No. 08-322

In the
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,
v.
ERIC H. HOLDER, Jr., Attorney General of the United States of America, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE HONORABLE BOB RILEY, GOVERNOR OF THE STATE OF ALABAMA, AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

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BRIEF OF THE HONORABLE BOB RILEY, GOVERNOR OF THE STATE OF ALABAMA[1]

INTEREST OF AMICUS CURIAE

Since Governor Riley assumed office in January 2003, Alabama and its political subdivisions have submitted more than 2,300 voting-related changes for preclearance under §5 of the Voting Rights Act and sustained only one objection. Additionally, the Governor has twice battled §5 litigation, at significant taxpayer expense, after appointing an African-American to a vacant county commission seat in a majority-minority district. *See Riley v. Plump*, 555 U.S. __, 129 S. Ct. 98 (2008) (mem.); *Riley v. Kennedy*, 553 U.S. __, 128 S. Ct. 1970 (2008).

While Governor Riley takes no position on the legal questions raised by Appellant, J.S. at i, as Alabama's chief executive, he has an interest in two related issues:

1. *Alabama's Progress*: By renewing Alabama's coverage in 2006, Congress wrongly equated Alabama's modern government, and its people, with their Jim Crow ancestors. To rectify this error, Governor Riley chronicles Alabama's progress in minority voting rights from 1965, when §5 was created, through today.

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[1]The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Governor's brief was funded by the State of Alabama.

2. *Section 5's Burden*: Congress also failed in 2006 to analyze the variety of burdens that §5 imposes on a fully-covered state. To fill this void, Governor Riley presents seven stories describing Alabama's dealings with §5 during the Governor's six years in office.

SUMMARY OF THE ARGUMENT

1. Alabama earned its spot on §5's original coverage list. Through acts of violence and willful defiance of federal law, Alabama maintained an all-white Legislature and 19% black voter registration rate in 1965. When Congress renewed §5 ten years later, Alabama's progress had been minimal. The gap between black and white voter registration languished at 23.6%, and African-Americans composed only 10.7% of Alabama's Legislature, despite constituting nearly a quarter of its population.

But that was 34 years ago. When Congress renewed §5 in 2006, Alabama had exceeded the national average in minority registration and voting 16 straight years. Black and white Alabamians registered at virtually identical rates (72.9% and 73.8% respectively), and black Alabamians outvoted white Alabamians in the 2004 general election. African-Americans composed 25% of Alabama's Legislature, a figure that squarely reflected Alabama's 24.5% black population. And the number of black elected officials at all levels of Alabama government had increased nearly five-fold since 1975.

As importantly, Alabama's governments had shed their systematic defiance of federal civil rights law. The Department of Justice ("USDOJ") had not objected to a statewide preclearance submission from Alabama in 12 years. In fact, in the decade leading up to §5's fourth renewal (1996-2005), USDOJ objected to only two of Alabama's 3,279 preclearance submissions from *all* levels of government—a scant 0.06%. Simply put, when it came to honoring the Fifteenth Amendment, Alabama was no longer its grandfather's state.

2. Section 5 is the most intrusive remedy in the Congressional arsenal. From watching DVDs of Alabama's deliberative process, to second-guessing state supreme court decisions on purely state law questions, §5 injects the federal government into the heart of Alabama's government.

During his six years in office, Governor Riley has witnessed—and sometimes experienced first-hand—a variety of ways that §5 burdens Alabama:

- Section 5's preclearance process has impeded implementation of necessary and clearly non-discriminatory voting-related changes for more than a year;

- Political factions have used §5 to impede implementation of unfavorable outcomes in the state legislative and judicial processes;

- Section 5 makes implementing federally-mandated voting changes unnecessarily taxing; and,

- Section 5 handicaps, and may even prevent, Alabama from making the same non-discriminatory changes made by non-covered states.

Each of these burdens, while unique, shares a common thread: Its costs are borne by all Alabama citizens.

ARGUMENT

I. ALABAMA HAS PROGRESSED SIGNIFICANTLY SINCE 1965 AND 1975.

Alabama has shed its abysmal voting rights record of the 1960's. Today, black and white Alabamians register and vote at virtually identical rates, and Alabama's minority voter registration rate has exceeded the national average in every year since 1990. App. 17a-19a.[2] Furthermore, African-Americans comprise approximately 25% of Alabama's population, approximately 25% of its legislature, and more than 30% of its government workforce. App. 22a; *United States v. Flowers*, 444 F.Supp.2d 1192, 1193 (M.D. Ala. 2006).

Alabama's citizenry has similarly transformed. In 2005, 61% of Alabamians were under the age of 45; meaning that nearly two-thirds of Alabama's population was either in daycare or yet to be born when §5 was created. *Interim Projections*

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[2]*See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama*, Tables 2-5 (2005) *available at* http://www.aei.org/docLib/20060505_VRAAlabamastudy.pdf.

of the Population by Selected Age Groups for the United States and States, U.S. Census Bureau, *available at* http://www.census.gov/population/projections/SummaryTabB1.pdf (last visited Feb. 26, 2009). By 2025—six years before §5 is set to expire—the same demographic is projected to reach 80%. *Id.*

One question facing the Court is whether §5's 25-year renewal is a "congruent and proportional" response to the modern state of minority suffrage in covered jurisdictions like Alabama. J.S. at i. When it last addressed §5's constitutionality after the 1975 renewal, the Court agreed with Congress that §5 was still necessary, and thus constitutional, due to insufficient progress in the following three areas:

1. Racial disparities in registration and voting;
2. Minority participation in state government, especially in the state legislature; and,
3. The state's history of §5 preclearance submissions and objections.

See City of Rome v. United States, 446 U.S. 156, 180-81 (1980). Using the *City of Rome* factors as guides, Governor Riley chronicles Alabama's progress from 1965 and 1975, when the Court deemed §5 a constitutional response to contemporary times, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *City of Rome*, *supra,* to 2006, when Congress re-authorized §5 for another generation.[3]

[3]The district court used the 1975 Congressional Record as the benchmark for judging covered states' progress by 2006. J.S. App. at 58, 112-16.

A. ALABAMA: 1965

> *"Even after apparent defeat, resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods."*
>
> - House Report (1965)[4]

Section 5's preclearance requirement was Congress's extraordinary response to an extraordinary problem: gamesmanship of federal litigation. For nearly a decade, Southern officials frustrated the Civil Rights Acts of 1957, 1960, and 1964 by treating federal litigation like a "game of whac-a-mole," popping up new discriminatory devices each time the federal courts beat an old one down. Transcript of Oral Argument at 47, *Riley v. Kennedy*, 128 S. Ct. 1970 (2007) (argument by Pamela S. Karlan); *see also Beer v. United States*, 425 U.S. 130, 140 (1976) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."). Not only was Alabama involved, it provided Congress's primary example. *See* H.R. Rep. No. 89-439, at 5-6 (1965); S. Rep. No. 89-162, at 5-6 (1965).

In 1961, only 156 of 15,000 voting-age African-Americans in Dallas County, Alabama were registered to vote.[5] S. Rep. No. 89-162, at 6 (1965). To ameliorate the situation, the United States sued the county registrars for violating the Civil Rights

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[4]H.R. Rep. No. 89-439, at 5 (1965).

[5]Selma, the site of "Bloody Sunday," is located in Dallas County.

Act. *Id.* But while the case was pending, Dallas County switched registrars, thereby forcing the district court to deny injunctive relief because the new registrars were untainted. *Id.*

The court of appeals eventually reversed and issued an injunction, but the gamesmanship continued. *Id.* The new registrars soon defied the court's order themselves by heightening the county's application standards. *Id.* This prompted the United States to file yet another lawsuit. *Id.* While this new case proceeded, Alabama one-upped the system again by implementing two new, statewide "literacy and knowledge of government tests." *Id.* at 7. In February 1965, the federal court issued an order banning the state's newest tests. *Id.* But after four years of litigation, minority registration in Dallas County rose only from 1% to 3%.[6] *Id.*

This rampant defiance of federal law led not only to §5's creation, but also to the paltry numbers Congress faced when placing Alabama under §5's coverage. In 1964, only 19.4% of eligible black Alabamians were registered to vote, H.R. Rep. No. 89-439, at 5 (1965), while 69.3% of white Alabamians were registered, S. Rep. No. 94-295, at 6 (1975), creating a 49.9% registration gap. Not surprisingly, no African-Americans served in Alabama's Legislature. App. 22a.

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[6]Dallas County officials were not alone in their defiance of federal court orders. The 1965 Senate Report also details three years of gamesmanship by Perry County, Alabama officials, which ensured minority registration rates in the single digits. *See* S. Rep. No. 89-162, at 7-8.

B. ALABAMA: 1975

> *"The nature of [the VRA's] progress has been limited. It has been modest and spotty in so far as the continuing and significant deficiencies yet existing in minority registration and political participation."*
>
> - Senate Report (1975)[7]

While many things had changed in Alabama by 1975, its government was slow to follow suit. The Governor and 10 state legislators remained in their respective 1965 positions. *Compare* Ala. S. Journ. 2136-2142 (1965) *with* Ala. S. Journ. 3753-3765 (1975). Only two African-Americans served in the state senate (5.7%) and thirteen served in the house (12.3%). App. 22a. The total number of elected black officials statewide had climbed, but only to 161. App. 20a.

Minority advancement in appointed government positions fared no better. In 1968, the United States sued Alabama's State Personnel Board and the heads of several state agencies for discriminatory hiring and promotion practices that resulted in (1) 49 black applicants being passed over by "lower-ranking white applicants" and (2) 94 of 3077 government jobs (3.1%) being held by African-Americans. *See United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970). This litigation resulted in a comprehensive injunction on state hiring practices that, by 1976, extended to virtually all state agencies. *See United States v. Frazer*, No. 2709-N, 1976 WL 729 (M.D. Ala. 1976).

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[7]S. Rep. No. 94-295, at 7-8 (1975).

Alabama's preclearance history and registration rates showed more promise. In §5's first decade, Alabama submitted 331 voting changes for §5 preclearance and received 22 objections (6.6%). *See* S. Rep. No. 94-295, at 16 (1975). During the same time period, black voter registration rose from 19.3% to 57.1%. *See id.* at 14. Yet, the gap between black and white voter registration languished at 23.6%. *Id.* at 13.

Based on this record, Congress's assessment of §5's continued need, at least with respect to Alabama, was understandable: "[A] 7-year extension of the Act was necessary to preserve the 'limited and fragile' achievements of the [VRA] and to promote further amelioration of voting discrimination." *City of Rome*, 446 U.S. at 182. But that was 34 years ago.

C. ALABAMA: 2006 AND TODAY

> *"Being an African-American just doesn't matter. I think it's a historical moment because we were given an opportunity to run."*
>
> -Representative James Fields[8]

James Fields recently violated a core tenet of §5's renewal: "The only chance minority candidates have to be successful are in districts in which minority voters control the elections." H.R. Rep. 109-478, at 34 (2006). On January 28, 2008, Fields, an African-American, was elected to represent a

[8]David Lazenby & Brittany Woodby, *Fields Gets Historic Win*, The Cullman Times, Jan. 30, 2008, *available at* http://www.cullmantimes.com/homepage/local_story_029111149.html?keyword=leadpicturestory (last visited Feb. 26, 2009).

majority-white district. *See* Adam Nossiter, *Race Matters Less in Politics of South*, N.Y. Times, (Feb. 21, 2008) *available at* www.nytimes.com/politics (search politics for "race matters less") (last visited Feb. 26, 2009). And not just any white district. Fields won 59.34% of the vote in Cullman, Alabama, a district whose voting populace is 96% white and 1% black.[9] Days later, Representative Fields joined Alabama's modern, integrated government.

Gone is Alabama's all-white legislature. When Congress re-authorized §5 in 2006, African-Americans composed 25% of Alabama's legislature (22.86% of the Senate; 25.71% of the House), a figure in line with Alabama's 24.5% African-American population. *See* S. Rep. No. 109-295, at 12 (2006). Similar advances have been made at the local level. Since 1975, the number of elected black officials increased nearly five-fold, from 161 to 756. App. 21a-22a.

Gone, too, is the thin representation of African-Americans in other areas of Alabama's government. For example, the Court has twice seen Governor Riley's commitment to appointing African-American county commissioners in majority-minority districts. *See infra* at 27-29. And in May 2003, the United States and Alabama jointly sought the termination of the 1970 *Frazer* injunction described *supra* at 8 because "the racial make-up of Alabama's government [was] dramatically different from what it was in 1970." *Flowers*, 444 F.Supp.2d at 1193. The "dramatic[] difference" was this: As of 2003, African-Americans constituted 39% of Alabama's

[9] *See fn.* 8.

government workforce, a figure approximately 15% greater than their representation in the general population. *Id.*

Alabama's modern governments have shown a great commitment to minority voting rights. The Department of Justice ("USDOJ") has not objected to a state-wide preclearance submission from Alabama in more than 14 years. App. 15a-16a. In fact, in the 10 years preceding the 2006 reauthorization, USDOJ lodged objections to a scant 0.06% (2 out of 3279) of Alabama's preclearance submissions from *all* levels of government: state, county, and municipal. *See id.*; App. 1a-14a (tracking the total number of §5 submissions from all jurisdictions from 1990 to 2008).[10] Furthermore, despite an exponential increase in Alabama's submissions, USDOJ objected to fewer Alabama submissions between 1982 and 2005 (45) than it did between 1965 and 1982 (59).[11] H.R. Rep. No. 109-478, at 73 (2006);

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[10]The Governor attaches USDOJ's chart of every objection from Alabama between 1994 and 2006. App. 15a-16a, *available at* http://www.usdoj.gov/crt/voting/sec_5 /al_obj2.php. The only sustained objection during Governor Riley's term occurred in the City of Calera in 2008. USDOJ File No. 2008-1621. Calera voluntary entered into a consent decree to ameliorate the problem and is currently awaiting USDOJ's decision whether to lift the objection. *See United States v. Calera,* No. CV-08-BE-1982-S (N.D. Ala) (consent decree) *available at* http://www.usdoj.gov/crt/voting/sec_5/calera_cd.pdf; Scottie Vickery, *Calera Has Two Mayors, Two Sets of Council Members*, The Birmingham News (Jan. 9, 2009) available at *www.al.com* (site search "calera has two mayors" in quotations) (last visited Feb. 26, 2009).

[11]The Governor attaches USDOJ's record of preclearance submissions from every covered jurisdiction since 1990. *See infra* at 1a-14a. Tellingly, the combined number of Alabama submissions between 1965 and 1975 (331), *see* S. Rep. No. 94-

cf id. at 21, 37 (justifying §5's renewal on a greater number of §5 objections between August 1982 and 2005 than between 1965 and August 1982); J.S. App. at 103-106 (district court opinion; same).

As Alabama's leadership progressed, so did its minority voting record. In every year since 1990, black Alabamians have registered and voted in percentages greater than the national average. *See* App. 17a-18a; *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). By 2004, Alabama virtually eliminated the registration gap between black voters (72.9%) and white voters (73.8%), *see* S. Rep. No. 109-295, at 11, 94 (2006), and Alabama's black voters actually out-participated white Alabamians 63.9% to 62.2% in the 2004 general election. *Id.* at 11; App. 19a.

USDOJ apparently has recognized Alabama's progress at the voting booth. Last year, the United States Attorney General sent more than 800 federal observers and Justice Department personnel to monitor the general election in 59 counties across 23 states, 16 of which are not fully-covered by §5. *See* Press Release, USDOJ, *Department of Justice to Monitor Polls in 23 States Across the Nation on Election Day*, (Oct. 30, 2008) *available at* http://www.usdoj.gov/opa/pr/2008/October/08-crt-973.html (last visited Feb. 26, 2009). Using his "predictive judgment" to determine the nation's likely trouble spots, the Attorney General chose to

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295, at 16 (1975), is one-tenth the number of submissions Alabama made between 1995 and 2005 (3460). App. 1a-14a.

monitor just one of Alabama's 67 counties. *See id.*; *cf.* H.R. Rep. No. 109-478, at 44 (2006) (justifying §5's renewal, in part, on "the continued need for Federal observers to monitor polling places located in covered jurisdictions"); J.S. App. at 103-106 (district court opinion; same).

His judgment proved correct. Despite the lack of federal oversight, Alabamians cast more than two million ballots in what Secretary of State Beth Chapman described as "close to a flawless Election Day." *Alabamians Cast Record Number of Votes*, Associated Press (Nov. 5, 2008). According to the Election Protection Coalition, Alabama, the nation's 23rd most populous state, finished tied for 27th in the number of reported problems during the 2008 general election cycle.[12] *See* Our Vote Live, *Nationwide Problems Map*, http://www.ourvotelive.org/map.php (last visited Feb. 26, 2009). In fact, Alabama had fewer voting-related problems than the following less-populated, non-covered jurisdictions: Nevada; New Mexico; Essex County, New Jersey; Riverside County, California; Franklin and Cuyahoga Counties, Ohio; and Broward, Miami-Dade, and Hillsboro Counties, Florida. *Id.*

* * *

[12]The Election Protection Coalition is the nation's largest, bi-partisan coalition dedicated to reporting and preventing registration and polling place problems. The statistics used in this brief were taken from the Coalition's twin websites, *www.ourvote.org* and *www.ourvotelive.org*, and the population data was taken from the United States Census Bureau website, *www.census.gov*.

Alabama is by no means perfect. But neither is Alabama the same state that justified §5's creation in 1965 or its renewal in 1975. As the following table shows, each of the factors that justified §5's renewal in 1975, *see City of Rome,* 446 U.S. at 180-81, swung in Alabama's favor by 2006:

	1965	1975	2006
African-Americans Registered to Vote	19.4%	57.1%	72.9%
Registration Disparity Black vs. White Voters	49.9%	19.3%	0.9%
African-Americans In The State Legislature	0%	10.7%	25.0%
Preclearance Objections (preceding 10 yrs.)	n/a	6.64%	0.06%

Simply put, Alabama is under new management, chosen by a new electorate. In 2006, Congress amassed no evidence suggesting that, without §5, Alabama's modern leadership and their successors through 2031 stood poised to systematically defy federal court orders to deny minority voting rights. The reason is simple: It is not true.

II. SECTION 5 IMPOSES A VARIETY OF BURDENS ON ALABAMA'S DEMOCRATIC PROCESS.

In the remaining pages, the Governor presents seven stories from his six years in office that demonstrate the variety of burdens that §5 imposes on a fully-covered state. Before placing the Court in the trenches with §5, however, the Governor details Alabama's implementation of §5's preclearance requirements.

A. HOW §5 WORKS IN ALABAMA.

Section 5 requires Alabama and its political subdivisions to obtain federal permission (*i.e.* "preclearance") before they may enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. §1973c; 28 C.F.R. §51.1. Changes requiring preclearance include, but are not limited to,

- "Any change in qualifications or eligibility for voting,"
- "Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting," and,
- "Any change in the boundaries of voting precincts or in the location of polling places."

28 C.F.R. §51.13(a), (b), (d).

At the state level, the Attorney General monitors Acts of the Legislature for "covered" changes, and state executive officials inform the Attorney General when they make a voting-related change. If a voting-related change possesses statewide effect, the Attorney General submits it for preclearance. If a change is local in nature, the Attorney General informs the appropriate local official of his obligation to seek preclearance.[13] If a change originates at the local level (a municipal annexation, for example), the local officials identify and submit the change.[14]

Once a voting change is identified, Alabama and its political subdivisions bear the burden of proving to USDOJ that the change is not "retrogressive;" that is, the change does not discriminate against minorities in purpose or effect.[15] 42 U.S.C. §1973c; *see also* 28 C.F.R. §§ 51.1-51.67 (preclearance guidelines). To satisfy USDOJ's submission requirements, Alabama must, at a minimum, compile and submit 16 pieces of information. 28 C.F.R. §51.27. In a nutshell, Alabama must (1) detail the old and new practices,

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[13]To help local officials satisfy their §5 responsibilities, the Attorney General has developed a step-by-step guide for submitting a preclearance request, App. 23a-30a, and offers advice or assistance as requested.

[14]The issue of whether state court opinions are covered changes is still unanswered. *See infra* Issue II(C)(2). No mechanism presently exists for monitoring voting-related changes arising from state court decisions.

[15]Alabama also has the option of seeking preclearance from a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. §1973c(a). Virtually all submissions are made to USDOJ, however, because the administrative route is generally faster and less expensive.

and the difference between the two, (2) detail the preclearance and litigation history of the old practice(s), (3) explain why Alabama wants to make the change, and (4) explain how the change impacts minority voters. *Id.*; App. 24a-26a (listing all required information). USDOJ may also request supplemental information from the State, *see* 28 C.F.R. §51.37(a), ranging anywhere from transcripts and DVDs of the State's deliberative process to the name and race of every state legislator for the past 25 years. *See infra* at 25-26, App. 26a-27a. USDOJ also considers outside comments and suggestions as part of its final consideration, 28 C.F.R. §51.53.

Submission times vary. Routine preclearance submissions, such as setting a special election date to fill a legislative vacancy, can be generated in hours. Other submissions may take days, weeks, or even months to draft. *See infra* at Issue II(B)(1-2). Until preclearance is granted, the new practice—however beneficial or urgent—cannot be enforced. *See Clark v. Roemer*, 500 U.S. 646, 652-53 (1991); 28 C.F.R. §51.10.

B. SECTION 5 IMPEDES THE ENFORCEMENT OF NECESSARY, AND CLEARLY NON-DISCRIMINATORY, STATE INITIATIVES.

Two recent stories demonstrate how §5's preclearance process may stall the enforcement of necessary, and racially benign, legislative Acts for well over a year.

1. Title 17: Rewriting Alabama's Election Code

Like many states, Alabama progressed from paper ballots, to machine voting booths, to electronic voting. Each new mechanism required specific state laws that remained on the books. Intervening developments such as the federal Help America Vote Act ("HAVA"), *see infra* at Issue II(D), Alabama Attorney General Opinions, and regulations of the Secretary of State also changed Alabama's election law landscape.

Beginning in August 2003, a bi-partisan, bi-racial committee of 25 legislators, attorneys, circuit clerks, probate judges, and the Secretary of State re-wrote Alabama's election code, "Title 17," to embody the modern state of Alabama's election law. After more than two years of committee meetings, public comments, and legislative vetting, Governor Riley signed the 370-page act re-writing Title 17 into law on April 25, 2006. *See* Ala. Act No. 2006-570.

When drafting a preclearance submission, the primary task is to identify each change within an Act. 28 C.F.R. §51.27a-c. To accomplish this task for the new Title 17, the Attorney General relied heavily on materials created by the bi-partisan committee and Alabama Code Commissioner red-lining each change. App. 30a.[16] But these materials were merely a starting point. Over the next few months, the Attorney General analyzed the new Act to

[16]Letter from Attorney General Troy King to Bob McCurley, Director, Alabama Law Institute (Feb. 20, 2007) (on file with counsel) (explaining why Title 17 had yet to be submitted for preclearance 10 months after enactment).

supplement the committee materials, producing a 30-page roadmap and commentary to the changes contained within the new Title 17. USDOJ File No. 2007-3488.

Another task under the USDOJ guidelines is compiling the preclearance history of the soon-to-be "changed" practices. 28 C.F.R. §51.27p. To clear this hurdle, the Attorney General first identified 59 Acts impacted by the new Title 17 that were passed after Alabama's coverage date of November 1, 1964. App. 32a. From there, the Attorney General researched the preclearance history of the 59 Acts and discovered that a handful had not been precleared. *Id.* This discovery required even further attention to the predecessor Acts. *Id.* In the end, this cumbersome process culminated in a 33-page preclearance history chart. USDOJ File No. 2007-3488.

The submission process was further complicated because the Legislature passed several other laws impacting Title 17 during the same legislative session—each of which had to be considered in conjunction with Title 17's on-going preclearance submission. *See, e.g.,* Issue II(E)(1); 33a. Needless to say, the overall process of drafting Title 17's submission request consumed weeks, if not months, of state attorney time. App. 30a-35a.

Ultimately, the Attorney General submitted Act 2006-570 for preclearance on July 13, 2007—15 months after it was signed into law. USDOJ File No. 2007-3488. The 44-page submission letter included the 30-page roadmap detailing the changes contained within the Act. *See* 28 C.F.R. §51.27c. The letter was

supplemented by 21 exhibits, including a red-line version of Act 2006-570 (marking the changes) and the 33-page chart detailing the preclearance history of the predecessor Acts. *See* 28 C.F.R. §51.27p; USDOJ File No. 2007-3488. According to its shipping label, the July 13 submission weighed 42 pounds.

USDOJ determined that the July 13 submission failed to provide the requisite clarity for describing the changes. *See* 28 C.F.R. 51.26(d). So, investing approximately 100 additional hours, the Attorney General created and proffered a unified 193-page chart setting out the old and new statutes, side-by-side, with detailed comments on the changes. USDOJ File No. 2007-3488. On October 29, 2007, USDOJ precleared Act 2006-570 (save for one change, which was later withdrawn), thereby allowing the new Title 17 to take effect 18 months after Governor Riley signed it into law.[17] *Id.*

2. Act 2007-488: Modernizing Alabama's County Commissions

A similar situation arose in 2007 when the Association of County Commissions of Alabama ("ACCA") successfully proposed legislation updating and unifying the law governing Alabama's county commissions. Act 2007-488, the "County Modernization Act," served multiple non-

[17]During the 18-month preclearance process, the newly-enacted, but yet-to-be precleared, Title 17 was published on Westlaw and in the updated Alabama Code. To date, Alabama has not devised a system to prevent publication of yet-to-be precleared voting changes, nor do the publishers track preclearance.

discriminatory purposes, such as enabling local officials to update courthouse hours and pushing back the first meeting date of newly-formed county commissions due to the advent of provisional balloting. *See* Ala. Act No. 2007-488. One non-discriminatory purpose is particularly relevant here: Act 2007-488 established a state-wide, one-year residency requirement for (1) all candidates seeking a county commission seat and (2) any person the Governor might appoint to a vacant county commission seat. *Id.* Governor Riley signed Act 2007-488 into law on June 14, 2007. *See id.*

While benign in purpose, the Act was a nightmare to submit for preclearance. Alabama has 67 counties. Submitting the newly-unified residency requirement for preclearance necessarily entailed researching and charting the legislative, preclearance, and litigation histories of the now-superseded requirements of the 67 counties. *See* 28 C.F.R. §51.27. To accomplish this task, the Attorney General created a multi-page questionnaire addressing the information required by 28 C.F.R. §51.27 and distributed it to each county. While the questionnaires were pending, the Attorney General researched local acts regarding local commissioner residency requirements, as far back as the late 1800's, to establish the baseline practice for each county. (Tracing these legal pedigrees, of course, is pointless absent §5.)

Spending hundreds of hours in the year-long process, the Attorney General ultimately lodged three preclearance submissions concerning Act 2007-488, the last of which encompassed the work on the one-year residency requirement. USDOJ File Nos.

2008-427, 2008-1576, 2008-3861, 2008-5601. That final submission exceeded 1,700 pages, including voluminous exhibits and a 103-page appendix summarizing the applicable local law, baseline practices, preclearance history, and litigation history for all 67 counties. *Id.* USDOJ approved the last of the three submissions, allowing the County Modernization Act to take full effect, on December 22, 2008—18 months after Governor Riley signed it into law.[18] *See id.*

C. OUTSIDE FORCES CAN AND WILL USE §5 AS A POLITICAL TOOL.

While benign submissions can be taxing enough, §5's financial and temporal costs skyrocket when politics are thrown into the preclearance mix. The following stories, both of which personally involved Governor Riley, demonstrate two ways that §5 can be used as a political tool to block enforcement of democratically-approved initiatives: (1) lobbying USDOJ for an objection and (2) filing §5 litigation.

1. Double Dipping

"Double dipping" is the practice of simultaneously serving in the state legislature and another government agency. For decades, double dipping tainted Alabama's two-year college system because legislators often peddled their legislative

[18]Like the new Title 17, Act 2007-488 was published before it was precleared. Consequently, state officials took steps to ensure that local officials would *not* apply the residency requirements enacted in 2007 during the 2008 elections. *See* Letter from Beth Chapman, Secretary of State to Probate Judges, Registrars, Political Party Officials, and County Commission Chairmen (Feb. 15, 2008) (on file with counsel).

influence for sham "educational" jobs, either for themselves or family members. In 2007, journalist Brett Blackledge earned the Pulitzer Prize by exposing the depth of the problem: One-quarter of Alabama's legislators, or their family members, double-dipped in Alabama's two-year college system. Brett Blackledge, *Dozens of Legislators Paid by Two-Year Colleges*, The Birmingham News (Oct. 8, 2006).[19] The aftermath has included federal convictions of "about a dozen people," including the former Chancellor of the two-year system and three State Legislators. Lee Roop, *Schmitz Guilty of Fraud*, *Loses Seat*, The Huntsville Times (Feb. 25, 2009) *available at* www.al.com (site search for "Schmitz guilty of fraud") (last visited Feb. 26, 2009) (detailing the federal conviction of a State Legislator who bilked more than $177,000 from Alabama's two-year system).

In April 2007, Governor Riley responded on two fronts. First, the Governor introduced twin bills in the House (H.B. 667) and Senate (S.B. 395) banning legislators from double dipping in any state agency. Not surprisingly, the bills swiftly perished. Second, in his role as President of the State Board of Education, the Governor proposed policies that would end double dipping in the two-year college system. Despite vocal opposition from several legislators and special interest groups, on August 23, 2007, the bi-partisan Board passed two policies. Policy 609.04 requires legislators to take accrued leave from their educational jobs when serving in the legislature. Policy 220.01 bans active legislators

[19]Mr. Blackledge's entire series, and its aftermath, can be viewed on-line at http://blog.al.com/twoyear/.

from holding employment within the two-year college system after the 2010 election.

The Board promptly submitted both policies for §5 preclearance on September 6, 2007. USDOJ File No. 2007-4397. The opposing legislators and special interest groups immediately shifted their political assault to a new front: the Justice Department. For example, one group of Democratic legislators lobbied USDOJ to interpose a §5 objection based on the theories that (1) banning double dipping would cause many black Democrats to either resign or not seek re-election due to lost income and (2) "if all the Democrats were replaced by Republicans, the balance in the House" would shift political parties. USDOJ File No. 2007-4397, Letter from Edward Still to John Tanner, Chief, Voting Section (Sept. 18, 2007).

Beyond the ethical question of double dipping, the premise of the legislators' political concerns was legally flawed: Even if a legislator left office, the voters of his district, not Governor Riley, would choose his replacement. *See* Ala. Code § 17-15-1. Alabama has successfully precleared Governor Riley's setting of a special election to fill a legislative vacancy on numerous occasions. *See* USDOJ File Nos. 2004-3196 (House District 47, death); 2004-3869 (Senate District 24, resignation, and HD 65, death); 2004-4547 (HD 82, resignation); 2005-0161 (HD 46, resignation); 2005-0768 (HD 72, resignation); 2005-4282 (HD 31, death); 2005-4588 (HD 1, death); 2006-6924 (HD 22, death); 2007-3166 (SD 32, resignation); 2007-4751 (HD 12, resignation); 2008-5759 (SD 7, resignation); 2009-0112 (SD 22, death); *see also* 2009-0343 (SD 19, federal felony conviction, submission

pending as of Feb. 20, 2009). In fact, the Governor will soon set a special election schedule (requiring §5 preclearance) to replace a State Legislator who was convicted just this week on seven counts of fraud for double dipping. Roop, *Schmitz Guilty of Fraud, Loses Seat, supra.*

Nevertheless, citing the Legislators' "concerns," USDOJ requested the following supplementary information:

- "A comprehensive list of individuals affected by Policy 609.04;"
- "Any transcripts or DVDs" of the Board of Education meetings and legislative committee meetings in which the double dipping policies were considered;
- The "total employment statistics" for the entire state of Alabama, "broken down by race;"
- A "breakdown," by race, of employment in Alabama's state agencies, its K-12 school system, and the two-year and four-year college systems; and,
- The name and race of every state legislator for the past 25 years, plus a designation of which legislators had been employed in Alabama's educational systems.

USDOJ File No. 2007-4397, Letter from John Tanner, Chief, Voting Section to Bradley Byrne, Chancellor (Nov. 2, 2007).

Over the next eight weeks, a team of state and private attorneys worked countless hours, at taxpayer expense, to compile the requested information.[20] On December 28, 2007, Governor Riley and the new post-secondary Chancellor, Bradley Byrne, supplemented the original submission with the items listed above, the items required by 28 C.F.R. §51.27, and 22 exhibits, including a 29-page history of Alabama's double dipping dilemma, which itself contained 59 exhibits.[21] USDOJ File. No. 2007-4397, "Supplemental Submission Under Section 5, Voting Rights Act of 1965."

The Governor's supplement explained that (1) Policy 609.04 was not retrogressive because it merely required a legislator "be present at work during his or her duty hours and expending accrued leave-time for absences" and (2) Policy 220.01 was not retrogressive because "minorities may continue to vote for any person of their choosing." *Id.* On February 29, 2008, USDOJ precleared Policy 220.01 (the double dipping ban) and ruled that Policy 609.04

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[20]Private attorneys alone logged (and billed) approximately 110 hours on the preclearance effort between December 2007 and February 2008.

[21]At USDOJ's request, the Board previously had submitted a DVD of its "entire [April 26, 2007] meeting" where "the Board, including its chairman Governor Bob Riley, discussed, in detail" the double dipping ban. USDOJ File. No. 2007-4397, Letter from Ella B. Bell, Member, State Board to John Tanner, Chief, Voting Section (October 5, 2007).

(the leave policy) was not a voting change that required preclearance. USDOJ File No. 2007-4397.

While preclearance was ultimately achieved, §5 turned the federal executive into a supplementary appeals court for political forces to challenge unfavorable outcomes in the state legislative and judicial processes.[22] *See* 28 C.F.R. §51.53 (allowing USDOJ to consider information submitted by "individuals or groups"). Just as troubling, §5 vested USDOJ with the authority to impede or block the Governor's attempt to eliminate legislative double dipping in the two-year system—at the same time USDOJ was itself prosecuting Alabama legislators for double dipping in Alabama's two-year system. *See Lawmaker Indicted In 2-Year College Probe*, The Associated Press (Feb. 1, 2008); Roop, *Schmitz Guilty of Fraud, Loses Seat, supra.* In other words, when the two sovereigns reacted to the same situation with a common purpose, only the State did so with a federally-induced handicap.

2. *Kennedy* and *Plump*

The Court is familiar with §5's use in litigation, as the following story recently brought Governor Riley before the Court on two occasions. While each case possesses its own nuances, the general facts overlap.

Long before §5, Alabama law required that vacant county commission seats be filled by

[22]Several legislators also filed suit against the Board policies in state court, and that action is currently pending before the Alabama Supreme Court. *See Byrne v. Galliher*, No. 1080247. (Ala. filed Nov. 17, 2008).

gubernatorial appointment. *See* Ala. Code §11-3-6 *repealed by* Ala. Act 2007-488. Local laws in Jefferson County (1977) and Mobile County (1985) purported to change the selection method to special elections. *See* Ala. Acts 77-784, 85-237. The Alabama Supreme Court struck down Mobile County's local law as unconstitutional under state law, thereby casting constitutional doubt on Jefferson County's similar law. *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988); *see also Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005) (holding that a 2004 legislative act did not revive the Mobile County local law). Following the state supreme court's decisions, Governor Riley appointed Juan Chastang to fill a commission vacancy in Mobile County and General George W. Bowman to fill a vacancy in Jefferson County. Both men were African-American, and both seats were in majority-minority districts.[23]

With each appointment, Governor Riley was sued under the following two-part theory: (1) The local laws, which had been precleared, changed the baseline practice from gubernatorial appointment to special elections and (2) any change back to gubernatorial appointment—even if the local laws were unconstitutional—was a change that required preclearance under §5. In *Kennedy*, this Court agreed with the Governor that Mobile County's local law never went into "force or effect;" thus no change occurred within the meaning of §5. *See Kennedy*, 128 S. Ct. at 1984-86. In *Plump,* this Court dismissed the Governor's appeal for want of jurisdiction. *See Plump*, 129 S. Ct. at 98.

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[23]The vacancies were created when an African-American was elected mayor of Alabama's largest city (Larry Langford in Birmingham) and its third largest city (Sam Jones in Mobile).

The Governor recalls *Kennedy* and *Plump* to make two points.

1. Neither §5 lawsuit was based on race (both of the Governor's appointees were black); the lawsuits were based on political affiliation. When former Governor Don Siegelman, a Democrat, appointed Reverend Steve Small to a vacant Jefferson County Commission seat in 2001, he did so without objection or §5 litigation. *See* Val Walton, *U.S. Court Asked to Oust Riley Appointee*, The Birmingham News (November 29, 2007) *available at* https://www.edwardstill.com/Bham%20News%202002%2011%2029.pdf (last visited Feb. 26, 2009). Yet, when Governor Riley, a Republican, appointed two African-Americans to fill vacant majority-minority seats, he was sued to block the appointees from taking office, and the Democratic Party accused the Governor of "thwarting the democratic process.[24]" *Id.* Both rounds of political wrangling were funded, at great cost, by Alabama's taxpayers.[25]

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[24]Each of the three plaintiffs in *Kennedy* was a Democratic state legislator.

[25]The Governor cannot give an exact financial cost for both defenses, because state attorneys (who do not track and bill time), as well as private attorneys, defended the Governor. A good starting point, however, may be the fee requests made by the Plaintiffs' attorneys for their work in *Plump* ("approximate[ly] $110,000") and *Kennedy* ($109,994.96). *See Plump, v. Riley,* No. 2:07-cv-01014-MEF-CSC (Doc. 51); *Kennedy v. Riley*, No. 2:05-cv-01100-MHT-DRB (Doc. 62). Included within the *Kennedy* fees request was compensation for time spent drafting objection letters and teleconferencing with the chief of USDOJ's voting section. *See* Issue II(C)(1).

2. The Court left unresolved the question festering in *Kennedy*: Does §5 require preclearance of a state supreme court decision interpreting the state constitution? If the answer is yes, as USDOJ asserted, then the federal government has the power to overrule Alabama's Supreme Court and to force Alabama's Governor to administer unconstitutional state laws. *See* Brief for the United States as Amicus Curiae Supporting Appellees in Part, *Riley v. Kennedy*, No. 07-77, at 10.

This issue may come to a head again soon. Alabama Act 2006-355 directs Governor Riley to appoint a new circuit judge in Talladega County "on or after October 1, 2009," and establishes general elections to determine that judge's successors in subsequent years. Ala. Act No. 2006-355; *see also* Ala. Const. Art. VI, § 153 (requiring a judicial appointee sit for one year before election); Ala. Const. amend. 615 (same). USDOJ precleared Act 2006-355 on June 29, 2006. USDOJ File No. 2006-4167.

Days later, litigation was filed in state court challenging the Act. Ultimately, the Alabama Supreme Court declared that Act 2006-355 unconstitutionally vested appointment power in the Governor, severed the appointment provision, and declared an election must be held in 2010. *See King v. Campbell*, 988 So. 2d 969 (Ala. 2007). The *Campbell* decision thus "changed" the date and manner of judicial selection prescribed by Act 2006-355, thereby placing the State in a Catch-22. Alabama can either (1) forgo seeking preclearance of the supreme court's decision and run the risk of another costly round of §5 litigation when the *Campbell* decision is followed or (2) expend public

resources to gain preclearance of the court's decision, thereby placing the fate of Alabama constitutional law in the hands of the federal government.

D. When it Comes to Federally-Mandated Changes, Preclearance Can Lead to Taxing and Absurd Results.

Section 5 was created to quash racist state initiatives, *see Beer*, 425 U.S. at 140, but it also requires covered states to submit for preclearance their responses to federally mandated changes. For example, the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301 *et seq*., mandated not only that Alabama change many of its voting practices, but also that Alabama preclear the federally-mandated changes. 42 U.S.C. §15545(b). Alabama responded to HAVA with Act 2003-313, which Governor Riley signed into law on June 19, 2003. *See* Ala. Act. No. 2003-313. The Attorney General submitted Act 2003-313 for preclearance, which USDOJ granted in November 2003. USDOJ File Nos. 2003-2245 & 2003-3434.

Instead of rehashing the process of preclearing the 76-page Act, which included changes to more than 20 individual sections of the Alabama Code, *see id.*, the Governor presents three examples of how taxing, and in some cases absurd, preclearing particular federally-mandated changes can be.

1. HAVA contains detailed standards for the type of voting machinery a state may employ. *See* 42 U.S.C. §15481. In Alabama, the process of purchasing HAVA-compliant machines was handled

at the county level. To assist county officials, the Attorney General spearheaded a unified preclearance submission. As he did with the County Modernization Act, *see supra* at 21, the Attorney General first developed and sent out questionnaires to gather the necessary information under 28 C.F.R. §51.27 and then followed up with the counties as needed. This process culminated in the creation of a table embodying the equipment changes in 54 of Alabama's 67 counties, as well as a letter setting out the remaining information required by 28 C.F.R. §51.27. Two months later, USDOJ precleared the changes for use in the June 2006 primary election. See USDOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, and 2006-3583 through 2006-3594.

This, however, was not the end of the story. In Alabama, municipalities manage their own elections, but generally use the same voting machines as their corresponding counties. The preclearance submissions described above applied to federal, state, and county elections (which are held simultaneously), but not to municipal elections. So, when it came time for a vast majority of Alabama's approximately 450 municipalities to hold elections in 2008, §5 required each municipality to seek preclearance to use the same machines, unnecessarily creating preclearance *déjà vu*.

2. HAVA mandated that Alabama switch from its county-based registration databases to a unified statewide electronic database. 42 U.S.C.

§15483. A federal court appointed Governor Riley special master over the database switch. *See United States v. Alabama,* No. 2:06-CV-00392-WKW (M.D. Ala.).[26] Under Governor Riley's leadership, and the federal court's watchful eye, Alabama's old county databases were replaced with a new, HAVA-compliant statewide database.

This switch raised an interesting §5 question, which has yet to be answered: When undertaken by a federal court's special master in response to litigation filed by the United States, is a federally-mandated switch from a local to statewide registration database a voting-related change that requires §5 preclearance? If it is, compliance with §5 may be out of the question. As part of the mandated switch, the old, non-uniform systems were dismantled and carted-off, thus making it (1) extremely difficult to ascertain the historical information required for a preclearance submission and (2) impossible to revert back to the old, non-HAVA compliant system pending the outcome of the preclearance process. 28 C.F.R. §51.27b, c, p.

3. HAVA also requires that states ask specific questions on their mail-in registration forms, such as "Are you a citizen of the United States of America?" 42 U.S.C. §15483(b)(4). While compiling the information required by 28 C.F.R. §51.27 for the linguistic changes was not particularly taxing, submitting the altered forms for preclearance was nonetheless complicated by several factors.

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[26]The *United States v. Alabama* litigation regarded timely compliance with the database switch. The complaint raised no allegations of racially discriminatory state initiatives.

For example, Alabama's mail-in registration form underwent several cosmetic changes over the years, such as changing the name of the Secretary of State and updating the contact information for the Board of Registrars. Because USDOJ took the position that any change to the form required preclearance, and the changes had not previously been submitted for preclearance, the State had to retroactively seek preclearance for each of these changes, as well as preclearance of the new HAVA-mandated changes. *See* 28 C.F.R. §51.27.

Furthermore, a plaintiffs' attorney urged USDOJ not to preclear the revised form—thereby preventing Alabama from becoming HAVA-compliant—based on his on-going litigation against state officials regarding felon voting. *See* USDOJ File No. 2006-4509; *Chapman v. Gooden*, 974 So. 2d 972, 980 (Ala. 2007) (describing a change to the registration form regarding felon voting and the reasons for it).

That Alabama ultimately overcame these difficulties to achieve preclearance, *see* USDOJ File No. 2006-4509, is beside the point. An important fact remains: Alabama had to endure difficulties that were foreign to non-covered states, who simply typed the newly-required language into their old forms and instantly became HAVA-compliant.

E. Section 5 Handicaps, and May Even Prevent, Alabama From Making the Same Non-Discriminatory Changes Made by Non-Covered States.

Being "covered" by §5 places jurisdictions at a severe disadvantage when attempting to make the same non-discriminatory change made by a non-covered state. Two final stories to prove the point. The first involves a nationwide change in which Alabama was ultimately successful in joining, but not without its share of §5-induced headaches. The second involves a non-discriminatory change that Alabama may be foreclosed from making.

1. "Super Tuesday" 2008

In April 2006, Alabama decided to push forward its Presidential preference primary from the first Tuesday in June, *see* Ala. Code § 17-16A-1(a) (1995), to the first Tuesday in February. Like each of the 24 states that made February 5, 2008 "Super Tuesday," Alabama's purpose was clearly non-discriminatory: "Any time we can make sure that Alabama has a stronger voice in national politics, we need to take advantage of it." *Bill Would Set Earlier Presidential Primary*, The Birmingham News (Apr. 12, 2006) (quoting Governor Riley). Section 5 simply made Alabama's switch more difficult.

On April 17, 2006, the Legislature passed Act 2006-634, which moved the primary to the first Tuesday in February. Ala. Act 2006-634. While the Act was on Governor Riley's desk, a problem was reported: Fat Tuesday fell on February's first Tuesday in 2008. Dan Murtaugh, *Primary, Carnival*

on Track to Clash, Mobile Press Register (Apr. 19, 2006) (on file with counsel). This created a dilemma in Mobile and Baldwin Counties because Fat Tuesday is an official holiday and downtown Mobile is transformed into a Mardi Gras parade route. *See id.*; Ala. Code § 1-3-8(c). To remedy the problem, the Legislature passed Act 2007-461, which required Mobile and Baldwin Counties to open polls both on Fat Tuesday and the preceding Wednesday. Ala. Act 2007-461.

Submitting both Acts for preclearance was no easy chore. Due to the Fat Tuesday fix, "changes" were made not only to the primary dates, but also to the rules for absentee voting, poll workers, and voter registration deadlines. *Id.* Furthermore, Mobile and Baldwin Counties had to open special election centers. *Id.* Each of these changes required preclearance. Later, language on the absentee registration forms had to be altered and submitted for preclearance. USDOJ File No. 2007-5733.

To complicate matters further, the Alabama Attorney General received a complaint that adding an additional primary was retrogressive under the theory that minorities tended to vote less as the number of elections in a year increased.[27] *Id.* Alabama included this complaint in its 35-page submission letter to USDOJ. *Id.* Alabama also included within its 27 exhibits a list of minority contacts and six charts of census data. USDOJ File No. 2007-3347.

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[27]The remainder of Alabama's federal, state, and county primaries remained on the first Tuesday in June.

The story has a happy ending: USDOJ precleared both Acts*, id.*, and Alabama bested its previous record turnout for a Presidential primary by 11%. *Alabama Has Record-Breaking Presidential Primary*, Press Release, Alabama Secretary of State (Feb. 7, 2008) *available at* http://www.sos.alabama.gov/PR/PR.aspx?ID=274 (last visited Feb. 26, 2009). The point is that when approximately 20 non-covered states made the same decision to hold their elections on Super Tuesday, they did so without struggling through a four-month preclearance process.[28] Furthermore, §5 granted the federal government the power to prevent Alabama from moving its primary date to Super Tuesday—a power it did not hold over non-covered states.

2. Appointing Supreme Court Justices

Since the Court granted cert in *Caperton v. A.T. Massey Coal*, No 08-22, the national debate between electing and appointing state supreme court justices has intensified. For example, Texas's Chief Justice, the Honorable Wallace Jefferson, recently called for Texas to switch from judicial elections to merit-based appointments, and a corresponding bill was immediately introduced in the Texas Senate. *See, e.g., Jefferson: Change Judicial Selection System*, The Associated Press (Feb. 11, 2009) *available at* http://www.kristv.com/Global/story.asp?S=9827329 (last visited Feb. 26, 2009).

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[28]The second Act, Act 2007-461, was passed on April 16, 2007. The Attorney General submitted both Acts for preclearance on June 29, 2007 and provided supplemental information on August 28. USDOJ File No. 2007-3347. USDOJ precleared both acts on August 30, 2007. *Id.*

Alabama knows this debate well; it was home to the nation's most expensive state supreme court race in 2008. *See* Eric Valesco, *Alabama High Court Race Again Garners Most Expensive Pricetag in U.S.*, The Birmingham News (Jan. 31, 2009) *available at* http://www.al.com/ (site search for "high court race again garners") (last visited Feb. 26, 2009). The Alabama State Bar has long advocated that Alabama switch from electing its appellate judges to a system of merit-based gubernatorial appointments; a position shared by Alabama's Chief Justice Sue Bell Cobb, if non-partisan elections are unattainable. *Cobb Wants to See Change and Prove Justice Is Not for Sale*, The Tuscaloosa News (Mar. 5, 2007) *available at* http://www.tuscaloosanews.com/article/20070305/NEWS/703050310 (last visited Feb. 26, 2009).

Section 5, however, may render the "election versus appointment" debate purely academic in Alabama (and Texas). Eliminating judicial elections is clearly a voting change requiring §5 preclearance. *See* 28 C.F.R. §51.13(i). While the purpose of switching to merit-based appointments is non-discriminatory, the effect may be considered retrogressive: Minority voters would lose the ability "to elect their preferred candidates of choice." 42 U.S.C. §1973c(b). Thus, under §5, the federal government could veto any change. *See id.*; 28 C.F.R. §51.52(c). And while it is admittedly impossible to predict the ultimate federal response, USDOJ has twice objected to changes from election to appointment in Alabama's past. *See* USDOJ File Nos. V4105 (objecting to a statewide change from electing to appointing justices of the peace); 2006-6795 (objecting to Governor Riley's appointment of

Juan Chastang to the Mobile County Commission; withdrawn after the Court's decision in *Kennedy*).

Of course, the Governor's point is neither to take sides in the "election versus appointment" debate nor to predict USDOJ's position. The point is simply this: Under §5, if Alabama ever seeks to switch to judicial appointments—*i.e.* a process that is available to every non-covered state and has worked for this Court for 220 years—the ultimate choice of Alabama's selection process will be made by the federal government.

CONCLUSION

This Court should consider §5's burden on a fully-covered state, as well as the changes in Alabama's government and voting record since 1965.

Respectfully submitted,

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February 26, 2009

Appendix

U.S. Department of Justice

Civil Rights Division

Freedom of Information/Privacy
Acts Branch – NALC
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

NDH:TCG:ANF
2008-0526(4-425)

SEP 30 2008

Misty S. Fairbanks
Alabama State House
11 South Union Street, 3rd Floor
Montgomery, Alabama 36130-0152

Dear Ms. Fairbanks:

This is in response to your Freedom of Information Act request dated September 23, 2008, for a copy of the "Submission Tracking and Processing (STAPS) Statistics Report" to cover the years 1990 to 2008.

Enclosed please find a copy of the document that you requested.

I hope the Civil Rights Division has been of some assistance to you in this matter.

Sincerely,

s/ Tawana C. Greene for
Nelson D. Hermilla, Chief
Freedom of Information/ Privacy Acts Branch
Civil Rights Division

Date: 09-23-2008
Time: 10:22 AM

Submissi[on] Tracking And Processing System [(ST]APS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	1990	1991	1992	1993	1994
ALABAMA 0/	296	198	404	183	248
ALASKA 1/	72	61	115	92	72
ARIZONA 2/	234	151	208	165	193
ARKANSAS 5/	0	1	0	1	0
CALIFORNIA 8/	23	41	118	89	87
COLORADO 3/	***	***	***	***	***
CONNECTI[-] CUT 4/	***	***	***	***	***
FLORIDA 3/	32	28	33	22	51
GEORGIA 0/	906	590	1028	790	857
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	1	***	***	***	***
LOUISIANA 0/	430	463	616	495	446
MAINE 4/	***	***	***	***	***

MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	0	3	7	1	3
MISSISSIPPI 0/	219	315	238	176	178
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	0	0	11	0	1
NEW MEXICO 6/	4	9	5	7	1
NEW YORK 3/	65	50	44	42	15
NORTH CAROLINA 3/	201	229	171	169	157
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	357	278	427	298	316
SOUTH DAKOTA 3/	0	0	3	0	1
TEXAS 0/	1597	1737	1445	1534	1665
VIRGINIA 0/	372	438	434	357	370
WYOMING 3/	***	***	***	***	***
Totals	4809	4592	5307	4421	4661

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

2/ Selected counties covered until 1975; entire state covered since 1975.

3/ Selected county (counties) covered rather than the entire state.

4/ Selected towns covered rather than the entire state.

5/ Coverage pursuant to court order under Section 3.

6/ Selected counties covered in 1976; subsequent coverage of state, for certain changes and three counties under Section 3.

7/ County covered under court order under Section 3; not covered in 1990, however, made one submission.

8/ Selected counties covered under Section 5; subsequent coverage under Section 3 for an individual county.

*** Not covered for years indicated

Number of Submissions By State for All Calendar Years

State Name	1995	1996	1997	1998	1999
ALABAMA 0/	181	288	233	237	287
ALASKA 1/	67	79	64	107	82
ARIZONA 2/	240	210	195	198	235
ARKANSAS 5/	0	0	1	0	1
CALIFORNIA 8/	64	36	28	43	36
COLORADO 3/	***	***	***	***	***
CONNECTI[-] CUT 4/	***	***	***	***	***
FLORIDA 3/	26	26	15	52	30
GEORGIA 0/	598	556	611	551	537
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	***	***	***	***	***
LOUISIANA 0/	403	460	507	504	497
MAINE 4/	***	***	***	***	***

MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	2	2	0	0	1
MISSISSIPPI 0/	239	203	150	180	216
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	0	0	0	0	0
NEW MEXICO 6/	3	0	3	1	1
NEW YORK 3/	26	26	35	29	26
NORTH CAROLINA 3/	173	174	199	193	219
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	323	367	305	282	257
SOUTH DAKOTA 3/	2	1	0	1	0
TEXAS 0/	1265	1974	1507	1500	1414
VIRGINIA 0/	387	327	194	143	173
WYOMING 3/	***	***	***	***	***
Totals	3999	4729	4047	4021	4012

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

2/ Selected counties covered until 1975; entire state covered since 1975.

3/ Selected county (counties) covered rather than the entire state.

4/ Selected towns covered rather than the entire state.

5/ Coverage pursuant to court order under Section 3.

6/ Selected counties covered in 1976; subsequent coverage of state, for certain changes and three counties under Section 3.

7/ County covered under court order under Section 3; not covered in 1990, however, made one submission.

8/ Selected counties covered under Section 5; subsequent coverage under Section 3 for an individual county.

*** Not covered for years indicated

Date: 09-23-2008
Time: 10:22 AM

Submiss[ion] Tracking And Processing Syste[m (S]TAPS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	2000	2001	2002	2003	2004
ALABAMA 0/	609	241	347	355	456
ALASKA 1/	65	85	103	78	86
ARIZONA 2/	235	178	309	248	268
ARKANSAS 5/	0	1	1	0	0
CALIFORNIA 8/	59	56	55	62	75
COLORADO 3/	***	***	***	***	***
CONNECTI[-]CUT 4/	***	***	***	***	***
FLORIDA 3/	31	19	37	22	46
GEORGIA 0/	661	590	963	1014	958
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	***	***	***	***	***
LOUISIANA 0/	397	305	724	502	478
MAINE 4/	***	***	***	***	***

MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	1	4	5	27	3
MISSISSIPPI 0/	174	118	264	188	203
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	0	0	3	0	44
NEW MEXICO 6/	1	0	2	2	3
NEW YORK 3/	11	23	21	48	17
NORTH CAROLINA 3/	219	265	230	213	219
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	336	241	398	292	347
SOUTH DAKOTA 3/	0	2	3	16	23
TEXAS 0/	1647	1751	2224	1569	1775
VIRGINIA 0/	192	343	221	195	209
WYOMING 3/	***	***	***	***	***
Totals	4638	4222	5910	4831	5210

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

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*** Not covered for years indicated

Date: 09-23-2008
Time: 10:22 AM

Submiss[ion] Tracking And Processing Syste[m (S]TAPS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	2005	2006	2007	2008	Totals
ALABAMA 0/	226	396	346	595	6126
ALASKA 1/	38	68	68	66	1468
ARIZONA 2/	316	332	312	214	4441
ARKANSAS 5/	0	0	0	0	6
CALIFORNIA 8/	99	111	69	46	1197
COLORADO 3/	***	***	***	***	***
CONNECTI[-]CUT 4/	***	***	***	***	***
FLORIDA 3/	23	40	22	19	574
GEORGIA 0/	921	907	858	617	14513
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	***	***	***	***	1

LOUISIANA 0/	403	421	455	380	8886
MAINE 4/	***	***	***	***	***
MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	1	4	10	1	75
MISSISSIPPI 0/	158	127	166	130	3642
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	57	2	0	0	118
NEW MEXICO 6/	0	1	0	0	43
NEW YORK 3/	29	15	21	21	564
NORTH CAROLINA/3	214	240	231	172	3888
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	308	346	362	283	6123
SOUTH DAKOTA 3/	16	8	5	7	88
TEXAS 0/	1689	3900	3056	2155	35404
VIRGINIA 0/	235	194	162	184	5130
WYOMING 3/	***	***	***	***	***

Totals	4733	7112	6143	4890	92287

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

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*** Not covered for years indicated

[USDOJ OBJECTIONS: ALABAMA (1994-2006)]

[Jurisdiction & USDOJ File No.]	[Objection To]	[Date of Objection]
Greensboro (Hale Cty.) (93-4223)	Districting plan for the city council	1-3-94
State (89-1439)	Amendment 425 to the Alabama Constitution, insofar as it provides that a referendum on a local constitutional amendment may not be held unless it is first approved by the Local Constitutional Amendment Commission	1-31-94
State (93-3195-96) (93-2322)	The changes for the courts of criminal and civil appeals and the supreme court occasioned by Act Nos. 602 and 987 (1969), 75 (1971), and 346 (1993) in the context of the at-large method of electing these courts	4-14-94 Withdrawn 3-18-96
Tallapoosa County (97-1021)	Redistricting plan	2-6-98

[Jurisdiction & USDOJ File No.]	[Objection To]	[Date of Objection]
Alabaster (Shelby Cty.) (2000-2230)	Annexations (Ordinance Nos. 94-338 and 96-410)	8-16-00

[BULLOCK-GADDIE]

TABLE 2

REPORTED REGISTRATION BY RACE IN ALABAMA AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992
ALABAMA							
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8
White	73.3	70.2	77.2	74.3	75	74.9	79.3
Non-South							
Black	60.6	61.7	67.2	63.1	65.9	58.4	63
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9

	1994	1996	1998	2000	2002	2004
ALABAMA						
Black	66.3	69.2	74.3	72	67.6	72.9
White	73.3	75.8	74.1	74.5	73.7	73.8
Non-South						
Black	58.3	62	58.5	61.7	57	na
White	65.6	68.1	63.9	65.9	63	na

Source: Various post-election reports by the U.S. Bureau of the Census

[BULLOCK-GADDIE]

TABLE 3

REPORTED TURNOUT BY RACE IN ALABAMA
AND OUTSIDE THE SOUTH,
1980-2004

	1980	**1982**	**1984**	**1986**	**1988**
ALABAMA					
Black	48.9	41.2	54.8	55.2	52.4
White	59.2	52	62.8	52.5	58.4
Non-South					
Black	52.8	48.5	58.9	44.2	55.6
White	62.4	53.1	63	48.7	60.4

	1990	**1992**	**1994**	**1996**	**1998**
ALABAMA					
Black	45.7	58.1	53.5	54.3	51.6
White	52.7	65.9	64.3	56.3	51.6
Non-South					
Black	38.4	53.8	40.2	51.4	40.4
White	48.2	64.9	49.3	57.4	45.4

	2000	2002	2004
ALABAMA			
Black	57.2	43.3	63.9
White	60.8	50.7	62.2
Non-South			
Black	53.1	39.3	na
White	57.5	44.7	na

Source: Various post-election reports by the U.S. Bureau of the Census

[BULLOCK-GADDIE]

TABLE 4

NUMBER OF AFRICAN-AMERICAN
ELECTED OFFICIALS IN ALABAMA, 1969-2001

Year	Total	County	Municipal	School Board
1969	70	2	34	5
1970	86	4	44	7
1971	105	4	45	12
1972	83	7	42	11
1973	149	20	55	16
1974	149	17	57	16
1975	161	17	60	20
1976	171	19	75	19
1977	201	22	91	23
1980	238	26	115	25
1981	247	32	112	32
1984	314	48	158	44
1985	375	52	212	47
1987	448	71	253	56
1989	694	86	428	86
1991	707	88	473	81
1993	699	94	435	86

Year	Total	County	Municipal	School Board
1995	-------No Report from the Joint Center-------			
1997	726	107	444	85
1999	725	101	439	94
2001	756	99	470	91

Source: Various volumes of *The National Roster of Black Elected Officials* (Washington, D.C.: Joint Center for Political and Economic Studies).

[BULLOCK-GADDIE]

TABLE 5

RACIAL MAKEUP OF THE
ALABAMA LEGISLATURE, 1965-2005

Year	Senate	House	% Black in Senate	% Black in House
1965	0	0	0	0
1967	0	0	0	0
1969	0	0	0	0
1971	0	2	0	1.90
1973	0	2	0	1.90
1975	2	13	5.71	12.38
1977	2	13	5.71	12.38
1979	3	13	8.57	12.38
1981	3	13	8.57	12.38
1983	3	15	8.57	14.29
1985	5	19	14.29	18.10
1987	5	19	14.29	18.10
1989	5	18	14.29	17.14
1991	5	19	14.29	18.10
1993	5	19	14.29	18.10
1995	8	27	22.86	25.71
1997	8	27	22.86	25.71
1999	8	27	22.86	25.71
2001	8	27	22.86	25.71
2003	8	27	22.86	25.71
2005	8	27	22.86	25.71

[LETTERHEAD: ALABAMA ATTORNEY GENERAL]

MEMORANDUM

Date: November 21, 2007

To: All Interested Individuals

From: Winfield J. Sinclair, Assistant Attorney General, Constitutional Defense Division

Re: Making a Preclearance Submission under Section 5 of the Voting Rights Act

Overview

On July 27, 2006, President Bush signed into law a 25-year extension of the preclearance provisions Voting Rights Act. Alabama governments remain under Section 5 preclearance requirements. Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) requires that the State of Alabama and its political subdivisions seek preclearance from the United States Department of Justice or the United States District Court for the District of Columbia before making any change in any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." The Office of the Attorney General makes many submissions under Section 5 to the Department of Justice ("DOJ") each year on behalf of the State but the State's political subdivisions are responsible for submission of local changes (such as annexations or ordinances). The Attorney General's Office can provide a sample submission for reference and comparison to help local officials in their preparation

of such a submission. This memorandum is a brief outline for local officials on how to prepare a Section 5 preclearance submission.

In preparing a preclearance submission to the Department of Justice, you should follow the "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965." The applicable regulations are in Part 51 of Title 28 of the Code of Federal Regulations and can also be found at the Department of Justice website http://www.usdoj.gov/crt/voting/28cfr/51/28cfr51.htm. The Voting Section portion of the website provides a great deal of helpful information regarding making Section 5 submissions at http://www.usdoj.gov/crt//voting/sec_5/about.htm. The Voting Section can also be contacted by telephone at (800) 253-3931 or (202) 307-2767. Their facsimile (FAX) number is (202) 307-3961.

Necessary Submission Contents

Sections 51.26, 51.27 and 51.28 of the DOJ regulations explain the necessary content for submissions. The list of required contents is found in section 51.27 and includes:

a. A copy of the Act, plan, ordinance, etc., to be precleared;

b. A copy of the Act, plan, ordinance, etc., repealed or amended by the submitted Act, plan, ordinance, etc. (if any);

c. An explanation of the change affecting voting;

d. The name, address, and telephone number of the person(s) making the submission;

e. The submitting authority and jurisdiction responsible for making the change;

f. The county and state in which the submitting authority is located;

g. The person or body responsible for making the change and the mode of decision;

h. The statutory authority under which the change is made;

i. The date of adoption of the submitted Act, plan, ordinance, etc.;

j. The effective date of the submitted Act, plan, ordinance, etc.;

k. A statement that the change has not been enforced or an explanation as to why such statement cannot be made;

l. If the change affects less than the entire jurisdiction, the scope of the change;

m. A statement of the reasons for the change;

n. A statement of the anticipated effect on minority groups;

o. Identification and description of past or pending litigation;

p. A statement that the prior practice has been precleared or why it was not precleared; and,

q. Other information as needed.

Supplemental Submission Contents

Section 51.28 lists supplemental contents for submissions. Some of this information is optional, but some is required. For example, maps are required for annexations. Examples of supplemental information include:

1. Maps, if pertinent, showing prior and new boundaries and location of racial groups;

2. Demographic information;

3. Total and voting age population in affected area by race;

4. Registered voters in affected area by precinct and by race;

5. Election returns and race of candidates;

6. Publicity information and participation of interested parties, e.g., newspaper articles, public hearings, public notices;

7. Notices of availability of submission to the public;

8. Minority group contacts – Name(s), address(es) and telephone number(s) of

minority individual)s) whom DOJ can contact regarding the change;

9. Old and new boundaries for annexations, district changes, etc.; and,

10. Racial makeup of areas.

Transmittal of the Preclearance Request

By Mail or Other Carrier

The preclearance submission should be addressed to the Chief of the Voting Section, and can be sent either by U.S. mail or by a private carrier, such as UPS, Federal Express, Airborne Express, or DHL. U.S. mail may be delayed due to volume and is not recommended. Whatever method of delivery is chosen, it is recommended that you obtain and retain proof of delivery. **The envelope and the first page of the submission must be marked: "Submission under Section 5 of the Voting Rights Act."** In the case of short submissions, a submission can be sent by FAX transmission, retaining proof of transmission, to: (202) 616-9514.

Submissions may also include electronically stored media (such as magnetic disks) but such submissions are subject to very detailed and specific requirements as to labeling, contents, and formatting, so a review of the DOJ requirements (posted on its website) is recommended before submitting a submission containing such media.

Use the following addresses for documentary submissions:

By U.S. Mail:

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

By Private Carriers:

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
1800 G St., N.W.
Washington, D.C. 20006
(202) 307-2767

By Electronic Means

The DOJ Voting Section website offers the option of filing a Section 5 preclearance submission (or updating a previous filing) electronically. Such a submission may only be submitted during certain times and using a space-limited DOJ form. To utilize this feature, the submitting jurisdiction accesses the DOJ Voting Section website at the appropriate place and clicks on either the "New Submission" button or the "Update Previous Submission" button and follows the instructions. Due to limitations in the electronic submission process, the Office of the Attorney General has not made a Section 5 submission electronically. Accordingly, we have no recommendations on such submissions at the present.

The DOJ Review Process

By statute, 42 U.S.C. § 1973(c), the Department of Justice has 60 days to review a submission. Sometimes DOJ will request additional information from the submitting authority and then

restart the 60 day clock. Frequently, the DOJ reviewer will contact the submitting authority by telephone and ask for additional information and/or clarification with respect to less important matters contained in a submission. This will not restart the 60 day clock and ordinarily will not delay preclearance.

Section 51.34 of the regulations explains how to request expedited consideration of a preclearance request. Expedited consideration cannot be guaranteed, but DOJ will attempt to complete its review by the requested date in appropriate cases.

When the DOJ grants preclearance, it will send a letter so stating but will further state that their grant of preclearance does not bar litigation. In the event that expedited preclearance is granted, the DOJ preclearance letter will also reserve the right to reexamine the submission if additional information comes to the attention of the DOJ before the 60 day submission review period expires. Finally, you will want to retain the DOJ preclearance letter for future preclearance purposes because DOJ regulations require submission of details of prior preclearance information in the event that you thereafter modify your practice.

[LETTERHEAD: ALABAMA ATTORNEY GENERAL]

February 20, 2007

Mr. Robert L. McCurley, Jr.
Director
Alabama Law Institute
Post Office Box 861425
Tuscaloosa, Alabama 35486-0013

Dear Bob:

Thank you for your letter inquiring into the preclearance status of Act No. 2006-570. You are correct that the submission to the Department of Justice for review pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, has not yet been made, though this massive project has been started.

As you know, Act No. 2006-570 is the 370-page revision of Alabama's election laws. While we understand that the Act was not intended to make substantive changes to existing law, such changes were made and each change must be specifically identified and explained. Any change which is not identified and explained cannot be enforced.

You may recall that my Office contacted you for assistance in identifying the changes made by Act No. 2006-570, and that you responded by providing a book identifying some changes. During that initial conversation, or a subsequent one, it became clear that the book did not identify every change made. Specifically, the conversation concerned changes made to section 17-4-124 of the Code of Alabama

which are not explained in the book, but which came to this attention of this Office during its defense of the *Gooden v. Worley* litigation.

We have learned through experience the importance of identifying changes to existing law. In *Ward v. Alabama*, 31 F. Supp. 2d 968 (M.D. Ala. 1998) (three-judge court), the State included a red-lined version of the amended absentee voting statute with its submission, but did not incorporate it by reference in its letter. The court enjoined enforcement of the law because the change at issue was not specifically called out. The court explained that, if the State had advised the Department of Justice that all of the changes were shown on the redline, that "might" be enough. *Id*. at 972; see also *id*. at 977 (Thompson, J. concurring). Then again, in another case, incorporating the redline by reference might not be sufficient. Id. at 974. Similarly, in *Boxx v. Alabama*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999), the court enjoined use of a recount procedure under the electronic voting regulations because the effect of the change was not specifically called out. The statute had been precleared, and the regulations had twice been precleared, but the State did not note that the regulations created a new basis for an election challenge. In both cases, the problem was not apparent in the abstract. Rather, only when the change was sought to be enforced, and politicians feared that the result of enforcing a nondiscriminatory provision of the law would be adverse to their interests, was Section 5 invoked.

In addition to carefully reviewing Act No. 2006-570 to identify, understand and describe the changes made, it is also necessary to research the

preclearance history of each and every statute involved. Accordingly, we have prepared a 25 page chart listing every statute renumbered, amended, or deleted by Act No. 2006-570. The chart details when each statute was enacted or last amended, as appropriate. While a number of statutes have not been enacted or changed since Alabama's coverage date, many others were. In sum, 59 different Acts are at issue in that they either added a statute, or last amended an existing statute, that is impacted by Act No. 2006-570.

Through a review of our own records and through a document request to the Department of Justice, we have ascertained that all but eight of those 59 Acts were submitted for Section 5 review and received the preclearance needed here.[1] As to the other eight Acts, a submission for each of those Acts may be necessary to facilitate the submission of Act No. 2006-570. Before preparing those submissions, however, we will look into whether any of these eight remaining Acts failed to make substantive changes requiring preclearance. We will also look into whether any of the statutes that had been impacted by these eight Acts were not substantively amended by Act No. 2006-570. It may be that not all eight submissions must be made before the review of Act No. 2006-570 can be completed.

Not only is the preclearance submission for Act No. 2006-570 standing alone a time-intensive project, but the 2006 federal, state and county

[1] An objection was interposed to portions of one Act, namely Acts 1975, No. 1196, but the objection did not impact any portion of the Act at issue in Act No. 2006-570.

elections have brought their own tremendous workload to the attorneys in my Office who have been assigned to prepare this submission. That work has manifested itself in the various election-related lawsuits as well as a higher-than-usual number of preclearance submissions which had to be made for the 2006 elections.

Many of these preclearance submissions were complicated, time-sensitive, and/or involved requests for more information from the Department of Justice. Additionally, many were connected to just a few of the election-related lawsuits that my Office has been actively defending over the past year.

Rest assured that the submission of Act No. 2006-570 has been assigned to able and experienced counsel who will do a thorough job explaining the various changes made by that Act and compiling the other information required by Department of Justice regulations. They have started this undertaking, and hope to have preclearance by sometime this summer.

The Act's effective date is January 1, 2007. This date was not realistic in light of the burdens placed on the State by federal preclearance requirements. This Act, and others with immediate effective dates, simply cannot be precleared before their effective date. In fact, there have been other preclearance matters in the past that have literally taken years, and a complete revision of Title 17 is not the sort of submission that one should expect to progress smoothly or quickly.

Your letter states that you have had inquiries from municipalities holding elections. I would recommend that you refer those municipalities to Ken Smith, Deputy Director/General Counsel at the League of Municipalities. My Office has worked with Mr. Smith on the submission of Act No. 2006-281 and the municipal portions of Act No. 2006-354. Otherwise, you should encourage the municipalities to continue following the current law until such time as the Department of Justice preclears the numerous changes made by Act No. 2006-570.

I trust this explanation is helpful to you in understanding why this project is not yet complete. Thank you, in advance, for your willingness to provide any assistance requested by this Office to answer any questions which might arise during the preclearance process. My Office will continue to work hard to obtain preclearance in a timely manner. We will let you know when the submission is made and when preclearance is achieved. In the meantime, if you have any further questions or if I can assist you in any way, I trust you will not hesitate to call on me again.

Sincerely,

Troy King
Attorney General

TRK/msf

cc: Honorable Randy Hinshaw, State Representative
Honorable Ken Guin, State Representative
Honorable Zeb Little, State Senator
Honorable Ken Smith, League of Municipalities