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 APPELLEES

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

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

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

Amy Howe
Kevin Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Cecil Gardner
THE GARDNER FIRM, P.C.
Post Office Drawer 3103
Mobile, AL 36652

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

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QUESTIONS PRESENTED

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

2. Whether a covered jurisdiction must seek preclearance under the Voting Rights Act before abandoning an already precleared and actually administered voting practice that a state court declares invalid under the state constitution.

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JURISDICTION

This Court's jurisdiction to hear appeals from cases arising under Section 5 of the Voting Rights Act is set forth in the statute itself. 42 U.S.C. § 1973c(a) ("Any action under this section shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court.").[1] The time limits for appeals are set by 28 U.S.C. § 2101(b), which states in pertinent part that appeals "shall be taken within thirty days from the judgment, order, or decree, appealed from, if interlocutory, and within sixty days if final."

The three-judge court entered final judgment in favor of appellees on August 18, 2006. J.S. App. 9a-10a; J.A. 3-4. Governor Riley filed his appeal seeking review of that judgment on May 18, 2007, after the district court issued an order awarding appellees postjudgment relief. J.A. 7. As explained below, this Court lacks jurisdiction to consider Governor Riley's appeal of the August 18, 2006, final judgment.

INTRODUCTION

This case arises out of Alabama Governor Bob Riley's decision to fill a vacant seat on the Mobile County Commission by gubernatorial appointment rather than by special election without first obtaining

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[1] During the course of this litigation, Section 5 was extended and amended in ways that do not alter its application here. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580.

preclearance under Section 5 of the Voting Rights Act of 1965. The Governor claims that he is excused from complying with Section 5 because his decision received the imprimatur of the Alabama Supreme Court, which held that the statute providing for special elections, although it had been precleared and actually administered in 1987, failed to comply with a state constitutional provision governing local legislation. The three-judge court properly rejected the Governor's assertion. This Court's decisions and the applicable Department of Justice regulations have consistently required that covered jurisdictions obtain preclearance of changes from election to appointment, and that covered jurisdictions seek preclearance of all changes that reflect the covered jurisdiction's policy choices, however generated. The involvement of the Alabama Supreme Court in the Governor's decision is therefore irrelevant to whether Alabama must obtain preclearance.

STATEMENT

I. The History of Section 5 and Voting Rights in Alabama

1. Section 5 of the Voting Rights Act forbids covered jurisdictions such as Alabama from "enact[ing] or seek[ing] to administer" a change to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless they first obtain preclearance from either the U.S. District Court for the District of Columbia or the Attorney General of the United

States. 42 U.S.C. 1973c(a).[2] To obtain either form of preclearance, a jurisdiction must show that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Id.*;[3] 28 C.F.R. § 51.52(a).

In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that Section 5 covers changes from election to appointment, finding that such changes can affect "[t]he power of a citizen's vote." *Id.* at 569. It noted that "[s]uch a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny." *Id.* at 570. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502 (1992), reaffirmed that changes from election to appointment are one of four paradigmatic "typologies" that require preclearance.

Allen further held that citizens whose rights are affected by an unprecleared change can bring a coverage lawsuit before a local three-judge district court, with appeal to this Court. 393 U.S. at 554-55, 560. In a coverage lawsuit, the sole questions are whether a change is covered by Section 5 and, if such

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[2] Obtaining a declaratory judgment from the U.S. District Court for the District of Columbia is the default preclearance procedure under Section 5. "The provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969).

[3] Prior to 2006, the language read "does not have the purpose and will not have the effect of denying or abridging the right to vote" on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c (2000).

a change has not been precleared, what remedy is appropriate. *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). The coverage court does not decide whether a change has a discriminatory purpose or effect; Section 5 reserves that inquiry for the U.S. District Court for the District of Columbia or for the Attorney General. *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978); *Allen*, 393 U.S. at 555-56, 558-59.

2. Congress enacted Section 5's preclearance requirement in response to the long history of racially discriminatory changes in covered jurisdictions' election practices. For a century prior to passage of the Voting Rights Act, minority voters seeking to enforce their rights under the Fourteenth and Fifteenth Amendments had fought recalcitrant state and local governments with litigation that was costly, time-consuming, and piecemeal. Even when victorious, their lawsuits often produced only ephemeral improvement, as jurisdictions sought "new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441; *see also* S. Rep. No. 97-417, p. 10 (1982); H.R. Rep. No. 109-478, p. 21 (2006) (describing how covered jurisdictions have continued to adopt new discriminatory practices and procedures when existing ones have been eliminated).

The State of Alabama was the source of many of the discriminatory circumventions Section 5 was intended to reach. *See* Brian K. Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act (2007) (describing how litigation in

Alabama contributed to particular provisions of the Act). The Alabama Supreme Court directly participated in one of the most notorious of these examples. Two years after this Court had struck down the white primary in *Smith v. Allwright*, 321 U.S. 649 (1944), Alabama enacted a literacy provision known as the Boswell Amendment. On the basis of a challenge brought by ten black citizens from Mobile, a federal court declared the amendment unconstitutional. *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), *aff'd*, 336 U.S. 933 (1949). The court found that the amendment's "main object was to restrict voting on a basis of race or color" and that it had "been arbitrarily used for the purpose of excluding Negro applicants for the franchise." *Id.* at 880.

Alabama responded to *Davis* by enacting another constitutional amendment: it retained a literacy test and delegated its content to the Alabama Supreme Court. *See United States v. Atkins*, 323 F.2d 733, 735 (5th Cir. 1963). That court responded by crafting a complicated application with difficult and sometimes unanswerable questions, as well as a supporting witness requirement. *See United States v. Penton*, 212 F. Supp. 193, 205-08 (M.D. Ala. 1962) (reprinting the test).

The Alabama Supreme Court updated the test to ensure it served its disenfranchising purpose. In 1960, after civil rights organizations began teaching applicants how to complete the form, questions were rearranged in twenty different sequences to place obstacles in the path of less well-educated black applicants. And in 1964, after several federal court decisions finding that the original test was being

administered discriminatorily, the court promulgated a new, even more exclusionary form. *See United States v. Parker*, 236 F. Supp. 511, 515 (M.D. Ala. 1964) (finding that the new test's civic knowledge section "consists of qualifications different from and more stringent than those used in registering white persons" in prior years). Both committee reports accompanying the Voting Rights Act condemned the Alabama Supreme Court's test. *See* H.R. Rep. No. 89-439, *supra*, at 2444 ("The inescapable conclusion is that these tests were not conceived as and are not designed to be bona fide qualifications in any sense, but are intended to deprive Negroes of the right to vote."); S. Rep. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2546 (describing the Alabama test as "an additional barrier to Negro registration"). Alabama abandoned the test only after the Voting Rights Act was upheld. *See* Landsberg at 196 n.53.

Like the Alabama Supreme Court, Alabama's lower courts actively participated in the disenfranchisement of black citizens. For example, then-Circuit Judge George Wallace, who later served as governor during the State's resistance to federal desegregation decrees, impounded the voter registration records of Barbour and Bullock counties in an effort to impede an investigation by the United States Commission on Civil Rights. Judge Wallace stated in response to a Commission subpoena that "[t]hey are not going to get the records. And if any agent of the Civil Rights Commission comes down here to get them, they will be locked up." Report of the U.S. Commission on Civil Rights 71 (1959).

After passage of the Voting Rights Act, Alabama state court judges continued to resist black political

participation. Several Circuit Court judges enjoined county probate judges—who were responsible for maintaining voter registration rolls—from placing on the official lists the names of citizens found qualified to vote by federal examiners appointed under Section 4 of the Act. Faced with the conflict between federal law and state court orders, the county officials "themselves invoked the jurisdiction" of the federal courts, "offer[ing] to do equity and . . . show[ing] no spirit of recalcitrance." *Reynolds v. Katzenbach*, 248 F. Supp. 593, 594 (S.D. Ala. 1965) (three-judge court). The federal court declared the state court injunctions "void, null and of no effect." *Id.*

3. Since its enactment, Section 5 has played an essential role in protecting the right to vote in Alabama. *See generally* Peyton McCrary et al., *Alabama*, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990, at 38, 47-48, 56 (Chandler Davidson & Bernard Grofman, eds. 1990) (describing the Act's role in increasing black political participation). Section 5's major contribution has been to deter covered jurisdictions from even attempting to make changes that will have a discriminatory purpose or effect. H.R. Rep. No. 109-478, p. 24 (2006). Even so, between 1982 and 2006, the Department of Justice objected to 46 of Alabama's Section 5 submissions. *See* The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, Map 5A (2006). During this period, Alabama and its jurisdictions also withdrew or otherwise modified 88 proposed voting changes after the Department requested more information during the preclearance process. Luis Fraga & Maria Ocampo, *More Information Requests and the*

Deterrent Effect of Section 5 of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 47, 61 tbl.3.3 (Ana Henderson, ed. 2007). Finally, during this period, the Department and private plaintiffs brought 22 successful coverage actions against unprecleared changes.

II. Alabama's Tradition of Local Laws, the Mobile County Commission, and Acts 85-237 and 2004-455

1. County commissions govern each of Alabama's sixty-seven counties. Historically, the composition and selection of these commissions have been determined by a combination of general and local laws. The general law appears in Chapter 3 of Title 11 of the Code of Alabama. Section 11-3-1(c) provides, *inter alia*, for commissions composed of four commissioners to be elected at large and the judge of probate, who serves as chairman. Until September 1, 2007, section 11-3-6 served as the general law governing the filling of vacancies on county commissions; it provided that such vacancies would be filled by gubernatorial appointment.[4]

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[4] Until 2004, the section stated that "in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed." Ala. Code § 11-3-6 (1975). As noted below, Act 2004-455 amended § 11-3-6 to authorize local laws to provide for the manner of filling vacancies. J.A. 118. Section 11-3-6 was repealed by Act 2007-488, § 2, and Ala. Code § 11-3-1 now addresses the filling of vacancies. Section 11-3-1(b) allows local law to dictate whether vacancies should be filled by special election or gubernatorial

Despite these general provisions, Alabama's legislature has shown a preference for local laws, and the state's history is honeycombed with laws prescribing variations from the State's general law.[5] The practice of local legislation deviating from general laws stretches back at least a century and has long been intertwined with the state's racialized politics. For example, when "the white-supremacist Democratic party" regained control of Alabama at the end of Reconstruction, "the state legislature passed a series of local laws that eliminated elections for county commission and instead gave the governor the power to appoint the commissioners. This system of gubernatorial appointment was particularly favored in black belt counties threatened with black voting majorities." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1358 (M.D. Ala. 1986).

In more recent years, local laws have often been more salutary. For example, local laws have provided for districted elections in jurisdictions with significant, geographically concentrated black populations that had been unable to elect representatives of their choice under the default at-large system.[6] While Mobile County adopted districts as the result of a federal court decree, *see infra* at 11-

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appointment. Section 11-3-1(f) makes the validation of local laws retroactive.

[5] *See* Pl.'s Trial Br., Exhibit E, Doc. No. 21-2, *Plump v. Riley*, 2008 U.S. Dist. LEXIS 4408, *amended*, 2008 U.S. Dist. LEXIS 5635 (M.D. Ala. 2008) (three-judge court) (detailing, by county and in chronological order, the hundreds of local acts passed in Alabama since 1866 regarding selection of county commissioners).

[6] *See* Exhibit E, *supra* note 5 (listing examples).

12, the local legislation at issue in this case enables voters there to be represented by a commissioner of their choice when a vacancy arises. Scores of local laws have been used, and continue to be used, throughout Alabama.

2. Mobile County is located in the southwestern corner of Alabama. Its estimated population in 2005 was 401,427, of whom 34.5 percent were black. J.A. 105. In Mobile County Commission District 1, there are 75,087 registered voters, of whom 62% are black. *Id.* at 23.

Until 1901, Mobile County's governing body was elected from single-member districts. *Brown v. Moore*, No. 75-298-P, slip op. at 6 (S.D. Ala. Mar. 2, 1977). That year, at the height of a "movement that swept the post-Reconstruction South to disenfranchise blacks," *Hunter v. Underwood*, 471 U.S. 222, 229 (1985),[7] the state legislature authorized at-large elections for five commissioners. In 1957, during the same legislative session that enacted the local law containing the notorious Tuskegee gerrymander, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960), Alabama enacted another local law that

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[7] In *Hunter*, this Court described the Alabama Constitutional Convention of 1901 as part of that movement, noting that the "zeal for white supremacy ran rampant":

> The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:
>
> > "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."

471 U.S. at 229 (quoting the official Convention proceedings).

reduced the size of the Mobile commission to three full-time members, still elected at-large but with the use of numbered places. *Brown*, slip op. at 6.

Following passage of the Voting Rights Act, black citizens in Mobile County brought suit in federal court challenging the County's at-large election scheme. In a decision from which the county did not appeal, the district court held that the use of at-large elections unconstitutionally diluted black voting strength. *Id.* at 39. It found that "discriminatory intent was present when the 1901 legislature changed from single-member districts to at-large elections." *Id.* at 20. Moreover, the court found that the state's refusal to adopt single-member districts after 1965 reflected racially discriminatory "intentional state legislative *inaction*," *id.* at 28 (emphasis in original), in that "concern . . . around how many, if any, blacks would be elected . . . prevented any effective redistricting which would result in any benefit to the black voters," *id.* at 27. In light of these findings, the court ordered the creation of three single-member districts to replace the at-large configuration. The court-ordered plan, which was supported by both parties, created one majority-black district. *Id.*, App. A at 1-3.

Once black voters in Mobile County could elect a representative of their choice to the Commission, the question of how vacancies should be filled took on new salience. In 1985, under the sponsorship of an African-American state senator from Mobile who represented a majority-black single-member district, the legislature passed Act 85-237 to ensure that any vacancies on the commission would be filled by special election and not by gubernatorial

appointment. The Department of Justice precleared the Act and it went into effect on June 17, 1985. J.A. 20.

The first vacancy arose in 1987, in the majority-black district. A voter sought to block the operation of Act 85-237 by filing suit in state court, claiming that the act's use of special elections violated the state constitution. The circuit court rejected the challenge and the election went forward, resulting in the election of Sam Jones. J.A. 27.

3. Subsequently, a divided Alabama Supreme Court interpreted article IV, § 105 of the state constitution to preclude the use of Act 85-237 given the existence of "general law" governing the filling of vacancies on county commissions.[8] *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988); J.S. App. 17a. *Stokes* relied on a prior decision, *Peddycoart v. City of*

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[8] Section 105 states that "No special, private, or local law … shall be enacted in any case which is provided by a general law." J.S. App. 18a. Contrary to the Governor's suggestion, see Brief for Appellant ("Riley Br.") at 2, the preference for general law in section 105 was not "race-neutral." *See Knight v. Alabama*, 458 F. Supp. 2d 1273, 1284-85 (N.D. Ala. 2004) (finding that the "general hostility to home rule in the 1901 Constitution … was motivated at least in part by race" in that white control at the state level served as "an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties") (internal quotation marks omitted), *aff'd*, 476 F.3d 1219 (11th Cir.), *cert. denied*, 127 S.Ct. 3014 (2007). *See generally Hunter*, 471 U.S. at 228-29 (describing the purposes of the 1901 constitutional convention).

As far as appellees can tell, the Alabama Supreme Court did not strike down a local law regulating county commissions for violating the anti-local law aspect of § 105 until Act 85-237 allowed a majority-black district to fill vacancies through special elections.

Birmingham, 354 So. 2d 808 (Ala. 1978), that had explicitly adopted a new interpretation of section 105, to be applied prospectively.[9] As a result, although the local law creating a three-member county commission for Mobile (rather than the five-member commission in the general law) remained constitutional, the local law providing for special elections did not. *See Stokes*, J.S. App. 21a-23a (Steagall, J., dissenting) (arguing that because the 1985 law had taken the form of an amendment to the 1957 local law, it should continue in force despite *Peddycoart*).

Faced with the opinion in *Stokes*, then-Governor Guy Hunt decided to return to the pre-1985 practice of gubernatorial appointment. He did not seek preclearance of his decision. J.S. App. 4a. But he nevertheless respected the will of the voters in Commission District 1, by using his asserted appointment power to select Sam Jones, the winner of the special election. *Id.* Thus, Mobile County voters had no practical reason to challenge his action under Section 5. Despite the decision in *Stokes*, the Alabama legislature did not repeal, and counties did not cease to use, myriad other election-related local laws passed before or after *Peddycoart*.

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[9] In *Peddycoart*, a case about municipal tort liability, the court held that future local acts would be "subject to all of the constitutional qualifications." 354 So. 2d at 814. By contrast, for already-enacted laws, the court announced that it would continue to "apply the rules which it has heretofore applied in similar cases," *id.*: local acts would be invalidated by general acts on the same subject only if the legislature had clearly indicated such an intention.

4. In 2004, the Alabama state legislature passed, and the Governor signed into law, a statute to remove the obstacle identified by *Stokes*. Act 2004-455 provided that vacancies on county commissions were to be filled by gubernatorial appointment "[u]nless a local law authorizes a special election." Ala. Code. § 11-3-6 (Supp. 2004); J.A. 116. Alabama obtained administrative preclearance for Act 2004-455. J.A. 21.[10]

In September 2005, Sam Jones—who had held his seat on the Commission since the special election of 1987—was elected Mayor of the City of Mobile. As a result, he vacated his seat on the Commission on October 3, 2005. J.A. 21-22.

Despite uncertainty over whether Act 2004-455 in combination with Act 85-237 required a special election to fill the vacancy, *see* Ala. Atty. Gen. Op. No. 2004-215, at 3-4 (interpreting the 2004 Act to overcome the rule announced in *Stokes*), Governor Riley announced his intention to fill the vacancy by appointment. J.S. App. 26a.

Three black voters who were also state legislators from Commission District 1 (and who are also the appellees in this case), brought suit in state court. They asserted that, in light of the 1985 and 2004

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[10] In its preclearance submission, the State said nothing to suggest that Act 2004-455 would permit only subsequently enacted local laws. Rather, it noted the problem presented by *Stokes* and simply stated that the new Act would "allow local law to provide for special elections to fill vacancies in the office of county commissioner." *See* Letter from Troy King, Attorney General, to Chief, Voting Section, Civil Rights Division, Aug. 9, 2004, at 2, ¶(o), *reprinted in* Pl.'s Trial Br., Exhibit F, Doc. No. 21-2, *Plump v. Riley*, *supra* note 5.

statutes, the vacancy was due to be filled by special election. The Circuit Court of Montgomery County agreed and ordered that a special election be held.[11]

Governor Riley appealed. J.A. 22. On appeal, the Alabama Supreme Court held that Act 2004-455 operated only prospectively and did not authorize local laws enacted prior to 2004. Thus, it held that the 2004 Act did not provide for special elections under Act 85-237. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005); J.S. App. 25a.

5. In light of this decision, on November 15, 2005, the Governor proceeded with his plan, and appointed Juan Chastang to fill the Commission vacancy. J.A. 23. He did not seek preclearance of his decision to use gubernatorial appointment. J.S. App. 5a.[12]

III. The Current Lawsuit

1. In response to Governor Riley's appointment of Chastang, appellees filed this Section 5 coverage

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[11] Acting pursuant to the Circuit Court's order, local election officials requested that the Department of Justice preclear an election schedule, which the Department did. J.A. 22.

[12] This is the last time gubernatorial appointment will be used to fill a vacancy on the Mobile County Commission. In 2006, the legislature once again provided that vacancies on the Commission should be filled by special election. *See* Ala. Act 2006-342; Mot. to Dis. or Affirm (M.D.A.) App. 1a. That Act conforms to the guidelines in *Riley* and the Department concluded it did not need to be precleared because it made no changes in the existing law. Moreover, in 2007, the Alabama legislature passed, and the Governor signed into law, yet another statute governing vacancies on county commissions that permits local laws providing for special elections. *See supra* note 4.

lawsuit in the U.S. District Court for the Middle District of Alabama on November 16, 2005. Appellees sued only Governor Riley and sought a declaratory judgment that the Governor "lack[ed] the power to appoint a person to fill a vacancy on the Mobile County Commission unless and until the defendant obtains preclearance, as required by Section 5 of the Voting Rights Act." J.A. 11. Appellees also asked for an injunction to prevent the Governor from delivering appointment papers or acting in any way to fill the vacancy by appointment. *Id.* Appellees further requested "such other relief as the premises may require," J.A. 12, as well as an award of costs and reasonable attorneys' fees. *Id.*

2. After a full hearing, a three-judge district court entered judgment for appellees, concluding that the change from special election to gubernatorial appointment was covered by Section 5. J.S. App. 3a-8a. The court followed the three-step inquiry laid out by this Court in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), which directs courts facing Section 5 coverage lawsuits to determine "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." Because the second of those issues was undisputed—the Governor admitted that he had not obtained preclearance, *see* J.A. 23—the court addressed only whether there was a covered change and, if so, what remedy was appropriate.

In answering the first question, the court "compar[ed] the new challenged practice with the baseline practice, that is, the most recent practice

that is both precleared and in force or effect." J.S. App. 6a-7a (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997), and *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990)). The court reasoned that, "[b]ecause Act No. 85-237 was the most recent precleared practice put into force and effect with the election of [Sam] Jones in 1987, it is the baseline against which we must determine if there was a change." J.S. App. 7a. It rejected Governor Riley's argument that Act 85-237 could not be the baseline because the act had later been declared unconstitutional on state-law grounds, noting that courts are "required to determine the baseline 'without regard for [its] legality under state law.'" *Id.* (quoting *Lockhart*, 460 U.S. at 133).

The court therefore held that, because the practice of gubernatorial appointment was different from the baseline, appointment marked a change that should have been precleared before it was implemented. J.S. App. 7a-8a. The court emphasized that it was "in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in [*Stokes v. Noonan* and *Riley v. Kennedy*], or that the governors acted in accordance with state law in making the appointments." *Id.* at 8a. Rather, it merely held that Section 5 requires state officials to obtain preclearance before implementing the change in state practice brought about by those decisions.

Having determined there was an unprecleared covered change, the court turned to determining the appropriate remedy. Because Governor Riley had already appointed Chastang to the Commission, an

injunction vacating his appointment would prove unduly disruptive if preclearance were easily obtainable. Accordingly, appellees had urged the district court to follow this Court's guidance in *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971), and "enter an order affording local officials an opportunity to seek federal approval." *See* Pl.'s Trial Br. at 7-8, Doc. No. 15 (Jan. 20, 2006). The court agreed, and therefore allowed the State 90 days to obtain preclearance, after which time it announced the possibility that it might "revisit" the issue of remedy. J.S. App. 9a.

The court entered judgment in favor of appellees on August 18, 2006, and directed the clerk "to enter [the judgment] on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure." J.S. App. 9a-10a. The court also ordered that costs be taxed against Governor Riley. *Id.* at 10a.

3. In light of the district court's judgment, the Governor could have appealed to this Court or filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment preclearing his use of gubernatorial appointment. *See* 42 U.S.C. § 1973c(a). Instead, the State decided to seek administrative preclearance, and it filed a submission with the Attorney General on November 9, 2006.

4. The Attorney General timely denied the State's request for preclearance on January 8, 2007. M.D.A. App. 2a-8a. Acting pursuant to his delegated

authority,[13] Assistant Attorney General Wan J. Kim determined that the State had "failed to carry its burden of proof that the change is not retrogressive." *Id.* at 6a-7a. Citing the particular circumstances of Mobile County, including its adoption of single-member districts as a remedy for unconstitutional vote dilution in *Brown*, the Department determined that "[t]he transfer of electoral power effected by [the return to gubernatorial appointment] appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission." *Id.* at 6a.

In making that determination, the Department necessarily rejected the Governor's argument that the return to gubernatorial appointment was not covered by Section 5.[14] The Department found that special election under Act 85-237 was the last precleared practice in force or effect, thus making it the last legally enforceable procedure under Section 5 and the benchmark against which changes were to be measured. M.D.A. App. 4a-5a. Because changes brought about by state court decisions are not exempt from Section 5, the Department concluded that the return to gubernatorial appointment was unenforceable. *Id.*

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[13] The Attorney General has delegated his authority to make preclearance decisions to the Assistant Attorney General, Civil Rights Division. 28 C.F.R. § 51.3.

[14] Had the Department agreed with Governor Riley's view, its regulations would have required it to return the submission "as promptly as possible" with an explanation as to why the change was not covered, making no response on the merits of the change. *See* 28 C.F.R. § 51.35.

5. Pursuant to Department regulations, the state sought reconsideration of the Department's objection. Due to the further delay this would occasion, in January 2007, five months after the district court had entered its final judgment, appellees filed a motion for further relief, asking the three-judge court to vacate Chastang's appointment and order a special election. *See* Pl.'s Motion for Further Relief, Doc. No. 35 (Jan. 10, 2007); J.A. 5. The district court denied that motion. *Id.* at 5-6.

6. The Justice Department reaffirmed its objection on March 12, 2007. M.D.A. App. 9a-19a. It noted that the State's request for reconsideration "contain[ed] no new factual information that impacts the retrogression inquiry," *id.* at 10a, and contained no new arguments which had not been addressed by either the three-judge district court, the January 8 objection letter, or both. *Id.* at 11a. Rejecting the State's argument that Act 85-237 was never in force or effect because it was later held invalid in *Stokes*, the Department found the conduct of the 1987 special election dispositive. "Indeed, no other steps could have been taken than were in fact taken to put the election method into force or effect." M.D.A. App. 13a. Citing this Court's opinion in *Branch v. Smith*, 538 U.S. 254, 262 (2003), the Department rejected the State's argument that the state courts' involvement changed the preclearance inquiry: "It is uncontroverted that a Section 5 change may be brought about by seeking to implement state court decisions." M.D.A. App. 14a. The Department further explained that its rejection was not based on any blanket policy against preclearing changes from elections to appointments; it had recently precleared such a change for an Alabama judgeship. *Id.* at 16a.

7. In light of the Justice Department's objection, and the fact that Chastang nonetheless remained in office, on March 13, 2007, appellees filed a motion asking the district court to order a special election. After full briefing, on May 1, 2007, the three-judge court vacated Chastang's appointment. J.S. App. 1a-2a. Governor Riley asked the court to stay its remedial order; the court denied his motion on May 17. J.A. 7. The following day, Governor Riley filed a notice of appeal to this Court. He did not seek a stay of the district court's remedial order from this Court.

Accordingly, Alabama conducted a special election on October 9, 2007, to fill the vacancy initially filled by Chastang. In that election, Chastang was defeated by Merceria Ludgood, who won nearly 80% of the vote.[15]

8. On November 20, 2007, this Court postponed jurisdiction to a hearing of the case on the merits. 128 S.Ct. 645.

SUMMARY OF ARGUMENT

I. Section 5 of the Voting Rights Act requires preclearance of the change in the method of filling vacancies on the Mobile County Commission from special election to gubernatorial appointment. Governor Riley contends that this change is exempt from Section 5 because it was made in response to an Alabama Supreme Court decision interpreting the state constitution. But the Governor's proposed

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

exemption is contrary to the text, logic, and history of Section 5, as well as its interpretation by this Court and the Department of Justice.

Confronted with evidence that jurisdictions such as Alabama were circumventing federal statutory and constitutional guarantees of the right to vote, Congress enacted Section 5 to require preclearance "[w]henever" a covered jurisdiction enacts or seeks to administer "any" change to a "standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c(a). Congress's categorical language was intended to cover *all* such changes, regardless of the covered jurisdiction's reason for "enact[ing] or seek[ing] to administer" them.

Thus, this Court has repeatedly held that changes from election to appointment lie at the core of Section 5. And it has also repeatedly held that the plain language of Section 5 covers changes ordered by state courts. That conclusion is reinforced by the evidence before Congress in 1965 of state judicial participation in the denial of minority voting rights, which makes it inconceivable that Congress somehow created—but did not write into the statute—the exemption the Governor seeks.

Governor Riley's fallback argument that there is "no change" because he seeks to return to the practice in effect when Section 5 went into force in 1964 is also meritless. For three decades, this Court has recognized that when a jurisdiction implements a new, precleared practice or when a federal court imposes a new practice to remedy a violation of federal law, that new practice becomes the baseline against which future changes are measured. The Department of Justice's regulations confirm that

Section 5 covers changes that "return[] to a prior practice or procedure." 28 C.F.R. § 51.12. Both the three-judge court and the Department of Justice thus properly concluded that the Section 5 baseline in this case is the practice of special elections enacted and precleared in 1985 and actually implemented in 1987. The Governor's argument that subsequent state supreme court rulings can erase that baseline, as determined by federal law, inverts the hierarchy of Article VI, § 2, under which federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

II. Although this Court should affirm the judgment of the three-judge court below if it reaches the merits, it lacks jurisdiction over Governor Riley's untimely appeal. The three-judge court issued its final judgment on August 18, 2006, but Governor Riley did not file his appeal until May 18, 2007, far outside the sixty-day jurisdictional time limit for appeals set by 28 U.S.C. § 2101(b). The 2006 judgment was final because it terminated the litigation on the merits, entered judgment in favor of appellees, and ordered precisely the form of relief this Court has commanded in cases where unprecleared changes have already been implemented—namely, allowing a jurisdiction to obtain preclearance for that change. The Governor is simply wrong to contend that the 2006 judgment was interlocutory because the court did not take the drastic step of also vacating his appointment of a commissioner to fill the seat.

The three-judge court's subsequent remedial order in 2007 vacating Governor Riley's appointment after the Department of Justice denied preclearance

did not revive the Governor's opportunity to appeal the court's 2006 coverage ruling. The 2007 order did not change the substance or in any way amend the 2006 judgment, nor was the order necessary to make the court's 2006 coverage ruling final and effective. Governor Riley's theory perversely predicates his ability to appeal on his failure to comply with the court's coverage ruling once preclearance was denied. That theory of jurisdiction is unsound and would have a deleterious effect on courts adjudicating Section 5 cases.

The Court should therefore dismiss the Governor's appeal as untimely, or alternatively, affirm the judgment of the three-judge court below.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER GOVERNOR RILEY'S UNTIMELY APPEAL OF THE DISTRICT COURT'S FINAL JUDGMENT ON THE QUESTION OF SECTION 5 COVERAGE

On August 18, 2006, the three-judge district court entered final judgment for appellees. It held that Section 5 of the Voting Rights Act required Alabama to obtain preclearance before implementing the change from special election to gubernatorial appointment. In light of this holding, it entered an appropriate remedy. Under 28 U.S.C. § 2101(b), Governor Riley had sixty days to appeal from that final judgment. He did not file his notice of appeal until May 18, 2007—a full nine months later. To be sure, this Court has jurisdiction to review the district

court's May 1, 2007, order vacating Chastang's appointment. But the Governor does not seek review of that order.[16] Instead he seeks review of the much earlier final judgment. Because the sixty-day time limit is jurisdictional, and because the finality of the district court's judgment was never suspended by postjudgment proceedings, Governor Riley's appeal is untimely and must be dismissed.

A. The District Court's August 18, 2006, Order Was a Final Judgment

A decision is final for purposes of appeal to this Court "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, Iron Mountain & S. Ry. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945).[17]

The August 18, 2006, decision did precisely that. As this Court has explained, in a Section 5 coverage lawsuit, the district court is limited to answering three questions: (i) whether the challenged practice constitutes a change covered by Section 5; (ii) whether preclearance procedures were followed; and

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[16] As the Brief *Amicus Curiae* of the Lawyers' Committee for Civil Rights Under Law explains, the Governor may have rendered this case moot on appeal by failing to obtain a stay of the district court's order removing Chastang from his seat.

[17] With respect to questions of finality, this Court has generally interpreted its own jurisdictional statutes harmoniously with those authorizing review by the courts of appeals. *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3909.

(iii) if not, what remedy is appropriate. *Lockhart*, 460 U.S. at 129 n.3. Once the court has decided these three questions, it is entitled to enter a final judgment.

The district court's August 18, 2006, order conclusively resolved each of these three questions. It held that Governor Riley's appointment of Chastang was a change covered by Section 5; that Alabama failed to obtain preclearance for that change; and that the proper remedy was to afford Alabama an opportunity to obtain preclearance. Thus, it properly entered final judgment.

Governor Riley does not dispute that the August 18, 2006, order completely resolved the first two questions in the *Lockhart* inquiry. Riley Br. at 19. Rather, he contends that since the district court allowed him to seek preclearance of the change instead of vacating his appointment of Chastang immediately, it "left the remedy issue open." *Id.*[18]

The Governor is wrong. This Court has instructed that, when a covered change has already been implemented without preclearance, the appropriate remedy is to enter an order "afford[ing] local officials an opportunity to seek federal approval." *Lopez v. Monterey County*, 519 U.S. 9, 21 (1996) (citing *Perkins v. Matthews*, 400 U.S. 379 (1971), and *Berry v. Doles*, 438 U.S. 190 (1978) (per curiam)). In *Berry v. Doles*, this Court was faced

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[18] As a factual matter, Governor Riley's contention that the August 18, 2006, order "disposed of none of [appellees'] prayers for relief" is inaccurate. *See* Riley Br. at 20. The court expressly granted appellees' prayers for declaratory judgment and costs. *See* J.S. App. 9a-10a.

with the question whether Section 5 required a three-judge court to invalidate the results of an election held pursuant to unprecleared changes. The Court concluded that the proper remedy was to

> enter an order allowing [local officials] 30 days within which to apply for approval of the . . . voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for [further relief].

Id. at 192-93. This Court's decision in *Berry* squarely resolved the "remedy" question in that case. *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985) (relying on *Berry* to describe the "appropriate remedy"). Therefore, the district court's August 18, 2006, order in this case did not "le[ave] the remedy issue open."

The three-judge court had every reason to treat its August 18, 2006, order as a final disposition. That is why, in addition to entering judgment in favor of appellees, the court awarded costs taxed against Governor Riley and directed that the judgment be docketed as final pursuant to Rule 58. J.S. App. 9a-10a. Indeed, the plain language of the judgment indicates its finality, since the prospect of any further remedy was entirely hypothetical: arising only "*if* the State fail[ed] to comply with" the order to obtain preclearance. *Id.* at 9a (emphasis added). The district court's order cannot be deemed interlocutory merely because postjudgment relief might be required in the hypothetical scenario in which (1) the State failed to either seek or obtain preclearance and (2) the Governor were nonetheless to insist on

keeping Chastang in office. Indeed, the Governor cites no authority for the proposition that the possible existence of hypothetical future eventualities that might raise questions of supplemental relief is enough to prevent entry of a final judgment or to transform an otherwise final judgment into an interlocutory order.

B. The Sixty-Day Limit of § 2101(b) is Jurisdictional and Governor Riley Therefore Cannot Now Appeal the Coverage Ruling

Under 28 U.S.C. § 2101(b), appeals must be taken from final judgments within sixty days. Appeals not taken within this period are jurisdictionally out of time. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 149 & n.24 (1980); *accord* Sup. Ct. R. 18.1 ("The time to file [an appeal] may not be extended."). Governor Riley did not file his notice of appeal within sixty days of the August 18, 2006, judgment, and appellees' postjudgment motion for further relief did not restart the clock on the Governor's appeal. Accordingly, his appeal should be dismissed.

Appellees' postjudgment motion requesting further relief did not suspend the finality of the August 18, 2006, order. It is well established that subsequent remedial orders do not revive the time for appealing an underlying final judgment.[19] "Only

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[19] *See, e.g.*, *Tyler v. City of Manhattan*, 118 F.3d 1400, 1402 n.1 (10th Cir. 1997) ("The fact that the district court may retain jurisdiction over the parties to enforce its judgment does not convert the judgment to an interlocutory order for purposes of appeal."); *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 594

when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). That did not happen here. The May 1, 2007, remedial order in no way "disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 212. The decision to vacate Chastang's appointment did not change the substance of (or in any way amend) the court's August 18, 2006, coverage ruling. It simply remedied the Governor's refusal to remove Chastang from office once the State failed to obtain preclearance for his appointment.[20]

(9th Cir. 1988) (finding appeal of supervisory remedial order untimely with respect to the underlying judgment); *Inmates of the Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196, 1199 (2d Cir. 1974) (finding underlying judgment "immune from attack" on appeal of a subsequent compliance order), *cert. denied sub nom. Hall v. Inmates of the Suffolk County Jail*, 419 U.S. 977 (1974).

[20] The cases Governor Riley cites do not support his theory of jurisdiction. In *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), this Court held that an order of partial summary judgment on liability alone that the district court itself had characterized as "interlocutory in character," 372 F. Supp. 1146, 1163 (W.D. Pa. 1974), was nonfinal.

Lucas v. Bolivar County, 756 F.2d 1230 (5th Cir. 1985), is also inapposite. *Lucas* involved a proposed redistricting plan for a county board of supervisors that was challenged by voters on various constitutional and statutory grounds. After ordering that changes be made, the district court upheld a revised redistricting plan, issued an order directing the county to

Nor was it reasonable for Governor Riley to have relied on appellees' motion for further relief to somehow revive his right to appeal. Appellees' motion was not even pending before the court until January 10, 2007, nearly three months after the time for appealing the August 18, 2006, judgment had run. *See* J.A. 5. If the Governor had wished to preserve his right to appeal the coverage ruling while seeking preclearance, he could have done so by filing a timely notice of appeal and then requesting from this Court an extension of time to file his jurisdictional statement. Had the Governor obtained the extension authorized by this Court's rules, he would have had ample time to receive a determination on the State's preclearance submission before having to litigate the coverage question in this Court.[21] Therefore, the

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submit the plan for preclearance, and retained jurisdiction for the purpose of scheduling elections under the plan once preclearance was obtained. *See id.* at 1232. The court of appeals held that since the district court would have had to revise the substance of its opinion if the Attorney General denied preclearance, its order approving the redistricting plan could not have been final. *Id.* at 1234. In this case, by contrast, the district court had no need to revisit its decision that preclearance was required after preclearance was denied.

Furthermore, in *Lucas*, the district court retained jurisdiction for the express purpose of issuing future orders that the court of appeals declined to characterize as "purely ministerial," *id.*, namely, devising a series of rules to govern the anticipated election. By contrast, in this case, the court did not announce any intention to issue future substantive orders after August 18, 2006, and indeed would never have had to do so had either preclearance been obtained or the State complied with the Department of Justice's objection.

[21] The Department of Justice must respond to a preclearance submission within sixty days. 42 U.S.C. § 1973c(a); *see* 28 C.F.R. § 51.42. After filing a Notice of Appeal,

Governor's contention that appellees' position makes "bad jurisdictional policy," Riley Br. at 22, gets the argument exactly backward.

C. Permitting Appeals Outside Section 2101(b)'s Sixty-Day Window Would Undermine Efficient and Effective Administration of Section 5

The Governor's theory of jurisdiction would create perverse incentives and waste resources for the parties involved in the Section 5 process. If coverage decisions are not considered "final" until all possible postjudgment injunctive relief is awarded, then appellate review of the coverage question may be delayed for months, even years, while jurisdictions pursue preclearance, first administratively and then judicially. If this Court were to eventually decide that Section 5 did not apply, then the judicial and administrative resources devoted to the preclearance process would have been wasted by the state's decision to hedge its bets by appealing the coverage ruling only after preclearance has been denied. Such delay undermines the effectiveness of Section 5. Requiring timely appeals of coverage rulings

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Governor Riley was entitled to seek a sixty-day extension of time to file his jurisdictional statement. *See* Sup. Ct. R. 18.3. Had he timely appealed from the August 18, 2006, order and received an extension, he would then have had until February 14, 2007, to file his jurisdictional statement, 37 days after the Justice Department denied the State's initial request for preclearance. Had the State filed its initial submission earlier, the Department might have even ruled on the State's reconsideration request by then.

embodied in final judgments by three-judge courts is therefore good policy.

Additionally, the Governor's position would encourage courts that wish to enter final judgments to be more draconian when choosing a remedy for Section 5 violations. Had the district court vacated Chastang's appointment in its August 18, 2006, order, its decision would have been final even under the Governor's approach. But such a remedy would be more disruptive to state policies and would, ironically, exacerbate the very federalism costs the Governor alleges.

Even worse, the Governor's rule would discourage covered jurisdictions from complying with coverage rulings. If the time to appeal a coverage ruling can be revived by a postjudgment remedial order, covered jurisdictions that have otherwise failed to file a timely appeal will have an incentive to restart the clock by continuing to violate Section 5 until the coverage court is impelled to order additional relief. This Court should therefore reject the Governor's interpretation.

II. SECTION 5 REQUIRES PRECLEARANCE OF THE CHANGE FROM ELECTION TO APPOINTMENT AT ISSUE IN THIS CASE

Section 5 requires Alabama to obtain preclearance before seeking to administer changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure," 42 U.S.C. § 1973c(a), regardless of which state officials decided the change should be made, why they decided to make it, or whether the change has a racially

discriminatory purpose or effect. In this case, Governor Riley decided to use gubernatorial appointment to fill the vacant seat on the Mobile County Commission. To be sure, his decision later received the imprimatur of the Alabama Supreme Court in its decision in *Riley v. Kennedy*. But the state court's involvement does not change the simple fact that Alabama is a covered jurisdiction, and it has sought to fill the vacancy on the Mobile County Commission by using a practice different from the last precleared practice in force or effect, which was special election pursuant to Act 85-237. Therefore, as the three-judge district court properly concluded, Alabama cannot implement the return to gubernatorial appointment without obtaining preclearance.

A. Section 5 Requires Preclearance of Changes from Election to Appointment

Governor Riley attempts to paint this case as involving an "unprecedented expansion" of Section 5. Riley Br. at 2. To the contrary: the three-judge court and the Department of Justice correctly resolved the coverage question in reliance entirely on decades-old precedents that this Court has squarely reaffirmed.

The Governor does not even cite this Court's seminal Section 5 decision, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). *Allen* held that when the selection of "an important county officer" is "made appointive instead of elective" the "power of a citizen's vote is affected." *Id.* at 569. "Such a change," the Court noted, "could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such

changes to scrutiny." *Id.* at 570. In *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502-03 (1992), this Court reaffirmed that changes from election to appointment remain one of four paradigmatic "typologies" that require preclearance. The Department of Justice's regulations have also consistently recognized that Section 5 covers "[a]ny change in the term of an elective office or an elected official or in the offices that are elective," including "changing from election to appointment." 28 C.F.R. § 51.13(i).

In light of *Allen*, Alabama was required to obtain preclearance before implementing Act 85-237's provision for special elections, as in fact it did. J.A. 20. In turn, the State was then required to preclear any change abandoning special elections, whether it did so because the legislature changed its mind as a matter of policy or because it concluded that the prior legislation was unconstitutional. *See infra* at 45-47 (a precleared practice becomes a new baseline). Similarly, preclearance would be required if executive officials became convinced that the special elections were a bad idea or violated the state constitution. And as we next explain, preclearance is also required if officials in a covered jurisdiction change a practice in response to or in anticipation of a state court decision.

B. The Plain Language of Section 5, as Consistently Interpreted by this Court and the Department of Justice, Creates No Exemption for Changes Approved by State Courts

Governor Riley's argument as to why preclearance is not required turns on the involvement

of the Alabama Supreme Court in his decision not to use Act 85-237. This argument, however, contravenes the plain language of Section 5 and the consistent interpretation of that language by this Court and the Department of Justice.

1. The language of Section 5 is categorical. "Whenever" a covered jurisdiction enacts or seeks to administer "any" voting practice or procedure, it must obtain preclearance. 42 U.S.C. § 1973c(a). Both the word "whenever" and the word "any" show that Congress required preclearance of *all* voting changes made by covered jurisdictions.

"When used as a conjunction, [whenever] is defined to mean, 'At any or all times that; in any or every instance which'. Either as an adverb or conjunction, the word 'whenever' cannot be defined as a restrictive word." *Hobby v. Hodges*, 215 F.2d 754, 758 (10th Cir. 1954) (quoting Webster's New International Dictionary of the English Language). Earlier this Term, this Court once again affirmed that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, No. 06-9130, slip op. at 4-5 (Jan. 22, 2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). An expansive reading of the word "any" is particularly appropriate absent any "restrictive language," *Ali*, slip op. at 5.

Both this Court and Congress have interpreted the word "any" in Section 5 to include all changes. Immediately after quoting the statutory language, this Court emphasized that "[t]he Act requires preclearance of *all* voting changes." *Branch v. Smith*, 538 U.S. at 262 (emphasis in the original). Moreover,

as this Court noted in *Dougherty County*, 439 U.S. at 38, "[h]ad Congress disagreed with this broad construction of § 5, it presumably would have clarified its intent when re-enacting the statute in 1970 and 1975." To the contrary, Congress has repeatedly reaffirmed the natural reading of "any": "Confirming" this Court's decisions, in 1975 both the Senate and House reports "stated, without qualification, that 'Section 5 of the Act requires review of *all* voting changes prior to implementation by the covered jurisdictions.'" *Dougherty County*, 439 U.S. at 39 (quoting S. Rep. No. 94-295, p. 15 (1975); H.R. Rep. No. 94-196, p. 8 (1975)) (emphasis in this Court's opinion).

In the face of this plain language, the Governor nonetheless reads Section 5 as if "whenever" means "sometimes" and "any" means "some." He would require Congress to add phrases like "without limitation" or "even if a state court approves the proposed change" in order to reach the change in this case. But given that Section 5 was intended to deal with the ingenuity of covered jurisdictions, *see supra* at 4-7, "Congress could not have chosen a more all-encompassing phrase." *Ali*, slip op. at 6. Thus, this Court can "have no reason to demand that Congress write less economically and more repetitiously." *Id.*

2. This Court's longstanding precedents reinforce the plain-language conclusion that Section 5 requires preclearance whenever a change reflects a covered jurisdiction's "policy choices," whatever the source of those choices. *Young v. Fordice*, 520 U.S. 273, 284 (1997); *see also, e.g.*, *Lopez v. Monterey County*, 519 U.S. 9, 22 (1996) (stating that preclearance is required "where a court adopts a proposal 'reflecting

the policy choices … of the people [in a covered jurisdiction]'") (ellipses and bracketed material in the original)); *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981) (preclearance is required "no matter what constraints have limited the choices available to" elected officials); *Allen*, 393 U.S. at 565 n.29 (requiring preclearance even when states make changes in an effort to comply with federal law). Thus, this Court has squarely held that Section 5 "requires preclearance of *all* voting changes, and there is no dispute that this includes voting changes mandated by order of a state court." *Branch*, 538 U.S. at 262 (emphasis in the original; internal citations omitted).

The Governor seeks to distinguish *Branch* with the puzzling assertion that a court's adoption of a redistricting plan is not a "core judicial-review function." Riley Br. at 43. But this Court has long recognized that a court's decision to craft a redistricting plan is "an appropriate and well-considered exercise of judicial power." *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964). Indeed, the dozens of federal courts that have struck down congressional, state, county, and local apportionments and then found it necessary to craft new plans when states failed to cure the constitutional violations would no doubt be surprised to learn that their acts somehow fall outside the "core judicial-review function" of protecting citizens' constitutional rights.

In any event, *Branch* itself shows why the Governor's distinction is specious. To support its holding that there was "no dispute" about the coverage of state court-mandated changes, *Branch*

cited *In re McMillin*, 642 So. 2d 1336 (Miss. 1994). *See* 538 U.S. at 262. *McMillin* concerned a chancery court order that simply enjoined an upcoming primary election. *See* 642 So. 2d at 1337. The Mississippi Supreme Court held that that order constituted a change "subject to § 5 preclearance or approval." *Id.* at 1339. Even under Governor Riley's artificial distinction, the order in *McMillin* falls on the "core judicial-review function" side of the line.

This Court's decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), further confirms that Section 5 covers changes mandated by state court decisions. *Hathorn* involved a 1964 Mississippi statute governing the selection of school board trustees. The statute contained a provision that applied only to a school district "embrac[ing] the entire county in which Highways 14 and 15 intersect." *See id.* at 258. That description applied to only one county, Winston County, and its officials originally declined to implement the county-specific provision because they believed that it "violated a state constitutional provision against local … legislation." *Id.* In 1979, however, the Mississippi Supreme Court struck the specific reference to the two highways from the statute, upholding the remaining requirement that affected school districts elect one trustee from each county supervisory district. *See Lovorn v. Hathorn*, 365 So. 2d 947 (1979). In light of the Mississippi Supreme Court's decision, the Winston County Chancery Court set out procedures to govern elections under the redacted statute, deriving various requirements from other provisions of Mississippi law. *See* 457 U.S. at 259. The chancery court then required local officials to seek preclearance of the election plan. But after the Attorney General

objected to the plan's inclusion of a runoff requirement, the Mississippi Supreme Court held that preclearance was not required and ordered the election plan into effect. *Carter v. Luke*, 399 So. 2d 1356 (Miss. 1981).

This Court reversed. It noted that the local officials "[did] not dispute that the change in election procedures ordered by the Mississippi courts is subject to preclearance under § 5," 457 U.S. at 265, and an accompanying footnote elaborated on that point, explaining that "the presence of a court decree does not exempt the contested change from § 5" because "§ 5 applies to any change 'reflecting the policy choices of the elected representatives of the people,' even if a judicial decree constrains those choices," *id.* at 265 n. 16 (quoting *McDaniel*).

Governor Riley tries to distinguish *Hathorn* by conflating the question whether changes required by a state court decision are subject to preclearance with an entirely different question—whether a particular state court decision actually effects a change. Appellees address that latter question *infra* at 49-51. But *Hathorn* squarely establishes that the answer to the first question is "yes": the fact that a covered jurisdiction makes a change because a state court has ordered it to do so does not relieve the jurisdiction of the obligation first to obtain preclearance. "The presence of a court decree does not exempt the contested change from § 5." 457 U.S. at 265 n.16.

3. The Department of Justice's response to the State's preclearance submission reinforces the district court's conclusion that Section 5 required preclearance. This Court "traditionally afford[s] substantial deference to the Attorney General's

interpretation of § 5 in light of [his or] her 'central role . . . in formulating and implementing' that section." *Lopez v. Monterey County*, 525 U.S. 266, 281 (1999) (quoting *Dougherty County*, 439 U.S. at 39); *see also NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985) ("Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference.").

Under the applicable regulations, "[t]he Attorney General will make no response on the merits" with respect to a submission that seeks preclearance for actions not within the scope of Section 5; instead, he will "notify the submitting authority of the inappropriateness of the submission." 28 C.F.R. § 51.35; *see also Perkins v. Matthews*, 400 U.S. 379, 393 (1971) (identifying three categories of submissions: those "the Department [does] not consider within the scope of § 5"; those to which it does not object; and those to which it objects as discriminatory). In this case, the Department twice rejected Alabama's suggestion that its submission involved actions outside the scope of Section 5. The Governor has provided no reason for rejecting the Department's conclusion on the question whether preclearance was *required*. As to the question whether preclearance should have been *granted*, that issue is not now properly before this Court: if Alabama wishes to obtain preclearance, it must now do so through a declaratory judgment action in the U.S. District Court for the District of Columbia. Appellees note, however, that the Department's conclusion that the change had a potentially retrogressive effect was borne out by the actual

events in this case: when given the opportunity to indicate their choice of a commissioner to represent them, the voters in District 1 decisively repudiated the Governor's selection, electing a different candidate by a margin of nearly four to one. *See supra* at 21.

C. Neither Logic nor History Supports the Governor's Proposed Exemption

1. The Governor claims that Section 5 should take into account what he sees as fundamental distinctions between state courts and all other organs of state government. *See also* Br. *Amicus Curiae* of Former State Court Justices. As an initial matter, his claim is beside the point: Congress made no such distinction. Indeed, the record before Congress shows that such a distinction would in fact have fatally undermined Section 5.

Moreover, this Court has often refused to draw such an artificial line. Particularly with respect to elected state courts (like Alabama's), the idea of the "complete separation of the judiciary from the enterprise of 'representative government' . . . . is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002);[22]

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[22] *Baldwin County v. Jenkins*, 494 So. 2d 584, 586 (Ala. 1986), illustrates this point. There, the Alabama Supreme Court acknowledged that its prior decisions had offered four "different" interpretations of Alabama Const. § 105 and that three of those interpretations would have permitted "local laws contrary to . . . general laws on the same subject"—the issue before the court in *Stokes*.

see also Chisom v. Roemer, 501 U.S. 380, 399 n.27 (1991) (recognizing in the context of the Voting Rights Act that "judges do engage in policymaking at some level").

In particular, this Court has recognized that state courts make value choices related to voting practices. For example, in *Growe v. Emison*, 507 U.S. 25, 35-36 (1993), this Court held that a federal court should have given the same weight to a state court's reapportionment plan that it would have given a plan formulated by a state legislature.

2. Given the role state courts had played in the exclusion of black citizens, *see supra* at 4-7, it is inconceivable that Congress intended to create—but did not bother to write into the statute—the exemption the Governor seeks. To have done so in 1965 would have "opened a loophole in the statute the size of a mountain." *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring). Congress knew of the danger that state courts might participate in abridging minority citizens' voting rights. Attorney General Katzenbach actually opened his testimony in support of the Act by describing the activities of Alabama Circuit Judge James Hare, who had "convicted, and punished Negroes discriminatorily, and had issued and enforced injunctions preventing Negroes from organizing and discussing their grievances" during the Selma voting rights campaign. *Voting Rights: Hearings Before Subcomm. No. 5 of the House Judiciary Comm. on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitution of the United States*, 89th Cong., 1st Sess. 8 (1965); *see also United States v. Clark*, 249 F. Supp. 720 (S.D. Ala.

1965) (three-judge court) (describing Judge Hare's activities); Br. *Amicus Curiae* of the NAACP Legal Defense Fund (discussing southern courts at the time of the 1965 Act).

3. Affirming the position taken by the district court and the Department of Justice would impose no new burden on covered jurisdictions. Covered jurisdictions have been submitting changes that have been prompted by state court decisions for decades. *See* Br. *Amicus Curiae* of the American Civil Liberties Union. Contrary to claim of several covered jurisdictions, Br. *Amicus Curiae* of Florida et al. 13, preclearance is not required for "*every judicial interpretation*." Rather, covered jurisdictions need only preclear actual changes to practices in force or effect.

4. The Governor's argument that the decisions in *Stokes* and *Riley* were race-neutral, Riley Br. at 2, has no bearing on the fact that the change from election to appointment required preclearance. "[I]n determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Dougherty County*, 439 U.S. at 42. Accordingly, in the coverage suit below, appellees were not required either to plead or to prove that the decisions were purposefully designed to abridge the voting rights of African American citizens. Nor were they required to show that following those decisions would have a retrogressive effect. The decision whether preclearance should be granted was confided by Congress not to the local federal district court or to this Court reviewing a coverage decision, but to

either the U.S. District Court for the District of Columbia or the Department of Justice. 42 U.S.C. § 1973c(a).

In any event, Alabama's own history, as well as the voluminous record before Congress from other covered jurisdictions, shows that a change from election to appointment has the *potential* for discrimination. History also reveals that this *potential* for discrimination is not somehow obviated by the involvement of a state court. This very case shows that using gubernatorial appointment rather than special election can "diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission." M.D.A. App. 6a. Thus, the district court and the Department of Justice correctly concluded that preclearance was required.

D. The District Court and the Department of Justice Properly Concluded That Special Election is the Proper Section 5 Baseline in This Case

The Governor finally argues that even if changes undertaken with the imprimatur of a state court decision require preclearance, no preclearance is required here because there was no change. He argues that because the State used gubernatorial appointment to fill such vacancies on the coverage date, November 1, 1964, that practice remains the "baseline" against which change should be measured, despite the passage, preclearance, and actual use of special elections pursuant to Act 85-237. The Governor's argument would require this Court to overturn a series of its precedents, reject the

consistent position taken by the relevant regulations, and ignore Congress's treatment of the issue.

1. This Court has long held that the appropriate baseline in a Section 5 case is measured by the practice "*in fact* 'in force or effect'" on the coverage date, *Perkins*, 400 U.S. at 395, only "[a]bsent relevant intervening changes." *Presley v. Etowah County Comm'n*, 502 U.S. at 495. The baseline changes when a jurisdiction implements a new, precleared practice or when a federal court imposes a new practice to remedy a violation of federal law.[23]

When the new practices are implemented, they "become part of the baseline standard for purposes of determining whether a State has 'enact[ed]' or is 'seek[ing] to administer' a 'practice or procedure' that is 'different' enough itself to require preclearance." *Young v. Fordice*, 520 U.S. 273, 281 (1997) (quoting *Presley*, 502 U.S. at 495). The essential question is whether the practices at issue in the coverage lawsuit are different from "those [practices] in existence before they were adopted." *Presley*, 502 U.S. at 495.

This Court has consistently used post-1964 practices as baselines. Most recently, in *Georgia v. Ashcroft*, 539 U.S. 461, 469 (2003), this Court treated the state's 1997 redistricting plan (and not the plan in effect in November 1964) as "the benchmark plan for this litigation [in which the state sought judicial preclearance] because it was in effect at the time of the 2001 redistricting effort." Similarly, in *Abrams v.*

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[23] When a federal court orders the adoption of a new practice, the practice must be precleared unless it was developed entirely by the federal court itself. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981); 28 C.F.R. § 51.18.

Johnson, 521 U.S. 74, 84-85 (1997), this Court looked to a congressional districting plan adopted in 1982 (and not the plan in effect in 1964) as the appropriate baseline for post-1990 redistricting efforts. So, too, in *Young v. Fordice*, 520 U.S. 273, 282 (1997), the Court declared it did not need to "look further back in time than 1994" under either party's theory of the case. *See also Busbee v. Smith*, 549 F. Supp. 494, 500, 516 (D.D.C. 1982) (three-judge court) (treating Georgia's precleared 1972 redistricting plan as the relevant baseline for deciding a Section 5 declaratory judgment action seeking preclearance of the 1981 plan), *aff'd*, 459 U.S. 1166 (1983).

Under the Governor's novel theory, this Court was wasting its time in *Georgia v. Ashcroft* and *Abrams*. Since Georgia had no congressional or state legislative districts in 1964 from which black voters elected candidates of their choice, there was no reason for this Court to struggle over whether the plans before it satisfied Section 5's nonretrogression standard: *any* plan would have done so. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-79 (1997) (a change that does not "*increase* the degree of discrimination" satisfies the nonretrogression standard of § 5") (quoting *Lockhart*, 460 U.S. at 134)).

"Had Congress disagreed with" this Court's treatment of baselines, "it presumably would have clarified its intent when re-enacting the statute . . ." *Dougherty County*, 439 U.S. at 38. Instead, in the 2006 amendments and extensions to the Voting Rights Act, Congress ratified the use of prior precleared practices as the appropriate baseline. *See, e.g.*, H.R. Rep. No. 109-478, p. 24 (2006) (treating the appropriate baseline for the post-2000 Georgia

congressional reapportionment as the 1997 plan); *id.* at 67 (treating the appropriate baseline for the post-1980 Georgia congressional reapportionment as the post-1970 plan).

2. Section 5 also requires preclearance of changes that revert to prior practices or procedures. The Attorney General's regulations confirm that "[a]ny change affecting voting, even though it . . . *returns to a prior practice or procedure*, . . . must meet the Section 5 preclearance requirement." 28 C.F.R. § 51.12 (emphasis added). Thus, the fact that Governor Riley sought to return to the practice in place in November 1964—gubernatorial appointment to fill vacancies on the Mobile County Commission—does not exempt his decision from the preclearance requirement.

The purpose of Section 5 requires this result. In enacting Section 5, Congress was particularly concerned with preventing states from doing away with advances minorities might make through either litigation or political action. *See, e.g.*, H.R. Rep. No. 109-478, p. 53 (2006) ("Section 5 . . . ha[s] been and continue[s] to be a shield that prevents backsliding from the gains previously won."); *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (describing the ephemeral gains from voting rights litigation that were easily erased by innovative "discriminatory devices"). If covered jurisdictions were allowed to return to prior practices without obtaining preclearance, they would be able to erase decades of progress. For example, many covered jurisdictions that used at-large elections in 1964 later adopted single-member district plans that have enabled minority voters to elect representatives of their

choice. *See* Quiet Revolution, *supra* at 54-56 (describing such changes in Alabama). Under the Governor's reading, a covered jurisdiction could return to at-large elections whenever it so chooses, without obtaining preclearance. This would place the burden on individual minority voters to challenge the abandonment of fair election systems, "shifting the advantage of time and inertia" back to the "perpetrators"—precisely what Section 5 was intended to prevent, *South Carolina v. Katzenbach*, 383 U.S. at 328. Such a result is completely inconsistent with Section 5's requirement that a change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. . . ." 42 U.S.C. § 1973c(a).

Perhaps recognizing the problems with his theory, the Governor asserts that "[t]he Court needn't tackle today the thorny question whether §5's language would preclude a state *legislature's* unprecleared return to a November 1, 1964 practice." Riley Br. at 27. But he provides no basis for this attempt at reassurance.

In any event, that question is hardly "thorny." The Attorney General addressed this very issue more than twenty years ago.[24] The Department of Justice

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[24] Governor Riley attempts to avoid 28 C.F.R. § 51.12 by quoting language from the *Federal Register* suggesting that the "the status of changes resulting from orders of State courts is not addressed" in the regulations. Riley Br. at 27 n.8 (quoting 46 Fed. Reg. 870, 872 (Jan. 5, 1981)). But the Governor is wrong on two fronts. First, the 1981 language that he quotes predates this Court's opinions in *Hathorn* and *Branch*, which both answered that question, holding that changes resulting from state court orders *are* covered by Section 5. *See supra* at 35-38. Second, the Department added the relevant language to § 51.12

"clarified § 51.12, Scope of Requirement, to make explicit that 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) is subject to the preclearance requirement." 52 Fed. Reg. 486, 488 (Jan. 6, 1987). Thus, the Governor's argument that a change is exempted from the preclearance requirement because it returns to a practice in place in 1964, is not only inconsistent with the purpose of Section 5; it directly flouts the Attorney General's longstanding construction of the Act.

3. Special elections are the baseline practice for filling vacancies on the Mobile County Commission. It is undisputed that Act 85-237, which required that vacancies on the Commission be filled through special election, was precleared. J.A. 20. It is also undisputed that an election was actually conducted in 1987 pursuant to Act 85-237, and that Sam Jones occupied a seat on the Mobile County Commission as a result of that election. J.A. 27. These events make clear that special elections were "the system actually in effect," *Lockhart*, 460 U.S. at 132, and therefore that special elections are the baseline by which to measure subsequent changes.

That Act 85-237 was "in force or effect" is supported by this Court's prior holdings. In *Perkins*, the Court found that a city's use of ward-based aldermanic elections in 1965, though illegitimate as a matter of state law because of a 1962 statute requiring at-large election, established the relevant Section 5 baseline. This Court found that election by

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in 1987, so it is irrelevant that the 1981 regulations did not resolve the question.

wards was "the procedure *in fact* in force or effect." 400 U.S. at 394-95. Similarly, in *Lockhart*, the Court held that election by numbered posts was the relevant baseline, despite the District Court's finding that under Texas law, the City of Lockhart was not entitled to use them. *Lockhart*, 460 U.S. at 132 (noting that "[t]he proper comparison is between the new system and the system actually in effect . . . regardless of what state law might have required.").[25]

The Alabama Supreme Court's 1987 decision in *Stokes v. Noonan* did not and could not change, as a matter of federal law, the answer to the question whether special election was the practice *in fact* in

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[25] The Governor claims that *Perkins* and *Lockhart* are inapposite because they were decided "in the absence of any definitive pronouncement of what state law [was]." Riley Br. at 41. This is not precisely true, nor is it decisive. In *Perkins*, the state legislature had made very clear what the law was, and there was little doubt that the city was in violation. 400 U.S. at 394. More importantly, in both cases this Court treated the question whether the practice actually in use complied with state law as simply "irrelevant." *Id.* at 395; *Lockhart*, 460 U.S. at 132. Neither opinion suggests that the Court or Congress imagined that a state practice actually in effect could be erased as a Section 5 baseline simply because a later state court opinion announced its illegality.

The Governor also argues that it made sense for the Court in *Perkins* and *Lockhart* to focus on the practices actually being used, because "[a]llowing States to fudge the practices actually in effect on [the coverage date] on the (perhaps pretextual) ground that they were contrary to state law would have undermined Congress' program." Riley Br. at 42. This is true, but actually supports appellees' position. This same logic applies equally to subsequent baselines, which could just as easily be manipulated to discriminatory effect.

effect beginning in 1985. That question, and not the practice's compliance or noncompliance with state law, was central to the baseline inquiry.

Nor does this Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997), suggest otherwise. In *Young*, the change at issue involved a provisional plan for voter registration that had been precleared, but had not been actually enacted into law. The provisional plan was in place for only a few weeks, and "the State held no elections prior to its abandonment." *Id.* at 282-83.

Mobile's experience with Act 85-237 is entirely different. Act 85-237 was not provisional; it was actually enacted and signed into law. A full election was held in 1987 that resulted in a candidate winning the vacant seat on the Mobile County Commission, actually taking office, and serving for more than a year. The subsequent decision by the Alabama Supreme Court could not change the fact that these events occurred, and that Act 85-237 was thus actually in force or effect.

4. Nor does treating special election as the baseline pose any federalism problem. While it is true that covered jurisdictions may be required to continue using baseline practices in order to comply with federal law even if the baseline becomes illegal under state law, this is neither new nor problematic. This Court has long recognized that "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect," *Lockhart*, 460 U.S. at 133, and that, as a result, Section 5 sometimes constrains state policy choices. The idea that old laws, even if repealed, must be kept in effect

until their replacements are precleared has been a mainstay of Section 5 since *Allen*. The mere fact that the Alabama Supreme Court invalidated the old law in *Stokes*, rather than the legislature choosing to replace it, makes no difference.

The Governor ignores this fact, seeking to invert the Supremacy Clause by claiming that if a practice is later declared to violate a provision of a state's constitution, it cannot serve as a Section 5 baseline. Riley Br. at 36-38. To this end, the Governor has profoundly misread *Abrams v. Johnson*, 521 U.S. 74 (1997). *Abrams* involved Georgia's post-1990 congressional redistricting. In 1992, the Department of Justice precleared a plan that replaced the one adopted in 1982. *Id.* at 80. But in *Miller v. Johnson*, 515 U.S. 900 (1995), this Court held that the 1992 plan was unconstitutional as a matter of the *federal* Constitution. One question before the Court in *Abrams* was whether a redistricting plan adopted by a federal district court in 1995 should be analyzed by comparing it to the 1992 plan. This Court held that the 1992 plan could not serve as a benchmark because "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." *Abrams*, 521 U.S. at 97. But that holding was based on the elementary proposition that the *United States* Constitution is the Supreme Law of the Land.[26]

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[26] In any event, *Abrams* did not address the question presented in this case—namely, whether the challenged practice constituted a change requiring preclearance. The remedial plan was developed by a federal court, and thus preclearance was not required. *See* 521 U.S. at 95. Moreover, the Court said nothing to suggest that the State would have been free to replace the

The Governor's claim that "[t]he Alabama Supreme Court's decision in *Stokes* operates the same way here that this Court's decision in *Miller* operated in *Abrams*," Riley Br. at 36, is baffling. *Miller* interpreted the federal Constitution, which is supreme over all other law. *Stokes* interpreted the Alabama constitution, which is not. Just as the federal Constitution trumps all other law, federal *statutes* trump conflicting state law, whether that law takes the form of a state statute or a state constitutional provision. Federal law is indifferent to the state-law characterization of a state policy. If this were not the case, then under the Governor's theory, states could circumvent Section 5 altogether by regulating their election processes through state constitutions rather than statutes.[27] This would undermine both the purpose of Section 5 and the basic tenets of our federal system.

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unconstitutional plan with a plan devised by its own courts or the state legislature without first obtaining preclearance.

[27] The apportionments at issue in the Reapportionment Cases were the product of state constitutions, rather than ordinary legislation, but that did not prevent this Court from acting. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the legislative apportionment plan contained in the Alabama Constitution of 1901 violated the equal protection clause and that the remedy in a proposed constitutional amendment failed to cure the violation); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (striking down the legislative apportionment formula contained in the New York Constitution of 1894); *Roman v. Sincock*, 377 U.S. 695 (1964) (striking down the apportionment plan contained in the Delaware Constitution of 1897 as amended in 1963).

The Governor's claim of impermissible commandeering is equally unavailing.[28] Nothing has been commandeered here. Federal standards are constitutionally permissible when they "'regulate[] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" *Reno v. Condon*, 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). Consistent with this principle, Section 5 merely regulates the actions of covered jurisdictions, limiting the universe of voting practices from which they may choose to those that have neither a discriminatory purpose nor a discriminatory effect. That this limitation may require a state to keep a practice in place that it would prefer to change is the very essence of Section 5, an essence that this Court has repeatedly reaffirmed. Just as in *Lopez*, 525 U.S. at 285, the district court's decision in this case "adds nothing of constitutional moment to the burdens that the Act imposes."

5. The unprecleared gubernatorial appointment of Sam Jones after the 1987 election cannot serve as the Section 5 baseline. The Department of Justice regulations make clear that an unprecleared change cannot become a new baseline: if an "existing practice or procedure . . . is not otherwise legally enforceable

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[28] Appellees are puzzled as to why the Project on Fair Representation thinks that this case "draws the constitutionality of Section 5 into question." Br. *Amicus Curiae* at 3. In fact, the plain language of the Voting Rights Act precludes that possibility. Under 42 U.S.C. § 1973*l*(b) as interpreted in *Shaw v. Reno*, 509 U.S. 630, 637, 641 (1993), challenges to the Act's constitutionality must be brought before a three-judge District Court for the District of Columbia.

under Section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54(b)(1). Even if the procedure "in effect" following *Stokes* was gubernatorial appointment, it cannot serve as a Section 5 baseline absent preclearance because it was never legally enforceable under Section 5.[29] The last "legally enforceable practice or procedure" was thus special elections, and it must serve as the baseline for future changes.

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[29] Nor, contrary to the argument of some *amici*, *see* Br. *Amici Curiae* of Abigail Thernstrom and Stephan Thernstrom, does Act 2004-455 return the baseline to gubernatorial appointment. When Act 2004-455 was submitted for administrative preclearance, nothing in the submission gave notice that the 2004 Act was intended to repeal Act 85-237. Moreover, as enabling legislation, Act 2004-455 did not itself determine whether a valid local law permitted special elections in Mobile County. *See* 28 C.F.R. § 51.15(a) (stating that the failure of the Attorney General to interpose an objection to enabling legislation "does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required") and 28 C.F.R. § 51.15(b)(4) (including "[l]egislation requiring a political subunit to follow certain practices or procedures unless the subunit's charter or ordinances specify to the contrary" as an example of such enabling legislation).

CONCLUSION

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

Respectfully Submitted,

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

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

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

Amy Howe
Kevin Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

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

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

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