

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 *AMICI CURIAE* OF FORMER STATE
COURT JUSTICES CHARLES FRIED AND
THOMAS R. PHILLIPS IN SUPPORT OF
APPELLANT**

H. CHRISTOPHER BARTOLOMUCCI
(Counsel of Record)
JAKE M. SHIELDS
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amici Curiae

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**STATEMENT OF INTEREST
OF *AMICI CURIAE***

Amicus the Honorable Charles Fried served as an Associate Justice of the Supreme Judicial Court of Massachusetts from 1995 to 1999.¹ He also served

¹ Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or

as the Solicitor General of the United States from 1985 to 1989. He is currently the Beneficial Professor of Law at Harvard Law School, where he teaches Constitutional Law.

Justice Fried has previously participated as *amicus curiae* in *Medellin v. Texas*, No. 06-984 (2007), *Gonzales v. Raich*, 545 U.S. 1 (2005), *Rasul v. Bush*, 542 U.S. 466 (2004), and, by invitation of the Court, *Alabama v. Shelton*, 535 U.S. 654 (2002).

Amicus the Honorable Thomas R. Phillips served as the Chief Justice of the Supreme Court of Texas from 1988 to 2004. Prior to his service on the Texas Supreme Court, he served as a civil district judge in Harris County, Texas. He is now a partner in the law firm of Baker Botts L.L.P.

Chief Justice Phillips has had first hand experience with the federalism issues presented by this case. During his tenure as Chief Justice, a three-judge federal district court held that the Texas Supreme Court's construction of a state election law in *State ex rel Angelini v. Hardberger*, 932 S.W.2d 489 (Tex. 1996), was subject to pre-clearance under Section 5 of the Voting Rights Act before that state law, as authoritatively construed by the Texas Supreme Court, could be enforced. *See LULAC of Texas v. Texas*, 995 F. Supp. 719 (W.D. Tex. 1998). Although the federal court "recogniz[ed] the potential state constitutional problems that could arise if the resulting election procedure is not pre-cleared," it dismissed these concerns because it "had little doubt that th[e] statute [as construed by the Texas

submission of the brief. The parties have consented to the filing of this brief.

Supreme Court in *Hardberger*] will be pre-cleared.” *Id.* at 726. Ultimately, a constitutional crisis was averted when the Justice Department granted pre-clearance.

As former members of state courts of last resort, *amici* possess a keen understanding of, and can speak to, the disturbing consequences of a federal rule that would require state supreme court decisions such as those at issue here – *i.e.*, decisions exercising the core function of judicial review based on general and unobjectionable principles of state constitutional law – to be “pre-cleared” by a federal executive branch official pursuant to Section 5 of the Voting Rights Act. In their view, such a rule would upset the federal-state balance struck by the Framers in the system of dual sovereignty. Such a rule would also significantly diminish the authority and dignity of state judiciaries, which are fully competent and duty-bound to uphold and apply federal law and are the final arbiters of state law matters. Section 5, in *amici*’s view, is not properly construed to impose such an alteration of the federal-state balance and intrusion upon an essential aspect of state sovereignty.

SUMMARY OF ARGUMENT

This Court has long recognized that the pre-clearance requirements of Section 5 of the Voting Rights Act significantly encroach on the sovereignty of the States. But the Court has held that, in response to the efforts by certain state legislatures and other state officials to deny the right to vote to many individuals on account of their race, Congress was justified in adopting the extreme remedy of requiring certain States to seek pre-clearance of changes to their voting laws. This was necessary to

prevent state legislatures and state executive officials, as they had done in the past, from enacting new restrictions on the right to vote in an effort to circumvent federal court rulings striking down prior restrictions that had been found to be unconstitutional or in violation of the federal civil rights laws.

This Court, however, has never affirmatively held that Section 5's pre-clearance requirement applies to the decisions of state courts, much less state court rulings exercising the core function of judicial review and applying long-standing principles of state constitutional law that do not on their face relate to the exercise of the franchise. And it should not do so here. In enacting the Voting Rights Act, Congress made no finding that state courts – in contrast to state legislatures and state executive branch officials – had sought to deny anyone the right to vote, much less sought to circumvent Congress's efforts to enforce the Fifteenth Amendment's guarantee of the franchise.

It is thus far from clear that the Congress that enacted Section 5 intended it to apply to the decisions of state courts; and even if the Congress had such an intention, it is even less clear – considering legislature's lack of findings on the matter – that Congress would have had the constitutional authority to do so. In an effort to avoid the very difficult constitutional questions that applying Section 5 to the decisions of state courts would raise, not to mention the impact that such a ruling would have on the independence of state judiciaries, this Court should apply its "clear statement rule" and hold that because Congress did not clearly state that Section 5 applies to the

decisions of state courts (and in fact seemed to suggest just the opposite), state court rulings such as the two Alabama Supreme Court decisions at issue here need not be pre-cleared before being enforced by state officials.

ARGUMENT

I. PRINCIPLES OF FEDERALISM AND SOVEREIGNTY DEMAND RESPECT FOR STATE JUDICIARIES.

A. The Constitution Creates a Governmental Structure of Dual Sovereignty.

“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Thus, “under our federal system the States possess sovereignty concurrent with that of the Federal Government.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Our federalist system of dual sovereignty is not an accident of history, but a product of the Founders’ design. As this Court has recounted, “the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers.” *New York v. United States*, 505 U.S. 144, 163 (1992). At the Constitutional Convention, the Founders debated two plans for structuring the Government: the Virginia Plan and the New Jersey Plan. *Id.* at 164. The Virginia Plan envisioned a federal model where the national government directly regulated the people. *Id.* The New Jersey Plan envisioned an all-powerful central government under which the states would serve as passive instruments of the national polity. *Id.* at 164-165.

“In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan.” *Id.* at 165. As one founding father explained, “[t]his Constitution does not attempt to coerce sovereign bodies, states, in their political capacity * * * [b]ut this legal coercion singles out the * * * individual.” *Id.* (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863)).

This Court has consistently recognized the importance of the Founders’ decision to retain the sovereignty of the States, and has gone to great pains to protect that sovereignty not only because the Founders intended for the States to retain “residuary and inviolable sovereignty,” THE FEDERALIST No. 39, at 245 (C. Rossier ed. 1961), but also because the “federalist structure of joint sovereigns * * * ensure[s] the protection of our fundamental liberties.” *Gregory*, 501 U.S. at 458; *see id.* (“a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front”).

As the Court explained in *Gregory v. Ashcroft*, a decentralized government “will be more sensitive to the diverse needs of a heterogeneous society; [will] increase[] opportunity for citizen involvement in the democratic process; [will] allow[] for more innovation and experimentation in government; and [will] make[] government more responsive by putting States in competition for a mobile citizenry.” *Id.* Consequently, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution

as the preservation of the Union and the maintenance of the National Government.’ ” *Id.* at 457 (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868)).

B. State Courts Play a Special Role in the Constitutional Scheme.

One need not agree with the Court’s decision in *Alden v. Maine*, 527 U.S. 706 (1999), to agree with the *Alden* Court’s recognition of the “special role of state courts in the constitutional design.” *Id.* at 757; *see also* *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 630 (1874) (extolling the virtues of the “independence of the State courts”). Like their federal counterparts, State courts are tasked with interpreting state legislative enactments and state constitutions, and, in a well-functioning government, serve as an important check against the political branches.

Understanding that its obligation to respect the sovereignty of state governments (and particularly state courts) is no less than that of Congress, this Court has recognized that “respect for federalism compel[s] [it] to defer to the decisions of state courts on issues of state law.” *Bush v. Gore*, 531 U.S. 98, 141 (2000) (Rehnquist, C.J., concurring); *see* *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940) (“It is fundamental that state courts be left free and unfettered * * * in interpreting their state constitutions.”); *Murdock*, 87 U.S. at 626 (“[s]tate courts are the appropriate tribunals * * * for the decision of questions arising under their local law”). “That practice reflects [the Court’s] understanding that the decisions of state courts are definitive pronouncements of the will of the States.” *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

Applying this basic principle, the Court has developed numerous doctrines designed to ensure that the decisions of state courts on state law issues are respected and that the autonomy of state judiciaries is preserved. Chief among those doctrines is this Court's refusal to entertain appeals from state courts on federal law grounds where there is an "adequate and independent state ground" on which a case was decided by the state tribunal. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); see *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The Court has explained that a "[r]espect for the independence of state courts * * * [has] been the cornerstone[] of [its] refusal to decide cases where there is an adequate and independent state ground" on which to affirm the state court judgment. *Long*, 463 U.S. at 1040; see *id.* ("[i]t is precisely because of this respect for state courts * * * that we do not wish * * * to decide issues of state law"). See also *Kansas v. Marsh*, 126 S. Ct. 2516, 2530-31 (2006) (Scalia, J., concurring) ("When state courts [decide cases] * * * on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy.") (emphasis in original).

It is this same respect for the independence of state courts and the sovereignty of the States that underlies the Court's "exhaustion doctrine" applicable in federal habeas cases where a prisoner seeks review of a state court conviction. See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("The exhaustion doctrine is principally designed to * * * prevent disruption of state judicial proceedings."); *id.* at 726 ("This is a case about federalism. It concerns the respect that federal courts owe the

States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."). *See also Williams v. Taylor*, 529 U.S. 420, 436 (2000) (recognizing that "[f]ederal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts").

The "rightful independence of state [courts]" also drives this Court's abstention doctrines. *Harrison v. NAACP*, 360 U.S. 167, 176 (1959). "[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until state courts have been afforded a reasonable opportunity to pass on them." *Id.*; *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (recognizing "a doctrine of abstention appropriate to our federal system * * * [that reflects a] scrupulous regard for the rightful independence of the state [courts]").

The Court's deference to state tribunals as having "the last word" (*Pullman*, 312 U.S. at 499) on state law issues is founded in a respect, not only for the federal system created by the Founders, but also for state jurists themselves. This Court has always assumed that "the members of [a State's] highest court have done * * * their mortal best to discharge their oath of office." *Sumner v. Mata*, 449 U.S. 539, 549 (1981). State court judges, no less than federal jurists, are tasked with protecting the rights of the citizenry and fairly applying the law. And state court judges, no less than Justice Department officials, are fully capable of ensuring, and are duty-bound to ensure, that the application of state law

will not interfere with the right to vote guaranteed by the Fifteenth Amendment. See *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (“State courts * * * are obliged to enforce federal law.”); *Hibbs v. Winn*, 542 U.S. 88, 113 (2004) (Kennedy, J., dissenting) (“state courts are qualified constitutional arbiters”).

The Constitution “recognizes and preserves the autonomy and independence of the States * * * in their * * * judicial departments.” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938). Federal “[s]upervision over * * * the judicial actions of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated by the United States. Any interference [with state courts], except as thus permitted, is an invasion of the authority of the state and, to that extent, a denial of its independence.” *Id.* at 79. As explained in the following section, the Congress that enacted Section 5 did not intend the interference sanctioned by the court below.

II. APPLYING THE SECTION 5 PRE-CLEARANCE REQUIREMENT TO STATE COURT DECISIONS WOULD RAISE SIGNIFICANT CONSTITUTIONAL QUESTIONS.

As this Court has said, certain applications of Section 5 of the Voting Rights Act can raise “serious constitutional concerns.” *Miller v. Johnson*, 515 U.S. 900, 926 (1995). “By its nature,” the Act “intrudes on state sovereignty.” *Lopez v. Monterey County*, 525 U.S. 266, 284 (1999). “Even the Department of Justice has described it as a ‘substantial departure * * * from ordinary concepts of our federal system’; its encroachment on state sovereignty is significant and undeniable.” *United States v. Board of Comm’rs of*

Sheffield, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (citation omitted); see *Presley v. Etoway County Comm'n*, 502 U.S. 491, 500-501 (1992) (recognizing that “suspension of new voting regulations pending pre-clearance was an extraordinary departure from the traditional course of relations between the States and the Federal Government”).

Section 5 provides that a covered jurisdiction that wishes to enact any “standard, practice or procedure with respect to voting different from that in force or in effect on November 1, 1964,” must first seek pre-clearance from the Attorney General of the United States or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a); *City of Rome v. United States*, 446 U.S. 156, 162-163 (1980); see *Lopez*, 525 U.S. at 269 (“States and political subdivisions are required to obtain federal pre-clearance before giving effect to changes in their voting laws.”).

From this Court’s very first consideration of the constitutionality of the Voting Rights Act it recognized that Section 5 was “an uncommon exercise of congressional power.” *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); see *City of Rome*, 446 U.S. at 200 (Powell, J., dissenting) (“The pre-clearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act”).

The Court, however, has “upheld § 5 as a necessary and constitutional response to some States’ ‘extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal

court decrees.’ ” *Miller*, 515 U.S. at 926 (quoting *Katzenbach*, 383 U.S. at 335).

As the Court explained in *Katzenbach*, “Congress had found that case-by-case [enforcement of civil rights laws] was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionists tactics invariably encountered in these lawsuits.” *Katzenbach*, 383 U.S. at 328. It thus chose to “shift the advantage of time and inertia from the perpetrators of the evil to its victim by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.” *Beer v. United States*, 425 U.S. 130, 140 (1976) (internal quotation marks and citations omitted).

In concluding that Congress employed a “rational means to effectuate the constitutional prohibition of racial discrimination in voting” by enacting Section 5, the *Katzenbach* Court noted that “[b]efore [adopting] the measure[] Congress explored with great care the problem of racial discrimination in voting.” *Katzenbach*, 383 U.S. at 308, 324. The legislative record amply demonstrated that state legislatures from the covered states, as well as many state and local executive branch officials, had engaged in a “widespread ‘pattern or practice’ ” of discrimination. *Id.* at 312. This included the enactment by state legislatures of discriminatory laws designed to disenfranchise black voters, as well as the discriminatory enforcement by state officials of otherwise valid laws that were designed to achieve the same unconstitutional result. *See id.* at 309-315.

Ultimately, the *Katzenbach* Court concluded that Congress’s extraordinary intrusion on state

sovereignty was justified in order to combat the efforts of state legislatures and state officials to deny the franchise and evade the enforcement of federal civil rights law. *See id.* at 334-335.² In other words, the harm identified by Congress justified the remedy it chose to address that harm. *See City of Rome*, 446 U.S. at 202 (Powell, J., dissenting) (explaining that Section 5 “like any remedial devise, [was] imposed only in response to [a particular] harm”).

Although Congress found ample evidence of discriminatory conduct by state legislatures and state executive officials, it made no such findings with respect to state courts. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 2437 (June 1, 1965) (“House Report”); S. Rep. No. 162, 89th Cong. 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 2508 (Apr. 9, 20, 21, 1965) (“Senate Report”). Nor did the *Katzenbach* Court find any evidence that state courts had engaged in tactics designed to deny the right to vote or aid other branches of state governments in their attempts to evade the enforcement of the federal civil rights laws. *See Katzenbach*, 383 U.S. at 301-336.

Rather, as the legislative history makes clear, the problem was with state legislatures and state executive officials. In explaining the purpose of

² Justice Black dissented. *See Katzenbach*, 383 U.S. at 355 (Black, J., dissenting). Although finding most of the Voting Rights Act’s remedial provisions constitutional, he concluded that Section 5’s pre-clearance requirement “so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.” *Id.* at 358. Justice Black warned that the provision “approaches dangerously near to wiping the States out as useful and effective units in the government of our country.” *Id.* at 360.

Section 5, the House Report declared that “[t]his section deals with the attempts by a State or political subdivision * * * to alter *by statute or administrative acts* voting qualifications and procedures in effect on November 1, 1964.” H.R. Rep. No. 439 at 2457-58 (emphasis added); *see* S. Rep. No. 162 at 2562. Opposing the Act, some Members of Congress described Section 5 as requiring that “no new election *law, rule, regulation or resolution* of a State or subdivision thereof may be put into effect without the prior approval of a Federal Court or the Attorney General.” H.R. Rep. No. 439 at 2470 (emphasis added).

Neither the legislative history, nor the statute itself, makes any mention of Section 5’s applicability to *judicial decisions*.³ *See* 42 U.S.C. § 1973c. And for good reason. Congress made no findings that

³ *Branch v. Smith*, 538 U.S. 254 (2003), did not decide the question. The parties in *Branch* did not “no[t] dispute” that Section 5 applies to “voting changes mandated by order of a state court.” *Id.* at 262. *See also Hathorn v. Lovorn*, 457 U.S. 255, 265 (1982) (“Respondents do not dispute that the change in election procedures ordered by the Mississippi courts is subject to pre-clearance under § 5.”). This Court reserved the question of whether state court decisions having the effect of rewriting state voting laws were subject to Section 5’s pre-clearance requirements. *See Branch*, 538 U.S. at 264-265. The District Court in that case had found that pre-clearance was required for the Mississippi Supreme Court’s determination that that State’s courts had the authority to craft a redistricting plan in absence of legislative action. *Id.* at 263-264. This Court did not address that question, and instead affirmed the lower court’s decision on other grounds. *Id.* at 265. It further directed that “[t]he District Court’s alternate holding [on the state court rulings was] not to be regarded * * * as binding upon state and federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court.” *Id.* at 256-266.

state courts were engaging in discriminatory acts designed to disenfranchise voters in violation of the Fifteenth Amendment.

Without such legislative findings, Congress could not justify employing its remedial power under the Fifteenth Amendment to deny state courts the autonomy and independence guaranteed them by their special and sovereign status as the final arbiters of state law. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (requiring Congress to “identif[y] a history and pattern of unconstitutional employment discrimination by the States” to enact remedial legislation); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 64-65 (2000) (rejecting remedial legislation because “Congress never identified any pattern of * * * discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation”); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (when Congress enacts remedial legislation to enforce constitutional rights “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”).

The application of Section 5 to state court decisions thus would once again put into question the constitutionality of the Voting Rights Act.

III. UNDER THIS COURT’S CLEAR STATEMENT RULE, SECTION 5 SHOULD NOT BE CONSTRUED TO APPLY TO THE ALABAMA SUPREME COURT DECISIONS AT ISSUE HERE.

Recognizing that Congress’s decision to encroach on the sovereign rights of States is a constitutionally significant one that the national legislature does not

approach lightly, this Court has required that Congress make its intentions to do so *unmistakably clear*. See *Gregory*, 501 U.S. at 460 (“ ‘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.’ ”) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

“This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, power with which Congress does not readily interfere.” *Gregory*, 501 U.S. at 461. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (“Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce” constitutional rights).

In addition to protecting the States from unintentional intrusion on their sovereignty, “[a]pplication of the plain statement rule * * * may [also] avoid * * * potential constitutional problem[s].” *Gregory*, 501 U.S. at 464. It would plainly do so here. As explained in the previous section, applying Section 5’s pre-clearance requirements to state judicial decisions would raise serious constitutional questions with respect to the provision’s validity that have not as of yet been addressed by this Court.

Applying the plain statement rule here, Congress has come far short of clearly stating any intention to impinge the sovereignty of the States with respect to the rulings of state courts by requiring the pre-

clearance of state court decisions on state law issues before those rulings may be enforced.

To be sure, Congress plainly intended to limit the sovereignty of covered states with respect to their legislative enactments and executive branch actions that alter “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” 42 U.S.C. 1973c(a). That is clear from the plain language of the statute, *see id.* (referring to States’ attempts to “enact or seek to administer” law relating to voting); *see also Branch*, 538 U.S. at 264-265 (explaining that “[a]n ‘enactment’ is the product of legislation, not adjudication”), as well as the Act’s legislative history, which details the misdeeds of state legislatures and state executive officials with respect to denying blacks the right to vote. *See Katzenbach*, 383 U.S. at 301-336 (detailing those findings).

Nowhere in the statute’s text or its legislative history does Congress so much as mention state courts, their judicial decisions or evince any intention to extend its unprecedented encroachment of state sovereignty to the realm of state judiciaries. Nor should this Court assume that Congress intended to do so. The Congress that enacted Section 5 understood that the legislation would be subject to constitutional challenge. Anticipating such scrutiny, the House Report dedicated several pages to the task of defending the Act’s constitutionality, *see H.R. Rep. No. 439 at 2448-2551*; and many more to developing the factual record that would be needed to justify the statute’s extraordinary remedy, *see id. at 2438-2444*.

Mindful of both the impending constitutional challenges, and its limited constitutional mandate, Congress went to great lengths to limit the scope of

its remedy to the harm that it sought to address. For example, it did not impose Section 5's pre-clearance requirements on all States, but only those that had a significant history of denying the franchise and seeking to evade the enforcement of the federal civil rights laws. *See* 42 U.S.C. § 1973b(b). Similarly, Congress did not require pre-clearance of all legislative enactments and administrative decisions of covered states, but only those related to voting. *See* 42 U.S.C. 1973c(a); *see also Presley*, 502 U.S. at 502 (“changes subject to § 5 pertain only to voting”).

In the same vein, Congress did not impose Section 5's requirements on all governmental entities in the covered States, but only those that had engaged in discriminatory conduct – i.e., the political branches of government. *See* 42 U.S.C. 1973c(a). Congress did not explicitly subject state courts to Section 5.

Importantly, in this case, there is no reason to believe that the Alabama Supreme Court was engaged in the kind of malfeasance that spurred Congress to enact the Voting Rights Act in the first place. The Alabama Supreme Court was engaged in a core judicial function, namely, judicial review of state law for consistency with the state constitution. And the two state law doctrines applied by the Alabama Supreme Court here – 1) the restriction on local law exceptions to general laws, and 2) the non-retroactivity of laws absent clear legislative intent – are ones that are well-grounded in state and federal constitutional jurisprudence. *See* Ala. Const. Art. IV, § 105 (1901); *ABC Bonding Co. v. Montgomery County Sur. Comm'n*, 372 So.2d 4, 5 (Ala. 1979); 73 AM. JUR. 2D STATUTES § 7 (“State constitutions generally prohibit the enactment of special laws where general laws can be made applicable.”); 2

SUTHERLAND STATUTORY CONSTRUCTION § 40:3 (6th ed.) (similar); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998) (“Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history.”) (citations and quotations marks omitted); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (“presumption against retroactive legislation is deeply rooted in our jurisprudence”); *Dennis v. Pendley*, 518 So.2d 688, 690 (Ala. 1987).

The prohibition on special laws has been enshrined in the constitutions of no fewer than 30 states,⁴ and can be found in the National Municipal League’s Model State Constitution.⁵ “The purpose of [such] constitutional prohibitions * * * is to prevent a legislature from providing benefits or favors to

⁴ *See* Alaska Const. art. II, § 19; Ariz. Const. art. IV, § 19; Ark. Const. art. V, § 25; Cal. Const. art. IV, § 16; Colo. Const. art. V, § 25; Del. Const. art. III, § 18; Ill. Const. art. IV, § 13; Ind. Const. art. IV, § 23; Iowa Const. art. III, § 30; Kan. Const. art. II, § 17; Md. Const. art. III, § 33; Mich. Const. art. IV, § 29; Minn. Const. art. IV, § 33; Miss. Const. art. IV, § 87; Mo. Const. art. III, § 40; Mont. Const. art. V, § 26; N.D. Const. art. II, § 70; Neb. Const. art. III, § 18; Nev. Const. art. IV, § 21; N.J. Const. art. IV, § 7(9); N.M. Const. art. IV, § 24; N.Y. Const. art. III, § 17; Okla. Const. art. V, § 59; S.C. Const. art. III, § 34(.9.); S.D. Const. art. III, § 23; Tex. Const. art. III, § 56; Utah Const. art. VI, § 26; Va. Const. art. IV, § 15; W. Va. Const. art. VI, § 39; Wyo. Const. art. III, § 27.

⁵ *See* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 4.11 (6th ed. 1968) (“Special Legislation. The legislature shall pass no special or local act when a general act is or can be made applicable, and whether a general act is or can be made applicable shall be a matter for judicial determination.”) (http://texaspolitics.laits.utexas.edu/html/cons/features/0301_02/modelcons.pdf).

certain groups or localities.” 73 AM. JUR. 2D STATUTES § 7 (2d ed.); see Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws In The Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 168 (1993) (explaining that such provisions “mandate the equal treatment of those who are in similar situations”); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 861 (1991) (“Constitutional prohibitions on special laws and local laws, widely adopted during the nineteenth century, reflected a similar concern [for equality].”).⁶

In Alabama, the rule has been applied to a range of state and local laws that address such diverse topics as “licensing of professional bail agents,” see *ABC Bonding Co.* 372 So.2d at 5, “the approval of on-site wastewater disposal systems,” *State Bd. of Health v. Greater Birmingham Ass’n of Home Builders, Inc.*, 384 So.2d 1058, 1059 (Ala. 1980), “hazardous duty pay” for police officers, *Johnson v. City of Fort Payne*, 485 So.2d 1152, 1154 (Ala. 1986), and the procedures for selecting juries, see *Ellis v. Pope*, 709 So.2d 1161, 1166 (Ala. 1997).

⁶ Although numerous state constitutions contain provisions prohibiting special, local, or private laws, the precise scope of such provisions (and the judicial construction of them) varies from State to State. See 2 SUTHERLAND STATUTORY CONSTRUCTION § 40:3 (6th ed.). Furthermore, such provisions need not be rigidly applied. See, e.g., 73 AM. JUR. 2D STATUTES § 7 (2d ed.) (legislative “classification will survive special-laws constitutional challenge if it bears a reasonable and substantial relation to the object sought to be accomplished by the legislation”).

Significantly, the doctrine has also previously been applied in the context of elections. *See Kiel v. Purvis*, 510 So.2d 190, 191 (Ala. 1987) (applying doctrine to law governing distribution of “campaign material” at “polling place”); *State ex rel. Bozeman v. Hester*, 72 So.2d 61, 64 (Ala. 1954) (“local act changing the method of electing” county official); *City of Birmingham v. Norton*, 50 So.2d 754, 757 (Ala. 1950) (law “to provide for elections”). Thus, no one could reasonably conclude that the Alabama Supreme Court was applying this well-established and unobjectionable doctrine in a tortured or even novel way.

Moreover, far from being a tool of a conspiracy of the Alabama political branches to deny black voters the franchise, the two decisions at issue here have instead provided two Alabama governors the opportunity to appoint two black men to public office. Applying Section 5 here thus cannot be justified on the grounds that the rights of black voters will be vindicated. *See City of Rome*, 446 U.S. at 206 (Powell, J., dissenting) (“If there were reason to believe that today’s decision would protect the voting rights of minorities in any way, perhaps this case could be viewed as one where the Court’s ends justify dubious means.”). It will only serve to remove a duly-appointed black official from office.

Finally, the Court should be hesitant to conclude that Section 5’s pre-clearance requirements apply to state court decisions because of the role the Justice Department will play in reviewing the state court rulings. The effect of such a holding would be that “decisions by state courts would be subject to being overturned, not just by an[] agency, but by an agency established by a different sovereign.” *Alaska*

Dep't of Envtl. Conserv. v. EPA, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting). This is particularly troubling here because federal officials would be tasked with reviewing state court decisions on matters of general state constitutional law that are far afield from the rules and regulations governing voter qualifications that are the principal target of the Voter Rights Act. *See Katzenbach*, 383 U.S. at 312 (recognizing that Congress's principle concern was the "[d]iscriminatory administration of voting qualifications").

In the end, as Justice Kennedy has concluded, "[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 clear instruction from Congress." *Alaska*, 540 U.S. at 513. There is no such "clear instruction" here. The Court should hold that Section 5's pre-clearance requirement does not apply to the state court decisions at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and hold that the State of Alabama was not required to seek pre-clearance of *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1998), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005).

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
(Counsel of Record)

JAKE M. SHIELDS

HOGAN & HARTSON L.L.P.

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5810

Counsel for Amici Curiae

JANUARY 2008