

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

**BRIEF FOR THE STATES OF FLORIDA,
SOUTH CAROLINA, ALASKA, LOUISIANA,
NEW HAMPSHIRE, NEW MEXICO, SOUTH
DAKOTA, AND VIRGINIA AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT**

BILL MCCOLLUM
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399
(850) 414-3300

HENRY D. McMASTER
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
JOHN F. KNESS
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

Counsel for Amici Curiae
[Additional counsel listed on signature page]

QUESTION PRESENTED

Whether Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, should be interpreted to require covered States, counties, and municipalities to obtain preclearance from the Federal government before implementing state court decisions that interpret or otherwise impact state laws affecting voting.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Under the decision below, any State or other jurisdiction covered in whole or in part by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, must now ask the United States Department of Justice for permission to enforce a decision of a state court—even the state supreme court—that interprets or otherwise affects any state law that implicates voting. And, as the appellees admit, where the Department of Justice *denies* preclearance—as it did here—the State’s executive branch will now be required to “keep in place a practice held invalid under state law” by the States’ own courts. Mot. to Dismiss or Affirm 23. Accordingly, while Section 5 obviously altered the relationship between the State and Federal governments, under the decision below it now intrudes markedly into the relationship between the executive and judicial branches *within* a State’s government. This is a remarkable expansion of Section 5.

This expansion, moreover, will impose significant additional burdens on all sixteen States that are covered in whole or in part by Section 5. Nine States—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—are wholly “covered jurisdictions” for purposes of Section 5. See 28 C.F.R. Pt. 51, App. Another seven States—California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota—contain counties or municipalities that are covered jurisdictions. See *ibid.* Although the latter States are not themselves covered by Section 5, their statutes and regulations are subject to preclearance requirements to the extent that they affect voting in covered counties or municipalities. See *Lopez v. Monterey County*,

525 U.S. 266, 287 (1999). Thus, covered jurisdictions in sixteen States (either the States themselves or jurisdictions within those States) are currently required to seek Federal approval of changes in voting-related policies before those policies can be implemented.

The *amici curiae* are States subject in whole or in part to the preclearance requirement of Section 5, and they bear the significant burdens already imposed by that requirement. They do not here challenge the validity of Section 5 or seek to avoid the existing burdens of its preclearance procedure. However, they are concerned that the interpretation of Section 5 adopted by the court below will dramatically increase those burdens by requiring States to seek preclearance of *every* state court decision interpreting or in any way affecting a voting-related statute or regulation—regardless of the grounds for the state court’s decision and regardless of the settled expectations created by longstanding decisions. Indeed, because there is no “statute of limitations” applicable to the preclearance requirement, no court decision rendered after a jurisdiction’s coverage date is immune from challenge—a point illustrated by the fact that the state court decision at issue in this case is nearly 20 years old.

In sum, the decision below adopts an interpretation of Section 5 that “alters the usual constitutional balance between the States and the Federal Government,” *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989)(quotations omitted.), even as it pushes the law toward (and perhaps beyond) the outer limits of congressional authority under the Fifteenth Amendment. And it does so without any clear textual or historical warrant.

Contrary to the decision below, the *amici* believe Section 5 should be given an interpretation that avoids this alteration in the federal-state balance and minimizes obvious constitutional concerns. Specifically, we believe the Court should require a clear statement from Congress before interpreting Section 5 to reach state courts' determinations of state law and thereby to require a State's executive to seek Federal permission before enforcing a decision of the State's highest court. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *United States v. Bass*, 404 U.S. 336 (1971). Alternatively, Section 5 should be construed to reach state courts' decisions *only* where those decisions reflect legislative, rather than judicial, choices. See 42 U.S.C. § 1973c.

STATEMENT

The dispute underlying the decision below traces its roots to a nearly 30-year-old Alabama Supreme Court decision interpreting Article IV, Section 105 of the Constitution of Alabama. That provision specifies that “[n]o special, private, or local law * * * shall be enacted in any case which is provided for by a general law.” In 1978, the Supreme Court of Alabama construed this constitutional provision to forbid the enactment of any local law on a subject already covered by a general statute. See *Peddycoart v. City of Birmingham*, 354 So. 2d 808, 813 (Ala. 1978).

In 1985, however, Alabama's legislature enacted a law providing that vacancies on the Mobile County Commission would be filled by special election where at least 12 months remained on the unexpired term. This local law squarely contradicted the general law of Alabama, which provided that all vacancies on

county commissions statewide must be filled by gubernatorial appointment. See Ala. Code § 11-3-6 (1975). The United States Department of Justice precleared Mobile County's local law, notwithstanding this obvious constitutional defect.

A Mobile County voter challenged the local law, and the Supreme Court of Alabama rendered a judgment declaring it unconstitutional under Section 105 of the state constitution. *Stokes v. Noonan*, 534 So. 2d 237, 239 (Ala. 1988). In Alabama, as in other States, an unconstitutional law is void and unenforceable. See *Ex parte Southern Ry. Co.*, 556 So. 2d 1082, 1090 (Ala. 1989).

In May 2004—16 years after *Stokes v. Noonan* invalidated the Mobile County special-election scheme—the Alabama Legislature, with the Governor's approval, amended the general law relating to county commission vacancies. Under the amended statute, county commission vacancies must be filled by gubernatorial appointment “[u]nless a local law authorizes a special election.” Act No. 2004-455 (codified at Ala. Code § 11-3-6 (Supp. 2004)). The Justice Department precleared this 2004 amendment.

Mobile County did not adopt a new local law, however, before the next vacancy arose on its county commission. In October 2005, Sam Jones, an African-American who had been elected (and then appointed) to the commission left his seat to become mayor of the City of Mobile. The appellees then sued the Governor in state court, arguing that this new vacancy should be filled by a special election, not a gubernatorial appointment. According to the appellees, the 2004 amendment *revived* the 1985 local law that had been invalidated in *Stokes v. Noonan*. The Supreme Court

of Alabama rejected this argument, holding that the 2004 amendment was prospective only and could not revive the previously-voided local law. *Riley v. Kennedy*, 928 So.2d 1013, 1017 (Ala. 2005).

Relying on this decision of the state supreme court, the Governor appointed Juan Chastang, an African-American, to fill the vacant seat on the county commission.

The appellees then filed this lawsuit, alleging that the Governor had violated Section 5 of the Voting Rights Act by acting upon the state supreme court's decisions in *Stokes v. Noonan* and *Riley v. Kennedy* without first obtaining preclearance from the Justice Department. A three-judge district court agreed, holding that (1) the unconstitutional 1985 local law was the relevant "baseline" for determining whether a voting-related change had occurred, and (2) the state supreme court's decisions in *Stokes v. Noonan* and *Riley v. Kennedy* "constituted changes that should have been precleared before they were implemented." *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006) (three-judge court).

At the court's prompting, the Governor requested preclearance of *Stokes v. Noonan* and *Riley v. Kennedy*. But the Justice Department denied his request. According to the Department, the 1985 local law requiring a special election "remains in full force and effect"—despite the fact that it was declared unconstitutional nearly 20 years ago. Because *Stokes v. Noonan* and *Riley v. Kennedy* would require filling this particular county commission seat by gubernatorial appointment rather than special election, and because this "transfer of electoral power" would "diminish the opportunity of minority voters to elect a rep-

representative of their choice to the Mobile County Commission,” the Justice Department interposed an objection to the Governor’s acting in reliance on these decisions of the state supreme court.

The Department advised the Governor that “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”—the method of selection required by the state supreme court’s rulings—“will continue to be *legally unenforceable* as a matter of federal law.” (Emphasis added.)

SUMMARY OF ARGUMENT

The decision below substantially increases the burdens placed on covered jurisdictions by Section 5, and it does so without any clear textual or historical warrant. Given the serious “federalism costs” already associated with Section 5 and the constitutional concerns raised by further judicial expansion of its scope, this Court should interpret that statute carefully to preserve some remnant of the affected States’ sovereign dignity. Specifically, because the decision below plainly infringes core federalism principles, this Court should require a clear statement of congressional intent before interpreting Section 5 to require preclearance of state courts’ interpretations of state laws affecting voting.

Congress made no such clear statement here: Consistent with the history of Section 5, the text of the statute plainly targets the *political* processes of enactment and administration, not classic judicial decision-making. The preclearance requirement should therefore be limited to those processes. And if Sec-

tion 5 is to be construed to reach *any* state court decisions, it should be reserved for those that are clearly legislative rather than judicial in character. For these reasons, the decision below should be reversed.

ARGUMENT

I. Applying Section 5 To State Courts' Interpretations Of State Law Would Impose Enormous Additional Burdens On States.

Section 5 is “one of the most extraordinary remedial provisions in an Act noted for its broad remedies.” *United States v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 141 (1978) (Stevens, J. dissenting). Because “its encroachment on state sovereignty is significant and undeniable,” Section 5 must be “interpreted with care.” *Ibid.*

A careful interpretation of Section 5 must begin with an appreciation of the significant burdens it already imposes on covered jurisdictions. The decision below only piles on additional burdens, increasing the costs of compliance for the affected States.

A. Section 5 already imposes significant burdens on covered jurisdictions.

By its terms, Section 5 requires covered jurisdictions to obtain federal administrative or judicial approval of any change in “voting qualification[s] or prerequisite[s] to voting,” and any change in “standard[s], practice[s], or procedure[s]” relating to voting. 42 U.S.C. § 1973c. To obtain federal approval of any such change in policy, a covered jurisdiction must prove a negative, namely, that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.” *Ibid.*; *City of Rome v. United States*, 446 U.S.

156, 183 n.18 (1980). Thus, as this Court noted in *Reno v. Bossier Parish School Board*, 520 U.S. 471, 480 (1997) (*Bossier Parish I*), “Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect.”

1. To carry this “difficult burden,” a covered jurisdiction must spend substantial time and resources making a case for its proposed policy changes. Justice Department regulations require the covered jurisdiction seeking administrative preclearance to submit relevant empirical data, 28 C.F.R. § 51.28, and the covered jurisdiction frequently will provide statistical analyses from experts to demonstrate that its proposed changes are not “retrogressive.” See *Georgia v. Ashcroft*, 539 U.S. 461, 472 (2003) (describing a State’s evidentiary presentation in a declaratory-judgment action under Section 5); *Beer v. United States*, 425 U.S. 130, 141 (1976) (Section 5 was intended to “insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”).

Even after the initial submission, moreover, the Attorney General may request additional information or even “conduct any investigation or other inquiry that is deemed appropriate in making a determination.” 28 C.F.R. § 51.38(a). Thus, for affected States, compliance with the preclearance procedure in the ordinary case is time-consuming and expensive.

2. These burdens have been increased by expansions of Section 5 since its enactment in 1965.

For example, the geographic coverage of Section 5 has expanded substantially since then. When the Act

was passed, Section 5 applied to only seven States plus specific counties in four more States. See *South Carolina v. Katzenbach*, 383 U.S. 301, 318 (1966). As subsequent census data relevant to the Act's coverage formula have changed, so has the reach of Section 5.¹ As a result of this expansion of Section 5, today jurisdictions in sixteen States—Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia—are wholly or partially subject to the preclearance requirement. See 28 C.F.R. Pt. 51, App. And its reach may well continue to expand as a result of future demographic changes.

Moreover, this Court has held that a covered county or municipality must obtain Federal permission before implementing state laws that might affect voting, even if the State itself is not covered under Section 5. See *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999). Thus, as the number of non-State entities subject to preclearance grows, so too will the number of States whose laws are impacted by that requirement.

¹ For a jurisdiction to be covered on a particular “coverage date,” the Attorney General must determine that the jurisdiction employed a prohibited test or device relating to voter qualification on November 1, 1964, November 1, 1968, or November 1, 1972, and the Director of the Census must determine that fewer than 50 percent of the voting-age population in that jurisdiction was registered to vote on the coverage date or voted in the presidential election that occurred in the November that includes the coverage date. See 42 U.S.C. § 1973b(b). These determinations, moreover, are not reviewable in any court and are effective upon publication in the Federal Register. See *ibid.*

Section 5’s preclearance requirement has also seen a dramatic temporal expansion. The Congress that created Section 5 limited its life to five years. See Pub. L. 89-110, 79 Stat. 439 (1965). However, later Congresses extended the life of Section 5 by five years in 1970, see Pub. L. 91-285, 84 Stat. 314-315 (1970); by another seven years in 1975, see Pub. L. 94-73, 89 Stat. 400 (1975); by 25 years in 1982, see Pub. L. 97-205, 96 Stat. 133 (1982); and by another 25 years in 2006, see Pub. L. 109-246, 120 Stat. 580 (2006). Thus, under current law, the affected States—plus any others that may be added in the future as a result of demographic changes—must comply with the preclearance regime for at least another 25 years.

3. The temporal and geographic scope of Section 5 are (at least) matched by its broad substantive sweep. The statute requires preclearance of any “standard, practice, or procedure with respect to voting” that represents a change from prior lawful practice. 42 U.S.C. § 1973c. And this Court has stated that the phrase “standard, practice, or procedure” must be given “the broadest possible scope.” *Dougherty County, Ga. Bd. of Educ. v. White*, 439 U.S. 32, 38 (1978) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

Following this approach, courts have held that preclearance is required before a covered jurisdiction implements any change affecting, among other things, methods of selecting election judges to supervising voting on election day, see *Foreman v. Dallas County, Tex.*, 521 U.S. 979 (1979) (*per curiam*); annexation of inhabited land by a municipality, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); internal voting rules of a county political committee,

see *Fortune v. Kings County Democratic County Comm.*, 598 F. Supp. 761 (E.D.N.Y. 1984) (*per curiam*) (three-judge court); procedures relating to the mailing of ballots to absentee voters, see *Ward v. Alabama*, 31 F. Supp. 2d 968 (M.D. Ala. 1998); procedures for challenging the residency of absentee voters, see *Curtis v. Smith*, 121 F. Supp. 2d 1054 (E.D. Tex. 2000); standards governing recounts before the filing of an election contest, see *Boxx v. Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999); the number of judges elected to serve on a state appellate court, see *White v. Alabama*, 922 F. Supp. 552 (M.D. Ala. 1996); and methods by which a county selects the form of local government, see *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983).

Moreover, covered jurisdictions may be required to seek preclearance several times in connection with a single voting-related issue: "even 'an administrative effort to comply with a statute that had already received clearance' may require separate preclearance, because § 5 'reaches informal as well as formal changes.'" *Foreman*, 521 U.S. at 980 (quoting *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985)).

The Justice Department's own regulations make clear that preclearance is required for "[a]ny change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change." 28

C.F.R. § 51.12.² The Department’s regulations also establish that preclearance of a procedural change does not affect the need to obtain preclearance of substantive changes brought about pursuant to the approved procedure: “For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement.” 28 C.F.R. § 51.16.

In sum, as it is currently understood and applied, Section 5 already makes enormous demands upon affected States. The *amici* believe these existing demands should be held firmly in mind as the Court considers the additional demands imposed by the legal theory adopted by decision below.

B. The decision below would impose even greater practical and dignitary burdens on affected States.

If approved by this Court, the district court’s approach would produce additional practical problems for state courts and executives.

1. At the outset, the decision below marks yet another expansion of the substantive scope of Section 5, which necessarily increases compliance costs for covered jurisdictions. Under the district court’s approach, these jurisdictions would be required to make “innumerable submissions” to the Department of Justice (or filings in the District Court for the District of

² As Alabama’s brief explains, this regulation does not address “the status of changes resulting from orders of State courts.” Br. for Appellant 27 n.8 (citing 46 Fed. Reg. 870, 872 (Jan. 5, 1981)).

Columbia) for each statute or regulation affecting voting. *Webber v. White*, 422 F. Supp. 416, 427 (N.D. Tex. 1976). Indeed, a covered jurisdiction will have to seek approval not only for the statute or regulation initially enacted, but also for *every judicial interpretation* of the statute or regulation. It will also have to seek approval where, as here, a state court invalidates part or all of it.

Thus, as this case demonstrates, a covered State's executive will have to seek and obtain Federal approval for (1) implementation of the statute or regulation in the first instance, (2) any change in implementation pursuant to a state court's interpretation of the statute or regulation, and (3) discontinuance of implementation based on a state court's determination that the statute or regulation is invalid under state law. The number of preclearance submissions will be limited only by the number of lawsuits brought to challenge any part of a voting-related statute or regulation.

This is no mere theoretical concern. State courts frequently must determine whether state laws affecting voting comport with other requirements of state law, including state constitutional law.³ Accordingly,

³ See, e.g., *City of Grenada v. Harrelson*, 725 So. 2d 770 (Miss. 1998) (holding that a trial court could enjoin a city election involving new wards that were illegal under state law, even though new ward lines had been precleared by the Department of Justice); *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992) (holding that proposed election districts created under a precleared reapportionment plan violated the anti-gerrymandering provision of the state constitution); *Kane v. Robbins*, 556 So. 2d 1381 (Fla. 1989) (holding that a 13-year-old local law providing for nonpartisan school board elections for a particular county violated the state constitution's prohibition against "special" laws relating to certain elections); *Caddo Par-*

any State that is a covered jurisdiction, or that contains a covered jurisdiction, is likely to have a number of decisions on the books that have not yet been precleared.

To avoid expensive additional litigation, then, covered jurisdictions will have to search for *every* court decision interpreting *any* voting-related statute or regulation since Section 5 became applicable in the covered jurisdiction. If a 20-year-old precedent such as *Stokes v. Noonan* is susceptible to challenge under Section 5, then no precedent post-dating the jurisdiction's coverage date is safe. Thus, Attorneys General in affected States will have to spend additional time and resources just to identify potential targets for Section 5 challenges—even before spending the time and resources necessary to make preclearance submissions to the Justice Department. And since Section 5 has been extended again, covered jurisdictions will have to bear these additional costs for the next 25 years.

2. Not only does the decision below impose additional compliance costs, but it does so without due regard for the dignity of the States or the relationships among their branches of government.

Like the governments of many other States and the United States, Alabama's government rests on

ish School Bd. v. Board of Elections Supervisors of Caddo Parish, 384 So. 2d 448 (La. 1980) (holding that a statute requiring a local school board to reapportion its districts violated a state constitutional prohibition against local laws regulating the management of school boards); *Chenault v. Bexar County*, 782 S.W.2d 206 (Tex. 1989) (reversing an order of a county commissioners' court that allowed an unstaggered election cycle for county offices in violation of the state constitution).

the principle of separation of powers. Indeed, “[t]he Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States.” *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So.2d 204, 212 (Ala. 2005). Specifically, the Alabama Constitution provides that “the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.” Ala. Const. art. III, § 43. And the Supreme Court of Alabama has held that “[e]ach branch within [the State’s] tripartite governmental structure has distinct powers and responsibilities, and [the state] Constitution demands that these powers and responsibilities never be shared.” *Monroe v. Harco, Inc.*, 762 So. 2d 828, 831 (Ala. 2000).⁴

Virtually every other State—including all of the *amici* here—has a similar separation between the judiciary and the other branches of state government. In some States, as in Alabama, this separation of

⁴ Under this structural framework, the State’s courts are empowered to “render final judgments” and in so doing to “say what the law is.” *Ex parte Segrest*, 718 So. 2d 1, 5 (Ala. 1998); *Opinion of the Justices No. 338*, 624 So.2d 107, 109 (Ala. 1993); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Governor and the Legislature must comply with the courts’ decisions. See *Opinion of the Justices No. 338*, 624 So.2d at 110 (“It is the province and duty of the judicial branch of government to interpret the constitution and to say what the law is, and an order issued by a court of competent jurisdiction that interprets the constitution is binding upon the Legislature unless the order is stayed or overturned by a higher court”).

powers is expressly required by the state constitution.⁵ In others, as with the United States government, the separation of powers is only implicit in the constitutional text, but well recognized in judicial opinions.⁶

This universal insistence on adherence to separation-of-powers principles should be respected in any construction of Section 5. Indeed, this Court in *Connor v. Johnson*, 402 U.S. 690 (1971), has already recognized *federal* separation-of-powers concerns in the Section 5 context, holding that orders of federal courts need not be precleared before they are implemented. See *id.* at 691. If that is true for federal courts, then surely the political branches should not hold effective veto power over traditional judicial decisions by State courts. If, in other words, “it would be strange indeed to construe § 5 of the Voting Rights Act * * * to require that actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia,” *id.* at 695 (Black, J., dissenting), it would be at least as “strange” to construe Section 5 to require that a state supreme court’s rulings on issues of state law must be approved by federal authorities before the state or local executives could rely on those rul-

⁵ *E.g.*, Ariz. Const. art. III; Fla. Const. art. II, § 3; Ga. Const. art. I, § II, ¶ III; La. Const. art. II, §§ 1-2; Mich. Const. art. III, § 2; Miss. Const. art. I, §§ 1-2; N.H. Const. Pt. 1, art. 37; N.C. Const. art. I, § 6; S.C. Const. art. I, § 8; S.D. Const. art. II; Tex. Const. art. II, § 1; Va. Const. art. III, § 1.

⁶ *E.g.*, *State of Alaska, Dep’t of Health & Social Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) (“The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution”).

ings. See *Gangemi v. Sclafani*, 506 F.2d 570, 572 (2d Cir. 1974) (“the reasoning of [*Connor*] is also applicable to a decision of a state court”).

In short, the decision below fundamentally conflicts with the reasoning of *Connor*, and that conflict should be resolved in favor of respecting the separation of powers within a State. As Justice Kennedy has explained, this Court “should be reluctant to interpret a congressional statute to deny to States the judicial independence guaranteed by their own constitutions.” *Alaska Dep’t of Environmental Conservation v. EPA*, 540 U.S. 461, 512 (2004) (*ADEC*) (Kennedy, J., dissenting).

3. Such “reluctance” is particularly appropriate here. Surely it cannot be disputed that requiring a State’s executive to ignore a decision of the state supreme court interpreting a statute or regulation in light of other state law (including state constitutional law) would fundamentally disrupt the constitutional relationships among coequal branches of state government. And this is especially unfair where the State is not a party to the lawsuit that provides the occasion for interpretation of the voting-related statute or regulation. As one court has noted, “[m]ost litigation over voting procedure in state courts involves actions by and against private litigants. The state executive and legislative branches have no control over the frequency of such suits, the questions raised therein, and the decisions reached.” *Webber*, 422 F. Supp. at 427-428. In such circumstances, “[i]t would be unrealistic to expect the state executive branch to explain and defend a decision by the state’s

judicial branch, a decision with which the other branches may even disagree.” *Id.* at 428.⁷

Even if the State’s executive did seek preclearance of a state court’s decision, the denial of preclearance would create serious governance problems. For one thing, the denial of preclearance would fundamentally compromise judicial independence. While executive and legislative decisions—*political* decisions—can be fine-tuned again and again to respond to specific objections by Federal authorities, judicial decisions are not so malleable and should not be subject to ongoing negotiation with administrative officials. Indeed, “[j]udges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings.” *ADEC*, 540 U.S. at 512 (Kennedy, J., dissenting). A state court judge should be allowed to determine whether a statute or regulation comports with the state constitution without having to look over her shoulder and attempt to predict whether the Justice Department will approve the effects of that determination.

A denial of preclearance would also compromise the executive’s ability to fulfill her constitutional duty

⁷ Even where the covered State is a party to the lawsuit, it may have little incentive to seek preclearance of the court’s ultimate decision, especially where that decision itself curtails the authority of state officials. See, e.g., *King v. Campbell*, ___ So.2d ___, 2007 WL 4216544 (Ala. Nov. 30, 2007) (striking down a previously-precleared statute allowing the Governor to appoint a circuit judge, holding that the statute violated a constitutional provision requiring election of circuit judges; in such a case the Governor would jeopardize his own appointment authority by seeking preclearance of the court’s decision).

to carry out the final decisions of state courts. If the Justice Department denies preclearance (as it did in this case), the Governor would be required to *ignore* an otherwise binding decision from the State's highest court and implement a statute or regulation that admittedly violates state law—even the state constitution. This is a startling intrusion upon *both* the historic policymaking domain of the States *and* the fundamental relationships among coequal branches of State government.

It is enough that Section 5 authorizes a Federal veto of State and local *legislation* in covered jurisdictions. This Court should not extend that power to reach state courts' interpretations of state law, so that Governors or local officials are required to ignore otherwise binding decisions of their States' highest courts and even, as here, to enforce state laws that have already been declared unconstitutional by the State's highest judicial authority.

II. To Minimize Constitutional Difficulties And Additional Federalism Costs, Any Further Expansion Of Section 5 Should Be Subject To A Clear Statement Rule.

The decision below does not merely impose practical burdens and dignitary harms upon covered jurisdictions. It also raises grave constitutional questions. And this Court has long recognized that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); see *Edward J. DeBar- tolo Corp. v. Florida Gulf Coast Bldg. & Constr.*

Trades Council, 485 U.S. 568, 575 (1988). And the Court has also long held that, “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989)(quotations omitted.)

The court below failed to heed these well-settled rules of statutory interpretation, and the result is a decision that significantly aggravates the long-recognized tension between Section 5 and constitutional principles of federalism. A clear-statement rule would help minimize these serious constitutional concerns and, in so doing, minimize the “federalism costs” imposed by Section 5. *Miller v. Johnson*, 515 U.S. 900, 926 (1995).

A. Section 5 already creates serious federalism costs and constitutional concerns.

This Court has long recognized the significant tension between Section 5 and traditional notions of federalism. Justice Powell observed, for example, that Section 5 “marked a radical departure from traditional notions of constitutional federalism,” *Dougherty County*, 439 U.S. at 48 (Powell, J., dissenting), and that it was “a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review,” *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting).⁸ More re-

⁸ Justice Black even argued that “the inevitable effect of any such law which forces * * * States to entreat federal authorities in far-away places for approval of local laws * * * is to create the impression that [such states] are little more than conquered

cently, this Court described Section 5 as “an extraordinary departure from the traditional course of relations between the States and the Federal Government,” which imposes significant costs on covered jurisdictions. *Presley v. Etowah County Comm’n*, 502 U.S. 491, 500-501 (1992).

Given the importance of federalism principles in our constitutional scheme, this Court has recognized that Section 5 should be interpreted in a manner that minimizes any additional federalism costs. For example, the Court in *Bossier Parish I* refused to require covered jurisdictions to prove that their proposed policies would not have a “dilutive” effect, simply because to impose that additional burden would only “increase further the *serious federalism costs* already implicated by § 5.” 520 U.S. at 480 (emphasis added). In the same way here, this Court should interpret Section 5 so as to avoid increasing these federalism costs and creating more serious constitutional concerns.

B. The decision below exacerbates constitutional concerns relating to Section 5.

There can be no doubt that the acceptance of the district court’s approach would aggravate existing federalism and constitutional concerns. For that approach expands the reach of Section 5 to state courts’ determinations of state law, and in so doing requires state executives to ignore the mandates of their own courts until the Justice Department or the District Court for the District of Columbia gives its blessing.

provinces.” *Katzenbach*, 383 U.S. at 359-360 (Black, J., concurring part and dissenting in part).

1. Under the decision below, for example, the Governor of Alabama was required to enforce a statute that the Supreme Court of Alabama had held to be unconstitutional (and therefore void) nearly 20 years earlier. Even if this result did not amount to “commandeering,” strictly defined, see *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992), the analogy is too close for constitutional comfort. And there can be no doubt that a Federal agency’s requiring a State to implement a law that its own courts have held unconstitutional and invalid represents a glaring affront to the State’s sovereign dignity. See *Alden v. Maine*, 527 U.S. 706, 715 (1999) (the States “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty”).

Even this Court—the Supreme Court of the entire United States, not just of the federal government—has long held that it must defer to a state supreme court’s interpretation of state law: “[S]tate courts are the ultimate expositors of state law,” *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); and “the views of the State’s highest court with respect to state law are binding on the federal courts,” *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*). Yet, contrary to this clear rule of constitutional law, the decision below requires a Governor to ignore his own state supreme court’s otherwise authoritative interpretation, and even to enforce a law that the state supreme court has held invalid. And it does so, not because the state law actually violates any federal law, and is therefore invalid under the Supremacy Clause, but because the Justice Department *might* conclude (but very probably will not) that it does.

2. Moreover, if Section 5 is applied to state courts' determinations of state law, the statute would create serious constitutional concerns under *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. Those decisions hold that a federal statute is not proper remedial legislation under the Fourteenth Amendment unless “[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 520.⁹

To be sure, the Court in *City of Boerne* held up the Voting Rights Act as a model of congruent and proportional remedial legislation. But that was precisely because the Act—at that time—was limited in duration and scope. *Id.* at 532-533 (noting that “limitations of this kind tend to ensure Congress’ means are proportionate to ends legitimate under § 5” of the Fourteenth Amendment). If this Court expands the scope of § 5 to include all state court interpretations of, and (as in this case) decisions about, voting-related statutes and regulations, it would be difficult to say that Section 5 remains a congruent and proportional response to any record of more recent voting-rights violations. Even more so given that the Justice Department has interposed objections to *fewer than 2 percent* of all preclearance requests submitted each year since 1983.¹⁰ See S. Rep. No.

⁹ Because Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments are coextensive, see *Lopez*, 525 U.S. at 294 n.6 (Thomas, J., dissenting), the *City of Boerne* analysis applies to Section 5.

¹⁰ During the period from 1982 through 2006, the Justice Department reviewed more than 110,000 preclearance submissions, and interposed only 754 objections—an objection rate of only .68 percent. See S. Rep. No. 109-295, at 13-14 (table). Moreover, “[s]ince 1982, six published cases have ended in a

109-295, at 13-14 (2006) (table). As one commentator has noted, “[t]here is something at least disquieting about the idea of continuing federal intervention if the grounds on which congressional action rest ‘have vanished long since, and the rule simply persists from blind imitation of the past.’” Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 Wm. & Mary L. Rev. 725, 731 (1998).

The point here is not to litigate the validity of Section 5 under *City of Boerne*, but merely to acknowledge that the expansive interpretation given by the court below raises significant constitutional concerns. Thus, even if this Court would conclude in some other case that Section 5 survives scrutiny under the *City of Boerne* analysis, the expansion of Section 5 reflected in the decision below undoubtedly pushes the statute to the outer limits of constitutionality.

C. Because further expansion of Section 5 would alter the federal-state balance, a clear statement rule is appropriate.

The Court can mitigate these constitutional difficulties by applying a “clear statement rule” in this context, holding that Section 5 cannot be applied to state courts’ determinations of state law absent a

court ruling or a consent decree finding that one of the 880 covered jurisdictions had committed unconstitutional discrimination against minority voters. The same number of cases ended in a finding that the covered jurisdictions had committed unconstitutional discrimination against white voters. During that same time period, six cases have found that a non-covered jurisdiction committed unconstitutional discrimination against minority voters.” *Id.* at 13.

clear statement from Congress that such determinations should be subject to preclearance.

Application of such a rule in this context is required by this Court's precedents. In *Will v. Michigan Department of State Police*, *supra*, for example, this Court noted the "ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." 491 U.S. at 65 (quotations omitted.) This clear-statement rule is "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991).

The Court has applied this clear-statement rule in various contexts implicating core federalism concerns. In *United States v. Bass*, 404 U.S. 336, 350 (1971), for example, the Court declined to read a federal criminal statute broadly to cover simple possession of firearms without proof of any interstate commerce, because possession was already proscribed by state law and an expansive reading of the federal statute would "dramatically intrude[] upon traditional state criminal jurisdiction." This conclusion followed from the rule that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349.

The Court followed the same approach in *Gregory v. Ashcroft*, *supra*, holding that Congress had not clearly indicated an intent to exclude appointed state judges from an exception to the Age Discrimination in

Employment Act. 501 U.S. at 470 (“In light of the ADEA’s clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included”). And in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 544-546 (2002), the Court relied on the clear-statement rule in holding that the supplemental-jurisdiction statute does not toll the statute of limitations for claims asserted against States in their own courts but later dismissed on sovereign immunity grounds.¹¹

This clear-statement rule applies not only in cases involving Congress’ own assertion of authority, but also in cases involving federal agencies’ interpretations of statutes. Thus, the Court has held that an administrative agency (such as the Justice Department) cannot apply a federal statute in a manner that “invokes the outer limits of Congress’ power” without “a clear indication that Congress intended that result.” *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001). Indeed, the Court’s concern that federal agencies should not “push the limit of congressional authority” is “heightened where the administrative interpretation alters the federal-state framework.” *Id.* at 173.

In cases involving “legislation affecting the federal balance”—such as Section 5—the requirement of

¹¹ Accord *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); cf. *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 432 (2002) (“We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation”).

clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Will*, 491 U.S. at 65; *Bass*, 404 U.S. at 349. And this is “obviously important when the underlying issue raises a serious constitutional doubt.” *Raygor*, 534 U.S. at 544 (citing *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (applying a clear-statement rule)).

As shown above, that is certainly true here. Accordingly, “[i]f, by some course of reasoning, state courts must live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon a clear instruction from Congress.” *ADEC*, 540 U.S. at 513 (Kennedy, J., dissenting).

III. Because Congress Did Not Clearly State An Intention To Require Preclearance Of State Courts’ Interpretations Of State Laws Affecting Voting, Such Decisions Should Not Be Subject To Preclearance.

The decision below should be reversed because Congress has given no clear indication that it believes the Federal government should have to approve state court decisions before state or local executives can follow those decisions. Given the constitutional difficulties raised by further expansion of Section 5, this Court should follow a more restrained approach that is both more consistent with the statutory text and confines the statute to the specific *political* harms that it was intended to remedy.

A. Neither the history nor the text of Section 5 suggests congressional intent to cover state courts' determinations of state law.

As this Court explained in *Beer*, Section 5 represents Congress' response to the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." 425 U.S. at 140 (quotations omitted). The legislative history confirms that Section 5 was intended to address "attempts by a State or political subdivision * * * to alter by statute or administrative acts voting qualifications and procedures." S. Rep. No. 89-162, pt. 3, at 24 (1965), reprinted in 1965 U.S.C.C.A.N. 2508, 2562 (emphasis added); H.R. Rep. No. 89-439, at 26 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2457-2458. Undoubtedly, then, Congress enacted Section 5 to confront "the ingenuity of those in legislative and executive positions who were bent on preventing Blacks from voting." *Webber*, 422 F. Supp. at 427 (emphasis added).

1. It is thus no surprise that the statute itself is aimed at ordinary *political* processes affecting voting. And that is why the preclearance requirement is expressly triggered only when a covered jurisdiction "enact[s] or seek[s] to administer" any change in a "standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. *Enactment* is a quintessentially legislative function, see *Black's Law Dictionary* (7th ed. 1999) ("enact" means "[t]o make into law by authoritative act; to pass"), and *administration* is the business of executive officers, see *ibid.* ("administration" means "[t]he management or performance of the executive duties of a government"). Thus, the plain

terms of Section 5 compel the conclusion that Congress did not intend to apply the preclearance requirement to state courts' interpretations of state law in specific cases—the clearest exercises of the judicial function. See *Webber*, 422 F. Supp. at 427 (“The limitation of the applicability of [Section 5] to legislative, executive, and administrative actions is self-evident from the use of these terms”).¹²

In sum, “the text of § 5 and what little legislative history there is seems to indicate that the statute was directed against the legislative and executive branches of state governments, and certainly does not indicate that it was intended to cover state court decrees.” *Williams v. Sclafani*, 444 F. Supp. 895, 904 (S.D.N.Y. 1977) (three-judge court); see also *Moldonado v. Rodriguez*, 523 F. Supp. 177, 179 (S.D.N.Y. 1981); *Eccles v. Gargiulo*, 497 F. Supp. 419, 422 (E.D.N.Y. 1980). Indeed, like their federal counterparts, state judges are sworn to uphold the federal Constitution, including the equal-protection requirement that the Voting Rights Act was designed to protect.

2. At the very least, Section 5 contains no *clear statement* of congressional intent to require Federal approval of state courts' determinations of state law,

¹² The appellees' “technical” distinction between a state court's decision and the executive's implementation of that decision (Mot. to Dismiss or Affirm 17) is meaningless. Because the judiciary relies on executive power to enforce or administer court rulings, challenging the *enforcement* of a court decision is tantamount to challenging the decision itself. As the Justice Department made clear in this case, the result of its refusal to preclear the Governor's implementation of *Stokes v. Noonan* and *Riley v. Kennedy* is that an unconstitutional state law “remains in full force and effect.”

especially state constitutional law. Here, there is no indication that Congress, in its consideration of Section 5, ever “intended to bring into issue” state courts’ determinations of state law. *Will*, 491 U.S. at 65; *Bass*, 404 U.S. at 349.

If Congress believes such determinations must be precleared before they may be relied on by other state officials, then Congress should say so expressly. Otherwise, because such an interpretation so clearly alters the federal-state balance, Section 5 should not be construed so expansively. See *supra* Section II.B.

B. At a minimum, Section 5 should not apply to state court decisions that reflect purely judicial rather than legislative decision-making.

Applying Section 5 to state courts’ decisions necessarily would increase the “federalism costs” of Section 5. If the Court nevertheless concludes that such a result is unavoidable in some circumstances, the Court should at least limit the increase by restricting application of Section 5 to state court decisions that resemble legislative or administrative policymaking.

For example, Section 5 might plausibly apply to a state court’s order drawing district lines as a result of the political branches’ failure to enact or administer constitutional policies. This Court has made clear that drawing district lines is a *legislative* function, see *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Connor v. Williams*, 404 U.S. 549, 552 n.4 (1972) (*per curiam*); *Ely v. Klahr*, 403 U.S. 108, 114 (1971); *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964),

requiring policymakers to “identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality,” *Connor v. Finch*, 431 U.S. 407, 415 (1977). And courts are permitted to perform this legislative function only “when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so.” *Wise*, 437 U.S. at 540; *Reynolds*, 377 U.S. at 586.

Where a state court must perform a quasi-“legislative task” such as redistricting or reapportionment, *Wise*, 437 U.S. at 539; *Ely*, 403 U.S. at 114, its decision could be viewed as resembling an “enactment” more than a judicial decision and thus could plausibly be subject to Section 5. See, e.g., *Branch v. Smith*, 538 U.S. 254 (2003) (considering a challenge to a state court’s congressional redistricting plan); *McDaniel v. Sanchez*, 452 U.S. 130 (1981) (Section 5 applies “whenever a covered jurisdiction submits a proposal reflecting the *policy choices* of the elected representatives of the people”) (emphasis added).¹³

By contrast, judicial decisions that simply interpret or determine the validity of an existing statute or regulation affecting voting, without prescribing any general policy or practice to be implemented or administered, are of a different kind—not akin to en-

¹³ Similarly, this Court in *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982), concluded in *dicta* that Section 5 could apply to a state court decision invalidating an election statute in part, excising the invalid portion, and directing compliance with the judicially-amended statute. While that kind of decision may approximate administration of the statute, the decisions at issue in this case—simply declaring the 1985 local law unconstitutional and holding that the 2004 amendment did not revive the unconstitutional law—bear no mark of administration or legislation.

actments or attempts at administration—and should be insulated from the preclearance requirement of Section 5.

* * * * *

If ever there was an issue of statutory interpretation that demanded application of the clear statement rule, this is it. Here, the district court's interpretation of Section 5 not only upsets the traditional balance between federal and state authority, but it also upsets the traditional separation of powers within the affected States. Because the district court's interpretation is unsupported by any clear statement of congressional intent, that interpretation should be rejected.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

BILL MCCOLLUM
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399
(850) 414-3300

HENRY D. McMASTER
Attorney General
Of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

GENE C. SCHAERR
Counsel of Record
 STEFFEN N. JOHNSON
 JEFFREY M. ANDERSON
 JOHN F. KNESS
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

Counsel for Amici Curiae

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TALIS J. GOLDBERG
Attorney General
of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-2133

JAMES D. CALDWELL
Attorney General
of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804
(225) 326-6081

KELLY A. AYOTTE
Attorney General
of New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-3658

GARY K. KING
Attorney General
of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6000

LAWRENCE E. LONG
Attorney General
of South Dakota
1302 E. Highway 14
Suite 1
Pierre, SD 57501
(605) 773-3215

BOB McDONNELL
Attorney General
of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-2071