No. 07-77

In the
Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

YVONNE KENNEDY, JAMES BUSKEY and WILLIAM CLARK,
Appellees.

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

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF

I. The Court Has Jurisdiction Over This Appeal.

On jurisdiction, the sole remaining dispute is whether the district court's August 2006 order was a final judgment. As the Government has correctly recognized (U.S. Br. 10–12), it was not.

Rather than respond to the points raised in our opening brief, the appellees have advanced a new argument—namely, that the district court entered a "remedy," and thus "conclusively resolved" the third prong of the coverage analysis under *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), when it "afford[ed] Alabama an opportunity to obtain preclearance." Red Br. 26. For support, the appellees cite decisions of this Court observing that when an unprecleared change has already been implemented, "it might be appropriate for the district court to afford local officials an opportunity to seek federal approval" before undoing the change. *Lopez v. Monterey County*, 519 U.S. 9, 21 (1996) (citing *Berry v. Doles*, 438 U.S. 190 (1978), and *Perkins v. Matthews*, 400 U.S. 379 (1971)).

Those decisions, though, have nothing to do with finality. They merely confirm an uncontroversial proposition—that it was "appropriate" for the district court to give the State an opportunity to preclear *Stokes v. Noonan* and *Riley v. Kennedy* before proceeding further with the case. But the fact that the district court acted *appropriately*—or even that its sensible decision to allow the State time might plausibly be described as a "remedy," Red Br. 27—does not mean that it acted *finally*. There are all kinds of appropriate remedies that do not finally resolve litigation—orders compelling discovery,

transferring cases, etc. Particularly given that the August 2006 order contemplated "revisit[ing] the issue of remedy" (J.S. App. 9a), that order's allowance of time cannot be deemed a "final" decision requiring immediate appeal.[1]

II. The Alabama Supreme Court's Decisions in *Stokes* and *Riley* Were Not Section 5 "Changes."

A. The Appellees' Efforts To Recharacterize the Case Are Unavailing.

Before getting into the particulars on the merits, we need to reset the stage briefly. The appellees seek to sidestep many of the key issues by reframing the case in two significant respects. The first of these moves mischaracterizes the question presented, and the second mischaracterizes our position.

1. The appellees first try to recast this as a routine §5 case in which the Alabama Supreme Court was, at most, only incidentally involved. They repeatedly assert that Governor Riley just "decided"—seemingly on his

[1] The appellees' amicus Lawyers' Committee asserts that this case is moot; even if Governor Riley were to prevail, it says, the district court would have no authority to reinstate Juan Chastang to his rightful position. That is incorrect. If §5 did not require preclearance of the *Stokes* and *Riley* decisions on which Chastang's appointment was based, then Chastang should never have been removed, there should never have been a special election in October 2007, and Chastang should be serving as a commissioner today. Reversal here, as the Government has explained, would nullify the district court's judgment and lead to Chastang's "reinstate[ment] to complete his term, which runs through November 2008." U.S. Br. 5 n.1. The Lawyers' Committee points to no principle of law or equity that would prevent the district court from remedying the wrong resulting from its own erroneous order.

own—to fill the commission vacancy by appointment rather than special election and, therefore, that this case is no different from any other in which a state legislature opts to replace an elected office with an appointed one. *See* Red Br. 1, 2, 15, 33, 35, 47; *accord* U.S. Br. 12.

The strategy behind that move is understandable enough. The notion that a federal executive-branch official might be empowered to veto a state court's exercise of judicial review (as opposed to a legislator's or administrator's policy choice) is what heightens the federalism concerns here and makes this §5 case so different from all that have come before it. But the appellees' recharacterization has no basis in reality. In filling the commission vacancy, Governor Riley was not choosing willy-nilly between appointments and elections. To the contrary, he was obeying the clear mandate of the Alabama Supreme Court, which had definitively held in *Stokes* (and then reconfirmed in *Riley*) that, under applicable Alabama law, vacancies on the Mobile County Commission "*shall* be filled by appointment by the Governor." Ala. Code §11-3-6 (J.A. 118) (emphasis added). Governor Riley could not have ignored that court's judgment without violating fundamental state separation-of-powers principles. *See Opinion of the Justices No. 338*, 624 So. 2d 107, 110 (Ala. 1993) (political branches are bound by "an order issued by a court of competent jurisdiction that interprets the constitution"). In the wake of *Stokes* and *Riley*, Governor Riley no more "decided" to fill the commission vacancy by appointment than the President "decides" to fill vacancies on this Court by appointment. *See* U.S. Const. Art. II, §2.

It is thus unsurprising that this case has always been about whether §5 required preclearance of the Alabama

Supreme Court's decisions. That is how the appellees argued the case to the district court. *See, e.g.*, Doc. 15, p. 2 ("Decisions of state courts modifying election procedures are 'changes' that must be submitted for preclearance."). That is how the district court decided the case. *See, e.g.*, J.S. App. 1a ("[T]his three-judge court held that two Alabama Supreme Court decisions, *Stokes v. Noonan* and *Riley v. Kennedy*, must be precleared before they can be implemented." (citations omitted)); *id.* at 3a, 4a, 5a, 6a, 7a–8a (all same). And that is how DOJ's Voting Section understood the case, too. *See, e.g.*, M.D.A. App. 3a (The district court "rul[ed] that the State of Alabama submit the two decisions for preclearance under Section 5."). In any event, whatever formalism the appellees might want to introduce now, it is clear that the *effect* of the district court's decision is to require preclearance of *Stokes* and *Riley*.

2. Having initially mischaracterized the case as having *nothing* to do with state-court decisions, the appellees then mischaracterize our position as seeking to exclude *all* state court decisions—indeed, any alteration in voting practices in which a state court is in any way "involved"—from §5's scope. *See* Red Br. 34–44.

The appellees are tilting at windmills. We are *not* asking the Court to hold that all state-court orders, no matter the circumstances, fall outside §5's scope. Nor is anyone else, for that matter. The amici States, to be sure, have urged the Court to read §5 so as not to reach "state courts' interpretations of state laws affecting voting"—at least those interpretations resulting from "purely judicial rather than legislative decision-making." States Br. 27–32. That argument has considerable force. It finds support not only in the traditional view (recently

reaffirmed by this Court) that courts declare rather than *change* the law, *see Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008), but also in the fact that it was explicitly embraced by a number of courts in the 1970s and thus arguably ratified by Congress when it reenacted §5 in 1982.[2]

But the Court needn't go even that far to decide this particular case. It need only hold, as we have argued, that at the very least, when (as here) a state court exercises *Marbury*-like judicial review to declare a previously-precleared state statute unconstitutional, it does not "change" state law within the meaning of §5 practice so as to require fresh approval. *See* Blue Br. 15, 22–23, 25, 27, 32–33, 34, 38, 41, 43.

That being so, many of the appellees' counterarguments simply evaporate. Most are aimed at their own broad-brush caricature, and do not respond to the more limited argument that we have actually made. Most conspicuous, perhaps, is the appellees' persistent suggestion that the Alabama Supreme Court's decisions in *Stokes* and *Riley* are indistinguishable from a naked "policy choice[]" by one of the political branches. Red Br. 2, 36, 51; *accord* U.S. Br. 32. While some court decrees might be so legislative in character that they could plausibly be described as pure policymaking, a state court's exercise of judicial review—at issue here—is not just politics by

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[2] *See Williams v. Sclafani*, 444 F. Supp. 895, 904 (S.D.N.Y. 1977) ("[T]he 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."); *accord Webber v. White*, 422 F. Supp. 416, 427 (N.D. Tex. 1976) (same); *Eccles v. Gargiulo*, 497 F. Supp. 419, 422 (E.D.N.Y. 1980) (same).

some other name. *See DeKalb County LP Gas v. Suburban Gas*, 729 So. 2d 270, 276 (Ala. 1998) ("[I]t is our job to say what the law is, not to say what it should be."); *see also Republican Party v. White*, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) ("There is a critical difference between the work of the judge and the work of other public officials."). And the fact that Alabama's judges are elected, rather than appointed, does not change that basic truth. *See id.* at 796 (Kennedy, J., concurring).

* * *

So this case *is* about state-court decisions. But it is not about *all* state-court decisions. The question, rather, is whether §5 can reasonably be read to cover *these* state-court decisions. The answer is no. Because extending §5 to require preclearance of *Stokes* and *Riley* would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (citation omitted), and because there is no "clear instruction from Congress" that it actually intended §5 to intrude so deeply into state judicial business, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), the district court's novel interpretation cannot stand.

B. No Source of Statutory Meaning Supports the District Court's Interpretation.

1. Section 5's text refutes the district court's interpretation.

The appellees appear, at first glance, to be hawkish on §5's text. "Both the word 'whenever' and the word 'any'" in §5, they say, "show that Congress required preclearance of *all* voting changes made by covered jurisdictions." Red Br. 35; *accord* U.S. Br. 13 (same). But the appellees' hawkishness is selective, for they ignore the balance of what §5 says.

a. The appellees fail even to mention §5's "savings clause," which states that neither administrative nor judicial preclearance "shall bar a subsequent action to enjoin enforcement" of the precleared practice. 42 U.S.C. §1973c(a). As we have explained, DOJ has interpreted that provision to authorize individuals to "'challenge [the precleared] practice under any applicable provision of *state … law*.'" Blue Br. 28–30 (citations omitted). We argued in our opening brief that "[i]t would be odd indeed" if the very sort of court decision that §5 sanctions—namely, one like *Stokes*, invalidating a precleared statute on a non-§5 ground—"was itself a 'change' that required a fresh approval." Blue Br. 27. In response, the appellees—and their amicus DOJ—have said nothing. Their silence is deafening, and it belies their assertion that we are seeking an "exemption" that Congress "did not bother to write into the statute." Red Br. 42.

b. While trumpeting §5's "plain" and "categorical" language, the appellees likewise repeatedly omit any reference to the fact that, by its terms, the statute requires preclearance of a voting practice "different from that in

force or effect on November 1, 1964." *See, e.g.*, Red Br. 2, 22, 32, 35. Here, the appellees don't so much ignore our position as they misstate it. Time and again, they caricature "the Governor's argument" as urging a per se rule "that a change is exempted from the preclearance requirement [if] it returns to a practice in place in 1964." *Id.* at 49; *accord id.* at 44, 46, 47. The appellees are attacking a straw man.

Our contention, as we have already said, is not that the Court needs to rethink prior dicta suggesting that, despite its language, §5 operates like a ratchet to subsume newly-precleared practices into a moveable baseline. *See, e.g.*, *Young v. Fordice*, 520 U.S. 273, 282 (1997) ("Regardless, none of the parties asks us to look further back in time than 1994 ...."). Perhaps in the ordinary course of business—where a legislative or administrative change is at issue—§5's text should be read to embody an unwritten "assumption" that baselines can "advance as voting practices progress[] in covered jurisdictions." U.S. Br. 16. That question is not before the Court, and we take no position on it.

This, though, is no ordinary §5 case. The question here is whether by declaring Act No. 85-237 unconstitutional and void in *Stokes* (and then declining to revive it in *Riley*), the Alabama Supreme Court "changed" state law within the meaning of §5 practice. With respect to that question, we cite the "November 1, 1964" language simply to establish these points: (1) In deciding this case—which presents new and troubling federalism issues—the Court should consult all relevant textual clues for some clear indication that Congress actually intended §5 to extend so far; and (2) §5's text *cannot* provide that clear indication with respect to *Stokes* and *Riley*, which

indisputably reaffirmed the practice (gubernatorial appointment) in place "on November 1, 1964."

2. Section 5's history and purposes undermine the district court's interpretation.

Because the district court's decision cannot be squared with a plain reading of §5's text, one might have expected the appellees to come forward with unambiguous support from §5's legislative history and underlying purposes. They haven't.

Instead, while disregarding the 1965 House and Senate Reports—both of which plainly state that §5 was intended to address changes effected by "'statute or administrative acts,'" Blue Br. 33 (citations omitted)—the appellees cite a handful of Jim-Crow-era episodes in which state judges engaged in blatantly discriminatory behavior. *See* Red Br. 4–7, 42; NAACP Br. *passim*. The point, presumably, is to show that although Congress didn't say so, it must have been motivated by a belief about "the role state courts had played in the exclusion of black citizens" (Red Br. 42) and, accordingly, that an across-the-board "exemption of state court orders" (NAACP Br. 4) would be contrary to the purposes that underlay §5. There are two problems with that line of analysis.

As an initial matter, it responds to an argument we haven't made—namely, that *all* state-court orders, of whatever stripe, fall outside §5's ambit. The cited anecdotes involve conduct that (while engaged in by judges, to be sure) bears no resemblance to the Alabama Supreme Court's decisions in *Stokes* and *Riley*. For instance, in "crafting" and "promulgat[ing]" several literacy tests during the 1950s and 1960s (Red Br. 5–6;

NAACP Br. 18–21), the Alabama Supreme Court was not even exercising a judicial function but, rather, was wielding a delegated legislative power. *Cf. Supreme Court v. Consumers Union*, 446 U.S. 719, 731 (1980) (promulgation of a state bar code, even if a "proper function of the Virginia [Supreme] Court," was not a "judicial function" but a "legislative" task). Nor do the instances in which state-court judges issued "extra-jurisdictional decrees and orders" (for instance, to "impound[]" voter-registration records) in an effort to thwart federal investigations have any bearing here. NAACP Br. 21, 23–24; Red Br. 6. Those incidents, in which renegade judges abandoned their judicial roles, shed no light on how Congress would have approached, for example, the Alabama Supreme Court's jurisdictionally-appropriate (and concededly correct) adjudication in *Stokes* that Act No. 85-237 violated a race-neutral, generally-applicable provision of the state constitution.[3]

Moreover, only two of the episodes that the appellees and their amici cite seem to have been mentioned anywhere in the legislative record—and then, only very obliquely. First, the appellees assert that "[b]oth committee reports accompanying the Voting Rights Act" denounced "the Alabama Supreme Court's [literacy] test."

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[3] The appellees' effort (Red Br. 12 n.8) to deny the race-neutrality of Alabama Constitution §105, which generally prohibits "local law[s]" that conflict with "general law[s]," is baseless. Their historical argument rests on a fundamental misunderstanding of the difference between "home rule" (*i.e.*, the power of municipalities to make their own laws) and local laws (*i.e.*, enactments of the State Legislature pertaining to matters of purely local concern). In fact, "[t]he prohibition on special laws has been enshrined in the constitutions of no fewer than 30 states," and, in Alabama specifically, "the rule has been applied to a range of state and local laws that address … diverse topics." Fried & Phillips Br. 19–20

Red Br. 6. To be sure, the reports condemned southern States' use of literacy tests. And unsurprisingly so; one of the Voting Rights Act's chief objectives—accomplished not by §5 but by §4—was to ban literacy tests outright in covered jurisdictions. But it simply is not a fair characterization of the record to suggest that Congress was in any way focused, in particular, on the Alabama Supreme Court's role in the creation of Alabama's test. Likewise, the appellees' attempt to leverage Attorney General Katzenbach's general introductory remarks "describing the activities of Alabama Circuit Judge James Hare" (Red Br. 42) into a particularized concern about state courts' exercises of judicial review falls well short. In fact, a review of Katzenbach's testimony reveals that it does not mention Hare by name or, for that matter, even use the word "judge" or "court."

In any event, reliance on these generalized references would be a most tenuous basis upon which to fix §5's meaning, in that neither "purport[s] to explain or interpret" §5 specifically. *Shannon v. United States*, 512 U.S. 573, 583 (1994). The legislative history addressing §5's meaning, in particular, confirms that the preclearance requirement does not extend to state-court decisions like *Stokes* and *Riley*. *See* Blue Br. 33-34.

3. DOJ's Section 5 regulations cannot save the district court's interpretation.

In the face of §5's text and legislative history, the appellees and their amici ask the Court to defer to a DOJ regulation, 28 C.F.R. §51.12. Their reliance is misplaced for two reasons.

First, §51.12 speaks to a question that is not presented here. That regulation states that "[a]ny change

affecting voting, even though it … returns to a prior practice or procedure … must meet the Section 5 preclearance requirement." The appellees and the Government emphasize language in the *Federal Register* indicating that §51.12 was intended to clarify that §5 covers a "voting change that returns a jurisdiction to a practice that was previously in effect (*e.g.*, to that in use on November 1, 1964)." 52 Fed. Reg. 486, 488 (1987). But even if the explanation in the *Federal Register* could be deemed dispositive of that question—and, as explained below, there is good reason to think it shouldn't be—it would resolve nothing here. The issue in this case, again, is not whether a legislative or administrative return to a 1964 coverage-date practice automatically precludes §5 scrutiny but, rather, whether a state court's exercise of judicial review to invalidate a previously-precleared statute as unconstitutional is properly understood to be a "change" within the meaning of §5 practice. With respect to *that* question, the regulations are intentionally silent: They expressly decline to address "[t]he issue of the status of changes resulting from orders of State courts." 46 Fed. Reg. 870, 872 (1981).

Second, and at any rate, the explanation on which the appellees and the Government rely renders §51.12 internally incoherent. The phrase "change affecting voting," which triggers §51.12's application, is a defined term. Specifically, it is defined to mean a practice "different from that in force or effect *on the date used to determine coverage*"—which, here, is November 1, 1964. 28 C.F.R. §51.2 (emphasis added). Thus, according to the appellees and the Government, §51.12 should be understood as follows: "Any [practice different from that in force or effect on November 1, 1964], even though it [is the same as that in use on November 1, 1964], must meet

the §5 preclearance requirement." The incomprehensibility of that reading is reason enough for refusing deference.

4. This Court's precedent provides no support for the district court's interpretation.

a. *Branch* and *Hathorn*. The Government contends that *Branch v. Smith*, 538 U.S. 254 (2003), and *Hathorn v. Lovorn*, 457 U.S. 255 (1982), "resolve the question here as a matter of *stare decisis*." U.S. Br. 15. That is incorrect. The Government's argument, like so many of the arguments in the bottom-side briefs, rests on a misunderstanding of our position as urging exclusion of *all* state court decisions from §5's ambit. U.S. Br. 9, 14, 27, 29, 31, 32.

To be sure, dicta in *Branch* and *Hathorn*[4] would seem to require preclearance of a state-court order that enforces an unprecleared legislative (or quasi-legislative) change and thus gives rise to a wholly new voting practice. But that is not what happened in this case. And because the mere "presence of a court decree does not exempt the contested change from §5," *Hathorn*, 457 U.S. at 265 n.16, those cases would likely defeat an argument that *any* "state court[] involvement" (Red Br. 33) magically immunizes a purported change from §5 scrutiny. But that is not our argument. With respect to our much narrower contention, *Branch* and *Hathorn* have little, if any, relevance.

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[4] The coverage question was not "dispute[d]" in either case. *Branch*, 538 U.S. at 262; *Hathorn*, 457 U.S. at 265. In both, "the controversy pertain[ed]" to a different issue. *Branch*, 538 U.S. at 262.

Though the appellees insist otherwise, there is a real and discernible difference between what the Alabama Supreme Court did in *Stokes* and what the Mississippi courts were doing in *Branch* and *Hathorn*. It is the difference between, on the one hand, a court exercising its core judicial "duty" to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and, on the other, a court ordering enforcement of a change that is fundamentally legislative in character. Redistricting, at issue in *Branch*, entails much more than the invalidation of an existing law; it requires a court to draw up a new electoral scheme. Accordingly, this Court has consistently described redistricting as a *legislative* task, even when undertaken by a court. Blue 43–44 (citing cases). And in *Hathorn*, both the petitioner and the Government characterized the court-ordered enforcement of an unprecleared election statute as "legislative" change. Br. for Petitioner at 6, *Hathorn*; Br. for U.S. at 11, 17–18 & nn.15–16, *Hathorn*. (When this Court said in *Hathorn* that §5 required preclearance of the "'policy choices of the elected representatives of the people,'" it was referring to the Mississippi *Legislature's* policy choices, not the Mississippi Supreme Court's. 457 U.S. at 265 n.16 (citation omitted).)

There is one final point: The appellees and the Government both quote the statement in *Branch*—as if it resolved this case—that §5 requires preclearance of "*all* voting changes" and "includes voting changes mandated by order of a state court." 538 U.S. at 262. That language, though, doesn't answer the question presented here, but rather invites it. We do not dispute that *when* a state-court order can fairly be deemed a §5 "change," it requires preclearance. The question here, however, is antecedent: *Can* the particular state-court decisions at

issue in this case fairly be deemed §5 "changes"? On that question, *Branch* and its predecessor *Hathorn*, which dealt with very different kinds of state-court orders, have no bearing.

b. *Perkins* and *Lockhart*. Both *Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), addressed the question whether an invalid state practice actually "in … effect" *on the statutory coverage date* establishes a §5 baseline, and not the textually and analytically different question whether a practice precleared *after the coverage date* remains frozen in place even after a state court has voided it on constitutional grounds. Unable or unwilling to come to grips with that distinction, the appellees simply ignore it. Their quotation from *Perkins* omits the words "on November 1, 1964" from the critical passage, and their quotation from *Lockhart* uses an ellipsis to cover over the words "on November 1, 1972." Red Br. 50.

As we have explained (Blue Br. 41), limiting *Perkins* and *Lockhart* to coverage-date baselines makes textual sense. It follows not only from the words "on November 1, 1964," but also from §5's savings clause, which states that preclearance will not protect a statute against a "subsequent action to enjoin enforcement," including, according to DOJ's own interpretation, an action based on "any applicable provision of state … law." *See supra* at 7. That clause—which by its terms applies *only* to the post-1964 preclearance regime and not to the pre-1964 coverage-date regime—authorizes state-court decisions (like *Stokes* here) invalidating previously-precleared statutes (like Act No. 85-237) on state-law grounds. Extending *Perkins* and *Lockhart* beyond coverage-date

baselines, and reading them to justify ignoring a state court's judgment that a precleared statute violates the state constitution, would unjustifiably circumscribe the savings clause's field of operation.

The appellees likewise have not met our argument that limiting *Perkins* and *Lockhart* to coverage-date baselines makes historical sense. In the years immediately surrounding §5's enactment, Congress was facing a "constantly moving" target (Blue Br. 42) as a result of States' intentional manipulation of voting laws. As the appellant in *Perkins* explained the problem, in that era "[s]udden adherence to previously ignored laws [was] a familiar discriminatory device." Br. for Appellants at 18 n.9, *Perkins*. But the historical warrant for ignoring state law no longer exists. Despite the appellees' speculation, there is no indication that, today, baselines are being "manipulated to discriminatory effect." Red Br. 50 n.25. That is particularly true when, as here, a practice's invalidity under state law has been authoritatively adjudicated by a State's highest court, thus eliminating the risk of gamesmanship.

C. The District Court's Interpretation Impermissibly Exacerbates Federalism Costs.

Seeking to avoid the rule that §5 should be interpreted so as not to "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts," *Bossier Parish*, 528 U.S. at 336, the appellees insist that the district court's interpretation does not "pose any federalism problem" that does not arise in the typical §5 case. Red Br. 51. We disagree.

1. *Nullification of state-court judgments.* This Court's §5 decisions have never sanctioned the "federal-

ism-and-separation-of-powers double-whammy" (Blue Br. 23) that the district court's decision here entails—in which a state court's exercise of judicial review is subject to the veto of a federal executive-branch official. That sort of intrusion has been altogether absent from the mine run of §5 cases, which have asked only whether DOJ can block an ordinary "policy choice" embodied in a state legislative or administrative rule. The district court's interpretation—which would for the first time permit a state court's truly judicial "judgments … [to be] revised and controuled … by an officer in the executive department," *Hayburn's Case,* 2 U.S. (2 Dall.) 409, 410 n.* (1792)—would represent a quantum expansion of §5's scope.

The appellees have offered no response at all to this point, and the Government's answer exalts form over substance. The district court's interpretation, the Government asserts, doesn't *technically* "subject[] state supreme courts to the 'insult' of having their 'authoritative determinations of state law' reviewed by employees of the federal executive branch" because DOJ doesn't *technically* "review the [state] court's interpretation of state law for correctness." U.S Br. 25. Even if the distinction the Government posits made sense on some theoretical level, it matters none in practice. Regardless of the reason DOJ gave here, the real-world effect of its review was to nullify the Alabama Supreme Court's decision in *Stokes*. The court there had held that Act No. 85-237 violated a race-neutral provision of the Alabama Constitution and was thus void; DOJ, by contrast, decreed that Act No. 85-237 "remain[ed] in full force and effect." M.D.A. App. 5a, 12a. Accordingly, despite having been binding state law for nearly 20 years, the Alabama Supreme Court's judgment in *Stokes* is no longer worth the

paper it is printed on. The well-settled doubts about an executive official's authority to countermand a federal-court judgment ought to apply doubly when a state-court judgment is at issue.

2. *Commandeering.* The appellees and the Government seek to avoid the anti-commandeering doctrine by recasting this as a straightforward preemption case—one in which a federal statute merely "'regulate[s] state activities,' rather than 'seek[s] to control or influence the manner in which States regulate private parties.'" *Reno v. Condon*, 528 U.S. 141, 150 (2000) (citation omitted). But the district court did not interpret §5 as setting a substantive *federal* standard requiring special elections. Instead, the district court interpreted §5 as requiring States to maintain and enforce *state* election practices that their own constitutions forbid. This Court has "always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States,* 505 U.S. 144, 166 (1992).

The appellees' response misses the point. The fact that a State may be forced to maintain a practice "that it would prefer to change" is, they say, "the very essence of Section 5, an essence that this Court has repeatedly reaffirmed." Red Br. 54. But this is not a case about States being made to select among a range of permissible policy "prefer[ences]." This is a case about States being made to act in ways that violate their own organic law. As we have already explained, it is one thing for §5 to require a State (as it often does) to keep in place a law "that it *does not want to have*." Blue Br. 47. It would be quite another thing if §5 were broadened to force a State "to

keep a law that the ultimate arbiter of state law has definitively determined it *cannot constitutionally have*." *Id.* The district court's interpretation, which the appellees have conceded has that effect (Red Br. 51; M.D.A. 10, 21, 23), turns up the commandeering volume substantially.

3. *Congruence and proportionality.* This Court's §5 decisions have never steered the statute into contexts in which the record before Congress established no particularized need for federal intervention—and thus into areas in which §5, as applied, might not be congruent and proportional under *City of Boerne v. Flores*, 521 U.S. 507 (1997). The appellees' anecdotal references to the discriminatory conduct of several state-court judges in the lead-up up to the Voting Rights Act's passage do not pass *Boerne* muster. As we have shown, the several episodes the appellees now cite (disgraceful though they were) are not relevant to the question actually presented in this case. *See supra* at 9-11. And, in any event, no fair reading of the legislative record could justify the inference that Congress actually grounded §5 on those episodes. *Id.* Given the absence of record evidence that state courts' exercises of judicial review, specifically, posed a serious threat to voting rights, an interpretation that stretched §5 so far would raise doubts about its as-applied constitutionality.

There is no merit to the suggestion that clear-statement and constitutional-avoidance arguments are off-limits here on the ground that the "District Court for the District of Columbia has exclusive jurisdiction over challenges to the constitutionality of Section 5." U.S. Br. 24 n.2. This case presents no such challenge, and nothing in the Voting Rights Act precludes this Court from

considering, in determining what §5 means, well-established interpretive doctrines.

D. The District Court's Interpretation Is Unworkable and Unnecessary.

1. In an attempt to argue that this case is simply §5 business as usual, the Government has pointed to evidence that certain state-court orders have, in practice, been submitted for preclearance under §5. Overwhelmingly, however, the sorts of orders to which the Government points are administrative and quasi-legislative court decrees that are well beyond the scope of the question presented here. In particular, the Government refers to state-court orders prescribing the form and content of voter-registration forms, approving annexations, formulating redistricting plans, and setting election schedules. U.S. Br. 29–30. If we were actually arguing here that §5 should be read to entail a categorical exemption for *all* state-court orders, the Government's laundry list might pack a punch. But we aren't, and so it doesn't.

A bit closer to the point, the Government cites two §5 submissions concerning "court decision[s] interpreting state law." *Id.* at 31. But those two submissions cannot overcome the fact that there have surely been scores of such decisions handed down during the last 40+ years that have *not* been submitted for federal approval. (And with good reason; there has been no basis for believing that they *needed* federal approval.) At the end of the day, the point remains that a decision by this Court subjecting state courts' ordinary exercises of judicial review to preclearance would open up a new universe of §5 liti-

gation and would dramatically increase the burdens on covered jurisdictions. *See* States Br. 12–19.

2. Nor have the appellees or their amici shown that there is a need for the district court's novel interpretation in light of the "panoply of established remedies for enjoining discriminatory voting practices." Blue Br. 50. The hypotheticals spun by the ACLU prove our point. It claims that our position would allow covered jurisdictions to "revert" to "discriminatory … system[s] of elections"—and, indeed, to "segregated polling places"—"free and clear of Section 5." ACLU Br. 18. The conclusive rejoinder is that such practices would be immediately remedied under either §2 of the Voting Rights Act, the Fourteenth Amendment, or the Fifteenth Amendment. There is simply nothing to the appellees' assertion that our position would somehow "'open[] a loophole in the statute the size of a mountain.'" Red Br. 42.

III. *Young v. Fordice* Provides an Alternative Basis for Reversal.

In our opening brief, we urged, as a stand-alone basis for reversal, that even if decisions like *Stokes* and *Riley* could sometimes be deemed §5 changes, *Stokes* and *Riley* themselves cannot be. The reason, we explained, is that under this Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997), Act No. 85-237 was never "in force or effect" because the Alabama Supreme Court voided it at the earliest possible juncture. Blue Br. 51–56. In a conclusory response, the appellees continue to seek to avoid *Young* on grounds that we have already shown do not give rise to valid distinctions—*e.g.*, that the voter-registration plan there "had not been actually enacted into law." Red Br. 51.

The Government's answer on *Young* actually makes our case. The Government *admits* that it would be inappropriate to "us[e] a procedure as a relevant baseline for measuring retrogression if that procedure were so obviously unconstitutional that it was immediately enjoined and never went into effect." U.S. Br. 23–24. This case is different, the Government says, because Act No. 85-237 was "approved by a trial court and put into effect by an election." *Id.* at 24. The Government concedes, in other words, that if the trial court in *Stokes* had invalidated Act No. 85-237 and enjoined the 1987 special election—as we now know it should have—the 1985 act would "not constitute a baseline under *Young*." *Id.* But because the trial court erroneously allowed the election to proceed, the argument goes, the 1985 act was frozen in place as a §5 baseline, and the Alabama Supreme Court's correction of the trial court's error constituted a §5 "change." That peculiar view, though, would invert the state-court hierarchy and make the trial court, rather than the Alabama Supreme Court, the ultimate arbiter of state law. *Compare* Ala. Const. Art. VI, §140(a) ("The supreme court shall be the highest court of the state ...."). Surely §5 doesn't require that.

CONCLUSION

This Court should take jurisdiction and reverse the district court's decision.

Respectfully submitted,

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