.

Section 3. All laws or parts of laws which conflict with this act are repealed.

Section 4. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

U.S. Department of Justice

Civil Rights Division

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

January 8, 2007

Mr. Troy King
Attorney General
Mr. John J. Park, Jr.
Assistant Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Messrs. King and Park:

This letter refers to the change in method of selection for filling vacancies on the Mobile County Commission from special election to gubernatorial appointment in Mobile County, Alabama, pursuant to decisions of the Alabama Supreme Court in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as amended. This matter arises from an order entered on August 18, 2006, by a three-judge

panel in *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), ruling that the State of Alabama submit the two decisions for preclearance under Section 5. We received your submission on November 9, 2006.

We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race. *Georgia v. United States*, 411 U.S. 526 (1973). *See also* Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.52. "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 C.F.R. § 51.54(a) (citing *Beer v. United States*, 425 U.S. 130, 140-42 (1976)).

Pursuant to Act No. 85-237, a vacancy on the Mobile County Commission is to be filled through popular election by the voters within the relevant single-member district. That statute was precleared by the Attorney General under Section 5 on June 17, 1985 (File No. 1985-1645), and was first implemented in a 1987 District 1 special election. Pursuant to decision of the Alabama Supreme Court in *Stokes v. Noonan*, that method of filling vacancies was changed

from election by the voters of the district to appointment by the Governor of Alabama in 1988, and reaffirmed by *Riley v. Kennedy* in 2005.

Pursuant to the decision of the three-judge federal panel in *Kennedy v. Riley*, the State has submitted the changes effected by *Stokes v. Noonan* and *Riley v. Kennedy* for review under Section 5 of the Voting Rights Act. Additionally, we understand that Alabama law has changed, legislatively reversing the decision in these cases and restoring the authority to fill vacancies to the voters themselves for future elections. This is the effect of Act No. 2006-342, which was signed by the Governor on April 12, 2006, and which would govern all future vacancies. The question before us, therefore, is limited to whether the change effected by *Stokes v. Noonan* and *Riley v. Kennedy* will lead to impermissible retrogression, caused by the appointment, rather than election, of an individual to fill a vacancy on the Mobile County Commission for a term expiring in 2008.

In evaluating whether a change affecting voting will lead to impermissible retrogression, the Attorney General compares the submitted change to the practice or procedure in effect at the time of the submission. 28 C.F.R. § 51.54(a). In light of your submission, we note that a change brought about by a state court decision is subject to Section 5. *Branch v. Smith*, 538 U.S. 254, 262 (2003). A practice or procedure that is not legally enforceable under Section 5 cannot serve as a benchmark; the comparison is with the last legally enforceable practice or procedure used by the jurisdiction. *Id.*

Changes that are not precleared are not enforceable. 42 U.S.C. § 1973c; *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982); *Clark v. Roemer*, 500 U.S. 646, 652 (1991). Because the changes pursuant to *Stokes* and *Riley* were never precleared, they cannot serve as the benchmark. *See Kennedy*, 445 F. Supp. 2d at 1336, (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997)); *Gresham v. Harris,* 695 F.Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990). The benchmark is determined without regard to its legality under state law. *Kennedy,* 445 F. Supp. 2d at 1336 (citing *City of Lockhart v. United States*, 460 U.S. 125, 132-133 (1983)); *Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971).

Thus, the last precleared procedure for filling vacancies in the Mobile County Commission that was in force or effect was the special election method set forth in Act No. 85-237. *Kennedy*, 445 F. Supp. 2d at 1336. This Act remains in full force and effect, as it affects voting, was precleared, and was implemented in the 1987 special election cycle. *See Young v. Fordice*, 520 U.S. 273, 282-83 (1997); *Lockhart*, 460 U.S. at 132-33. It is therefore the benchmark against which we measure the proposed change to fill vacancies by appointment of the Governor of Alabama.

The measurement is straightforward. As a result of litigation under the Voting Rights Act, Mobile County is governed by the three-member Mobile County Commission, the members of which are elected from single-member districts. *Brown v. Moore*, Civ. Act. No. 75-298-P (S.D. Ala. 1976)

(unpublished opinion). One of the single-member districts, District 1, is over sixty-three percent African-American in population and registered voters. The African-American voters of District 1 enjoy the opportunity to elect minority candidates of their choice to the County Commission; indeed, they enjoyed it in the 1987 special election in which Act 85-237 was first implemented. There is no dispute that the change would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters of District 1. Attorneys General have on at least ten occasions previously interposed objections to changes in method of selection from election to appointment in Alabama and elsewhere. For instance, in 1971, the Attorney General objected to Act No. 2445 of the Alabama Legislature, which changed the method of selection of judges of Justice of the Peace Courts in Alabama from election to appointment. Letter of David L. Norman, Assistant Attorney General, Civil Rights Division, to Hon. William J. Baxley, Attorney General, State of Alabama, Dec. 26, 1973.

The transfer of electoral power effected by *Stokes v. Noonan* and *Riley v. Kennedy* appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission. We have received no indication that the voters of District 1 would have selected the particular individual selected by the Governor. Under these circumstances, the State has failed to carry its burden of proof that the change is not retrogressive. On behalf of the Attorney General, therefore, I must interpose an objection to the change in method of

selection for vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment.

We note that under Section 5, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 28 C.F.R. § 51.44. In addition, you may request that the Attorney General reconsider the objection. *See* 28 C.F.R. § 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the method of selection for vacancies on the Mobile County Commission by gubernatorial appointment will continue to be legally unenforceable as a matter of federal law. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

We also have been advised, as suggested above, that the State has, in essence, re-enacted the provisions of Act No. 85-237 in Act No. 2006-342, which similarly provides that future vacancies on the Mobile County Commission will be filled by special election. To the extent that Act No. 2006-342 does not change the voting practices and procedures set forth in Act No. 85-237, it need not be submitted for Section 5 review. We respectfully request your advice as to whether changes covered by Section 5 are contained in the 2006 law. In the meantime, special elections may be held pursuant to Act No. 85-237.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning this matter. If you have any questions, please call Robert Lowell (202-514-3539), an attorney in the Voting Section. Because this matter has been the subject of pending litigation in *Kennedy v. Riley*, we are serving copies of this letter by facsimile transmission to the Court and counsel of record.

Sincerely,

/s/ Wan J. Kim

Assistant Attorney General

U.S. Department of Justice

Civil Rights Division

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

March 12, 2007

Mr. Troy King
Attorney General
Mr. John J. Park, Jr.
Assistant Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Messrs. King and Park:

This letter refers to your January 30, 2007 request that, under 28 C.F.R. § 51.45, the Attorney General reconsider his objection to the change in method of selection for filling vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment in Mobile County, Alabama, pursuant to decisions of the Alabama Supreme Court in *Stokes v. Noonan*, 524 So.2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as amended. We received your request on January 30, 2007.

We have carefully considered all of the information contained in your reconsideration request. Under Section 5, whether considering an initial submission or a request for reconsideration, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race. *Georgia v. United States*, 411 U.S. 526 (1973). See also *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. § 51.52. "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 C.F.R. § 51.54(a), *citing Beer v. United States*, 425 U.S. 130, 140-142 (1976).

As an initial matter, we note that the State's reconsideration request contains no new factual information that impacts the retrogression inquiry. Pursuant to Act No. 85-237, a vacancy on the Mobile County Commission is to be filled through popular election by the voters within the relevant single-member district. Pursuant to decisions of the Alabama Supreme Court in *Stokes v. Noonan* and *Riley v. Kennedy*, that method of filling vacancies was changed from election by the voters of the district to appointment by the Governor of Alabama. The Attorney General interposed his objection because the change in method of filling vacancies from election to appointment, as applied here, has the

effect of denying the minority voters of majority-black Mobile County Commission District 1 the ability to elect a candidate of choice when a vacancy occurs.

In your request for reconsideration, you raise six primary arguments to support your contention that the objection was inappropriate: that the use of Act No. 85-237 as a benchmark is incorrect on the grounds that Act No. 85-237 was never "in force or effect"; that the objection is an unjustified intrusion into state sovereignty; that the objection evinces a general disapproval of changes from election to appointment; that *Stokes v. Noonan* and *Riley v. Kennedy* are based on generally applicable, race-neutral principles; that the individual selected by the Governor of Alabama is African-American; that it is impossible to prove that that individual would not have been the candidate of choice of District 1 voters; and that Alabama is now left without a mechanism for filling vacancies on the Mobile County Commission, because Act No. 2006-342 is not immediately enforceable. Each of these arguments has already been dealt with by the three-judge panel of the United States District Court for the Middle District of Alabama that decided *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), by the Attorney General in the January 8, 2007, objection letter, or by both. Nevertheless, for the sake of clarity, we shall address each of your arguments seriatim.

Regarding the use of Act No. 85-237 as the benchmark against which we measure retrogression, the use of a procedure as a benchmark does not depend on the legality of that procedure under state

law. The Supreme Court specifically has clarified that a pre-existing procedure that violates state law must still be used as a benchmark. In *Perkins v. Matthews*, 400 U.S. 379 (1971), Canton, Mississippi, was required by a 1962 (pre-Voting Rights Act) state law to change to at-large elections for its city council. Canton illegally continued to use a district system in its (post-Act) 1965 elections. Even though the district system violated state law, the Court held that the district system served as the benchmark because "the procedure in fact 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards." *Id.* at 395. Similarly, in *City of Lockhart v. United States*, 460 U.S. 125 (1983), the Supreme Court held that "[t]he proper comparison is between the new system actually in effect on [Section 5 the coverage date] regardless of what state law may have required." *Id*. at 132 (citing *Perkins*).

Following the Supreme Court's guidance, the District Court held that "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." *Kennedy v. Riley*, 445 F. Supp. 2d at 1336 (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997); *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990)). It is not contested that Act No. 85-237 was precleared by the Attorney General; what is at issue is whether it was "in force or effect." As the case law indicates, the Act remains in full force and effect because it was implemented in an election cycle. The three-judge panel duly found this fact dispositive, stating that "Act No. 85-237 was

. . . put into force and effect with the election of [Samuel] Jones in 1987[.]" *Kennedy v. Riley*, 445 F. Supp. 2d at 1336. Indeed, no other steps could have been taken than were in fact taken to put the election method into force or effect. Accordingly, we see no basis on which we could depart from the determination of the three-judge panel, and of this Department, that Act No. 85-237 was in fact put into force and effect with the election of Mr. Samuel Jones in 1987. Act No. 85-237, therefore, is the proper benchmark for measuring potential retrogression.

We are aware of no court decision, and your letter cites none, in which a court has held that a practice was not "in force or effect" where an election was held under that practice. Your reliance on *Young v. Fordice*, 520 U.S. 273 (1997), is misplaced. *Young* involved a provisional voter registration plan that had not been enacted by a state legislature, that was only in use for forty-one days, and that was only utilized by a third of the state's registrars. Moreover, and critically, no election was conducted or imminent under that voter registration plan. *Young*, 520 U.S. at 282-83. Under those circumstances, the Court held that the plan remained a work in progress and was not in force or effect. *Id*. at 283. In contrast, here, as in both *Perkins* and *Lockhart*, elections had been held under the questioned practices.

Your letter also relies on your assertion that appointment is the longstanding norm in Alabama. This assertion is at odds with many recorded instances in Alabama in which vacancies have been filled by election rather than appointment. In any event, your letter cites no legal authority establishing

why such a practice or tradition is important to the legal analysis required in the Voting Rights Act. Indeed, the longstanding and persistent nature of some discriminatory practices was a reason for the enactment of Section 5. The law is clear: under Section 5, once a gain in voting rights is established as a benchmark, retrogression from that benchmark is prohibited. *Beer v. United States*, 425 U.S. 130, 141 (1976).

Your letter also urges that this objection unjustifiably intrudes into Alabama's sovereignty and the role of the Alabama courts, and contends that a "state statute within the scope of Section 5 must be both valid as a matter of state law and precleared if it is to be enforceable." Recons. Req., at 16. You provide no support for this argument other than your trial brief in *Kennedy v. Riley*, which was unanimously rejected by a federal three-judge panel. It is uncontroverted that a Section 5 change may be brought about by seeking to implement state court decisions. *Branch v. Smith*, 538 U.S. 254, 262 (2003). The Supreme Court has ruled on numerous occasions that the authority, pursuant to Section 5, to bar the implementation of a change under state law is an "appropriate means for carrying out Congress' constitutional responsibilities and . . . [is] consonant with all other provisions of the Constitution. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). "Principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state

sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980). *See also Katzenbach*, 383 U.S. at 334-35.

As such, the fact that the proposed change would be generally applicable is not legally dispositive. All changes are analyzed under the same fact-intensive, context-specific framework to determine whether they comply with the Section 5 retrogression standard. The Attorney General's objection is based on the State's failure to establish the absence of such an effect.

Your letter also urges that the fact that the individual appointed to the Mobile County Commission District 1 seat is African-American demonstrates a lack of discrimination in the selection. The Voting Rights Act, however, looks to the opportunity of the voters to choose a candidate of their choice, and not to the race of the person chosen. It does not set aside certain positions based on race. "[A] minority preferred candidate may be a non-minority. Conversely, a candidate is not minority-preferred simply because the candidate is a member of the minority." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551 (9th Cir. 1998) (internal citations omitted).

Our conclusion that the individual appointed by the Governor would not have been the candidate of choice of District 1 voters is supported by interviews with experts on Mobile politics, including officials of both parties, and neutral political scientists whom we have independently contacted. Further, as we explained in our objection letter, the evidence

establishes that electoral choices of the voters of Mobile County Commission District 1 regularly differ from the choices of voters in the State of Alabama as a whole, who elect the Governor of Alabama. Your letter presents no information – such as election returns, statements from experts or community leaders, details of the involvement of elected officials or advocates in the selection of an appointee for the position, instances in which a substantially similar constituency has elected this individual to office, or other information – to contradict the evidence adduced during our investigation. Hence, the uncontroverted evidence before us makes clear that the effect of the implementation of *Stokes v. Noonan* and *Riley v. Kennedy* is to lead to a retrogression in the position of the African-American citizens of Mobile County Commission District 1 with respect to their opportunity to elect the candidate of their choice.

In the absence of facts supporting your claim that the instant change would not be retrogressive, your letter states that our objection evinces a policy of blanket disapproval of changes from election to appointment, and that we would never, for example, permit a change in the manner of selecting judges from election to appointment. That is simply incorrect. You will recall our June 29, 2006, letter preclearing Act No. 2006-355, which changed the method of filing a new judgeship from the longstanding practice of election to appointment by the Governor. Indeed, in 1999, we precleared precisely the type of change suggested in your reconsideration request, a Florida statute permitting jurisdictions to adopt a "Missouri Plan" system of

judicial selection that involved initial appointment and retention elections. We have precleared many changes from election to appointment for judges and other positions. We look at the reality of each change as it affects the opportunity of minority citizens to participate effectively in the political process. "[A]ny assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003). That assessment remains unchanged in this instance.

Under these circumstances, I must, on behalf of the Attorney General, decline to withdraw the January 8, 2007 objection to the change in method of selection for filling vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment in Mobile County, Alabama, pursuant to the *Stokes v. Noonan* and *Riley v. Kennedy* decisions.

As we previously advised, you many seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. We remind you that unless such a judgment is rendered by that court, the objection by the Attorney General remains in effect and the proposed change continues to be legally

unenforceable. See *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

Finally, we note that you have contended that if the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* are not precleared, you will be left without a mechanism for filling vacancies on the Mobile County Commission that is both precleared and valid as a matter of state law. Both Act No. 85-237 and Act No. 2006-342 provide this authority – Act No. 85-237 because it remains in force in the absence of authority to implement the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* because they have not been precleared, and Act No. 2006-342 inasmuch as it simply reaffirms that special elections are to take place when vacancies occur. Only changes in "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting" fall within the purview of Section 5. 42 U.S.C. § 1973c(a). Thus, if an enactment has not brought about a change, it need not be submitted for Section 5 review. If Act No. 2006-342 only reaffirms the most recent practice that is both precleared and in force or effect, *i.e.*, Act No. 85-237, it need not be submitted for review under Section 5. If Act No. 2006-342 effects changes, we will be happy to review them under Section 5 on an expedited basis. Meanwhile, the special election provisions of Act No. 85-237 must be used for Commission vacancies.

If you have any questions, you should call Mr. Robert Lowell (202-514-3539) of our staff. Please refer to File No. 2006-6792 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Wan J. Kim

Assistant Attorney General