No. 07-1460

IN THE
Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA,
Appellant,

v.

FRED PLUMP,
Appellee.

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

MOTION TO DISMISS OR TO AFFIRM

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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 section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires preclearance when a covered jurisdiction enacts a statute repealing its preexisting law mandating special elections to fill vacancies on a county governing body and replaces it with a provision providing for temporary gubernatorial appointment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MOTION TO DISMISS OR TO AFFIRM

This case is about whether Alabama must obtain preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, when the state legislature repeals a statute requiring special elections and replaces it with one providing for temporary gubernatorial appointment. In 1977, the Alabama Legislature enacted a law providing for special elections to fill vacancies on the Jefferson County Commission. That legislation was precleared by the Attorney General, as required by section 5, and used twice without controversy to fill vacancies. In 2007, when another vacancy arose on the Commission, Governor Bob Riley (the appellant in this case) refused to follow the 1977 Act and appointed George Bowman to fill the seat for the remainder of the unexpired term. A three-judge district court subsequently held that appellant's use of gubernatorial appointment rather than special election to fill the vacancy constituted a change affecting voting requiring preclearance under section 5.

A month after appellant filed his jurisdictional statement in this case, the Alabama Supreme Court, in a parallel proceeding, confirmed that gubernatorial appointment in fact marks a change in the method for filling vacancies on the Jefferson County Commission. In *Working v. Jefferson County Election Comm'n*, 2008 WL 2569255 (Ala. June 30, 2008), that court found that the Alabama Legislature has repealed the 1977 Act through the normal legislative process. In the course of its opinion, the Alabama Supreme Court rejected the Governor's

contention that he had the right to appoint a commissioner to fill the entire unexpired term in favor of an interpretation of Ala. Code § 11-3-1(b) under which the Governor is now entitled to make a temporary appointment to be followed by special election this coming November. And it expressly declined to address the Governor's claim that the 1977 Act had been rendered unconstitutional by its earlier decision in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988).

The State has not yet submitted new section 11-3-1(b) for preclearance. Indeed, it has expressly refused to do so.

These developments take the situation here decisively outside the "narrow scope" of this Court's holding in *Riley v. Kennedy*, 128 S. Ct. 1970, 1986 (2008). In *Kennedy* this Court identified three factors explaining why the use of gubernatorial appointment to fill vacancies on a different body – the Mobile County Commission – constituted no change despite the presence of a precleared 1985 local act authorizing special elections. All three of those factors are absent here.

First, in *Kennedy*, "the presence of a judgment by Alabama's highest court declaring the 1985 Act invalid" was "critical." 128 S. Ct. at 1986. That judgment, the Court explained, distinguished the situation from the "routine" application of section 5 to situations "requiring a State to administer a law it has repealed" through the political process. *Id.* In this case, by contrast, Alabama's highest court expressly *refused* to declare the 1977 Act unconstitutional and instead found that it had been

repealed – exactly the "routine" circumstance requiring preclearance identified by this Court.

Second, in *Kennedy*, the 1985 Mobile County local law had been "challenged the first time it was invoked and struck down shortly thereafter." *Id.* The court distinguished that case from one in which "a practice [was] invalidated only after enforcement without challenge in several previous elections." *Id.* Here, by contrast, Act 77-784 was enforced without challenge in two previous elections. Indeed, the first challenge to the Act's validity was not filed until January 2008, more than twenty-five years after it had twice been used.

Third, in *Kennedy*, the state court's decision holding the 1985 Act unconstitutional had simply "reinstate[d]" a practice of gubernatorial appointment "identical" to the prior baseline practice. 128 S. Ct. at 1987. This Court emphasized that preclearance "might well have been required" had the state court instead required use of a "novel practice." *Id.* This case, by contrast, undeniably involves the adoption of a new practice differing both from the relevant section 5 baseline – the prior, precleared practice set out in the 1977 local act – and from the practice in force or effect on section 5's coverage date.

If this Court were to reach the merits of appellant's section 5 claim, summary affirmance would be appropriate. But because appellant filed each of his notices of appeal more than thirty days after the interlocutory orders he is challenging, this Court lacks jurisdiction to consider his claims.

STATEMENT OF THE CASE

1. When the Voting Rights Act was passed in 1965, a number of different laws governed how vacancies on Alabama county commissions – the general governing body for the State's 67 counties – were to be filled. There was a general state statute, Ala. Code Tit. 12, § 6 (1958), which served as a default, providing for gubernatorial appointment.[1] But in some counties, vacancies were filled by other procedures pursuant to local acts governing only those counties. In particular, in Jefferson County, vacancies were filled pursuant to a 1957 local act, Act 57-429.[2] That Act called for vacancies to be filled in the manner specified in the general state statute – gubernatorial appointment – but shortened the term of office of the replacement. Rather than serve out the remainder of the unexpired term, the appointed person would hold office only until a successor could be elected in "the next general election for any state officer held at least six months after the vacancy occurs." (Such elections are held in even-numbered years.)

In 1977, the Alabama Legislature passed new legislation governing vacancies on the Jefferson County Commission. Alabama Act 77-784 provided

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[1] Tit. 12, § 6 was later recodified without substantive changes as Ala. Code § 11-3-6 (1975). Its successor, which does contain substantive modifications from the provision in force or effect in 1965, appears in Ala. Code § 11-3-1(b).

[2] The 1957 local act was a "population bill," in that it did not refer to Jefferson County by name, but specified that it was to govern only counties with a population of 500,000 or more. Jefferson County was the only county to meet that description.

that vacancies would be filled exclusively by special election. J.S. App. 44a-49a.

Because Alabama is a covered jurisdiction, section 5 of the Voting Rights Act required the State to obtain preclearance of Act 77-784 before administering the change from temporary appointment to election. Alabama sought, and received, preclearance from the Attorney General. *See* J.S. App. 7a.

Following its preclearance, Act 77-784's special election procedures were used two separate times in 1982 to fill vacancies on the Commission. Neither time did anyone challenge the use of Act 77-784.[3]

Twenty-five years later, in October 2007, the vacancy giving rise to this lawsuit occurred when Larry Langford, the commissioner representing District 1, was elected mayor of Birmingham. After Langford resigned his seat, the Jefferson County Election Commission, pursuant to Act 77-784, adopted a resolution calling for a special election on February 5, 2008 – the date of the presidential primary – to fill Langford's seat. J.S. App. 4a.

In November 2007, however, Governor Riley appointed George F. Bowman to the seat. His

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[3] A third vacancy on the commission, which occurred in 2001, was filled through gubernatorial appointment. The record in this case does not reflect any challenge being brought to the governor's appointment. The district court in this case speculated that the 2001 vacancy was filled by the governor "presumably because of [an intervening Alabama Supreme Court decision in] *Stokes*" *v. Noonan*, 534 So. 2d 237 (Ala. 1988), J.S. App. 3a, which had struck down a different local law providing for special elections as a violation of Ala. Const. § 105.

appointing letter, which made no reference to Act 77-784, provided that Bowman would fill the entirety of Langford's unexpired term. *See* Letter from Bob Riley to George Bowman, Nov. 21, 2007, Dist. Ct. Docket No. 38, Attach. 2, Exh. Q. Governor Riley made the appointment after appellee filed suit in the district court.

2. Appellee Fred Plump is an African American citizen of Alabama and a registered voter in Jefferson County Commission District 1. In the face of appellant's announcement of his intention to fill the vacancy by appointment, appellee filed suit in November 2007 in the United States District Court for the Middle District of Alabama. In his amended complaint, appellee alleged that the Governor's actions violated sections 2 and 5 of the Voting Rights Act as well as the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. The complaint sought both declaratory and injunctive relief.

On January 22, 2008, the three-judge court issued an opinion addressing appellee's motion for a preliminary injunction with respect to his section 5 claims.[4] The court concluded that the use of gubernatorial appointment rather than the special election procedure set out in Act 77-784 constituted a change with respect to a voting practice or procedure requiring preclearance under section 5. Act 77-784, it found, was the applicable baseline. J.S. App. 7a. "The gubernatorial appointment power exercised thereafter was, therefore, a change in practice

[4] That opinion did not address appellee's section 2 or constitutional claims.

covered under the Voting Rights Act which must be precleared." *Id.* The district court recognized that the situation in Jefferson County was "not identical" to that in Mobile County, J.S. App. 6a, given appellee's argument that the 1977 Jefferson County Act, unlike the 1985 Mobile County Act at issue in *Kennedy*, had never been declared unconstitutional by the Alabama Supreme Court. Still, along with relying on this Court's decisions in *City of Lockhart v. United States*, 460 U.S. 125 (1983), and *Perkins v. Matthews*, 400 U.S 379 (1971), to explain why Act 77-784 was the appropriate section 5 baseline regardless of whether it conformed to other provisions of Alabama law, the district court did point to the reasoning regarding this question in the district court's opinion in *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), later reversed by this Court. *See* J.S. App. 6a-7a.

Having found that gubernatorial appointment required preclearance, the district court then considered what relief to order. It granted appellee's request for a declaratory judgment that preclearance was required. J.S. App. 10a. But it denied appellee's request for immediate injunctive relief removing appointed Commissioner Bowman from office. Relying on this Court's decisions in *Lopez v. Monterrey County*, 519 U.S. 9 (1996), and *Berry v. Doles*, 438 U.S. 190 (1978), the district court instead gave the Governor the opportunity either to seek preclearance of the appointment or to advise the court that instead of seeking preclearance, he would file an appeal to this Court. J.S. App. 9a. The district court then announced that the Governor would have until February 5, 2008 – the date of the

already scheduled special election – to inform the court whether he would seek preclearance. If the Governor did not inform the court of his intention to seek preclearance by that date, then the district court directed that "the seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court." J.S. App. 10a. By contrast, if the Governor did announce an intention to seek preclearance, he would be given ninety days to obtain preclearance. If preclearance were not obtained during that time, then the seat would be vacated. *Id.* In its January 22 opinion and order, the district court did not explicitly announce what it would do if appellant simply filed a notice of appeal.

On January 25, 2008, the district court amended its original judgment to provide that if the Governor decided to appeal the January 22 judgment but declined also to seek preclearance, the seat would be vacated on February 5, 2008. J.S. App. 17a.

On February 5, 2008, appellant informed the district court that Alabama would seek preclearance of the exercise of gubernatorial appointment to fill vacancies on the Jefferson County Commission. J.S. App. 31a. The State filed its preclearance submission on March 18, 2008. On May 8, 2008, the Department of Justice requested more information from the State. J.S. 6 n.5. Earlier this month, the State, among other things, notified the Department of Justice that it considered the request "to be both misguided and unreasonable" and accordingly "no response will be provided." Letter from Ala. Ass't Att'y Gen. Misty S. Fairbanks to Chief, Voting Section, July 1, 2008, at 2.

Although the district court's January 25 judgment purported to be a final judgment, the court later revisited what appellant calls its "contingent, springing remedy order." J.S. 6. On April 16, 2008, the district court stayed its January 25 judgment until the earlier of sixty days from the date of the State's preclearance submission or the Attorney General's response to the submission. And the district court "open[ed] the door" to further stay motions in the event the preclearance process took longer than sixty days. J.S. 6 n.4.

Appellant filed his first notice of appeal on March 22, 2008, fifty-seven days after the January 25 judgment. He filed a second notice of appeal on May 20, 2008, 116 days after the January 25 judgment and thirty-four days after the district court's April 16 stay order.

3. Parallel to the proceedings in this case, there was litigation in the Alabama state court system concerning the Jefferson County Election Commission's decision to set a special election for February 5, 2008, to fill Langford's seat.

On January 31, 2008, shortly after the district court's initial decision in this case, two Jefferson County residents filed suit against the Election Commission in the Jefferson County Circuit Court. *Working v. Jefferson County Election Commission*, Civ. Act. No. CV 08-900316 JSV (filed Jan. 31, 2008). The plaintiffs alleged, inter alia, that the February 5, 2008, special election was unauthorized because Act 77-784 violated section 105 of the Alabama Constitution, which prohibits the enactment of a "local law" in "any case which is provided for by a general law." They eventually amended their

complaint to allege that although the February 5, 2008, election would be invalid because of the unconstitutionality of Act 77-784, the Election Commission was required by a different Alabama statute, Ala. Act 2007-488 (codified as Ala. Code § 11-3-1(b)), to hold a special election in November 2008 to replace the Governor's appointee. *See Working v. Jefferson County Election Comm'n*, 2008 WL 2569255, at *2 (Ala. June 30, 2008). Governor Riley intervened in the *Working* litigation as a plaintiff in support of the constitutional challenge and also to argue he was entitled to appoint for the remainder of the unexpired term. Appellee Plump intervened as a defendant to defend the validity of Act 77-784.

The circuit court declined to enjoin the February 5, 2008, election, which was held as planned. On February 14, 2008, however, the Alabama Supreme Court granted an emergency motion filed by the *Working* plaintiffs and enjoined the Election Commission from certifying the results of the election pending a trial on the merits of their claims.[5]

At that trial on the merits, the circuit court upheld Act 77-784 against the claim it violated the prohibition on local laws contained in section 105 of the Alabama Constitution, interpreting Ala. Code § 11-3-1(b) to authorize this form of local legislation. *See Working v. Jefferson County Election Comm'n*,

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[5] According to unofficial tallies, William Bell, who was subsequently added as a party defendant, received a majority of the votes cast, defeating – among the other five candidates – the governor's appointee, George Bowman. *See Working v. Jefferson County Election Comm'n*, Civ. Act. No. CV 08-900316 JSV at 3.

Civ. Act. No. CV 08-900316 JSV at 1, 10 (Jefferson County Cir. Ct. Mar. 18, 2008).

On appeal, the Alabama Supreme Court did not reach that constitutional question. Instead, it held Act 77-784 had been repealed by Ala. Act 2007-488, codified as Ala. Code § 11-3-1(f). *Working* 2008 WL 2569255, at *11. The starting point for the court's analysis was Ala. Code § 11-3-1(b). Section 11-3-1(b) (enacted as part of Ala. Act 2004-455 and originally codified as section 11-3-6) provides, in pertinent part, that "[u]nless a local law authorizes a special election, any vacancy on the county commission shall be filled by appointment by the Governor." In *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), the Alabama court had construed this provision as an explicit approval only for local laws enacted subsequent to 2004. Since Act 77-784 had been enacted decades earlier, the court concluded Ala. Code § 11-3-1(b) did not affirmatively ratify Act 77-784. *Working*, 2008 WL 2569255, at *11.

To the contrary, the Alabama Supreme Court concluded that the Alabama Legislature, in Ala. Act 2007-488 (the operative subsections of which have not been precleared)[6] expressly *repealed* Act 77-784:

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[6] Act 2007-488 enacted a sweeping set of changes in the law governing Alabama county commissions. The State submitted a preclearance request, which specifically identified the particular provisions for which the State sought preclearance. The Department of Justice granted preclearance as to those provisions.

However, the State expressly declined to submit section 11-3-1(b) for preclearance. Nor did it submit section 11-3-1(f), as later interpreted by the Alabama Supreme Court. Rather, the State represented that section 11-3-1(f) did not constitute "a

> Section 11-3-1(f) now expressly repeals local laws in conflict with any other provision of § 11-3-1: "Any existing local law or portion thereof in conflict with this section is specifically repealed to the extent of the conflict effective with the next election following September 1, 2007." Act No. 784, by purporting to provide for special elections to fill vacancies on the Jefferson County Commission, is "in conflict" with § 11-3-1(b), which requires vacancies to be filled by gubernatorial appointment, with no exception for preexisting local laws. Act No. 784, as a preexisting local law, therefore was repealed by the legislature's adoption of § 11-3-1(f).

Working, 2008 WL 2569255, at *11.

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substantive change affecting voting," and requested preclearance only "[t]o the extent that the Department may disagree." Exh. IV of Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section, February 4, 2008, State Sub. No. 2008-0427. Accordingly, the Department of Justice precleared section 11-3-1(f) only "to the extent not inconsistent with the unsubmitted and unprecleared changes in Section 11-3-1, Sections (a) and (b)." Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Ass't Att'y Gen. Winfield J. Sinclair at 2 (April 4, 2008).

Because the preclearance submission did not specifically identify sections 11-3-1(b) and 11-3-1(f) as changes in election practices, and did not specifically request preclearance of those sections, the State has not yet obtained preclearance of either. *See Clark v. Roemer*, 500 U.S. 646, 657 (1991) ("A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices.") (quotation omitted).

In light of this construction of the Alabama Code, the court found it "unnecessary" to resolve "the issue of the constitutionality of Act No. 784 in relation to § 105 of the constitution." *Id.* at *11 n.11. But the court did make clear that it, and not the governor, had the sole power to declare a law void under section 105. *See id.* at *5 n.8.

Having resolved the question whether Act 77-784 required a special election, the court then turned to the *Working* plaintiffs' other claim – that Ala. Code § 11-3-1(b) required one. After providing a general authorization of gubernatorial appointment, section 11-3-1(b) further provides that if a gubernatorial appointment occurs early enough in an election cycle,[7] then "the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein." The Alabama Supreme Court construed this section to require a special election here, since Governor Riley's appointment of Bowman occurred within the time frame prescribed by section 11-3-1(b). *Working*, 2008 WL 2569255, at *11. That election, the court held, should occur as part of the November 2008 general election. *Id.* at *12. It therefore rejected the Governor's contention that he was entitled to fill the seat for the entirety of Langford's unexpired term.

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[7] The precise language is "[i]f the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5" of the Alabama Code. Section 17-13-5(a) provides that party qualifying shall occur sixty days before the primary election, which is held on the first Tuesday in June, *id.* § 17-13-3.

On July 1, 2008, the State informed the Department of Justice, before which the preclearance submission regarding the gubernatorial appointment of George Bowman was pending, of the Alabama Supreme Court's decision in *Working*. *See* Letter from Ala. Ass't Att'y Gen. Misty S. Fairbanks to Chief, Voting Section, July 1, 2008. The State acknowledged its initial submission, which had sought preclearance of gubernatorial appointment to fill the remainder of Langford's term (which lasted until 2010) had been overridden by *Working*, but did not seek preclearance of the repeal of Act 77-784 or the adoption and use of Ala. Code § 11-3-1(b). *See id.* at 2.

SUMMARY OF ARGUMENT

I. This appeal should be dismissed for lack of jurisdiction because appellant failed to file timely notices of appeal from the interlocutory orders he is challenging. 28 U.S.C. § 2101(b) requires appeals from interlocutory orders be taken within thirty days. That provision is jurisdictional and cannot be waived. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *accord* Sup. Ct. R. 18.1 ("The time to file [an appeal] may not be extended.").

In this case, appellant seeks review of the district court's amended judgment issued on January 25, 2008. He filed his initial notice of appeal on March 22, 2008, fifty-seven days later. He filed a second notice of appeal on May 20, 2008, 116 days after the January 25 judgment and thirty-four days after the district court had stayed that initial order.

Consequently, neither of these notices of appeal was timely.

Appellant cannot escape this jurisdictional bar by characterizing the January 25 judgment as final or, alternatively, calculating the timeliness of his appeal from various dates on which the judgment, interlocutory when rendered, might have become final had various contingencies occurred. The January 25 judgment addressed only one of the claims presented in appellant's amended complaint and thus cannot be final because it did not resolve all the causes of action presented in the complaint. *See Collins v. Miller*, 252 U.S. 364 (1920); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948). Nor did the district court follow the mechanism provided by Fed. R. Civ. P. 54(b) for entering final judgment on a single claim. And even as to the section 5 claim the district court did address, the judgment was not final because it left the timing and nature of the relief in limbo, dependent on several contingencies that to this day remain unresolved. The district court's April 16, 2008, order granting appellant a temporary stay did nothing to resolve the additional claims or bring finality to the section 5 claim. Thus, the only two dates relevant for purposes of measuring the timeliness of appellant's notices of appeal are January 25 and April 16, 2008. Appellant's failure to file a notice of appeal within thirty days after either date deprives this Court of jurisdiction to consider his claims.

II. If this Court does reach the merits, it should affirm the district court's judgment. Section 5 of the Voting Rights Act requires preclearance when a covered jurisdiction shifts from election to

appointment as a means of filling a public office. *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). This Court's recent decision in *Riley v. Kennedy*, 128 S. Ct. 1970 (2008), both reaffirmed *Allen* and *Presley* and confirmed that "requiring a State to administer a law it has repealed" unless and until that repeal has been precleared is "a routine consequence of § 5," *id.* at 1986.

This case falls squarely within the scope of section 5 as interpreted in *Allen*, *Presley*, and *Kennedy*. In 1977, Alabama enacted, and received preclearance for, a law providing for special elections to fill vacancies on the Jefferson County Commission. That law – Ala. Act 77-784 – was used twice, without challenge. Special elections thus became the section 5 baseline. Nonetheless, in 2007, a vacancy on the Commission was filled through gubernatorial appointment, rather than by special election. The district court in this case correctly held that the Governor's appointment effected a change in voting practice and therefore required preclearance.

The Alabama Supreme Court subsequently confirmed that the process for filling vacancies on the Jefferson County Commission has indeed been changed from the Act 77-784 baseline. It found that as the result of legislation passed in 2007, the Alabama Legislature replaced Act 77-784, which it described as the "preexisting local law," with a new system involving a mixture of gubernatorial appointment and special election depending on when a vacancy occurs. *Working v. Jefferson County Election Commission*, 2008 WL 2569255, at *11 (Ala. June 30, 2008). Alabama has not obtained

preclearance of the repeal of Act 77-784 or its replacement with the mixed system set out in Ala. Code § 11-3-1(b).

Governor Riley argues that he was not obligated to obtain preclearance before exercising his appointment authority because Act 77-784 violates the Alabama constitution and was therefore void *ab initio*, and because his appointment simply represents a return to the practice in force or effect in 1964. Both arguments are incorrect. In *Working*, the Alabama Supreme Court expressly refused to declare Act 77-784 unconstitutional. Rather, the court described that Act as a "preexisting local law" that governed the filling of vacancies on the Jefferson County Commission until its legislative repeal in 2007. Moreover, as interpreted by Alabama's highest court, the scheme set out in Ala. Code § 11-3-1(b) differs both from the relevant section 5 baseline – Act 77-784 – and from the practice in force or effect on section 5's coverage date. In light of the Alabama Supreme Court's clarification of state law, this case falls in the heartland of this Court's section 5 jurisprudence.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR GOVERNOR RILEY'S UNTIMELY APPEAL.

Direct appeals to this Court must be taken "within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final." 28 U.S.C. § 2101(b). Thus, while Congress contemplates that some direct appeals will

involve interlocutory orders rather than final judgments, it has specifically shortened the time for appealing in such cases.

In this case, appellant filed his initial notice of appeal, seeking review of the district court's January 25, 2008, judgment, fifty-seven days later, on March 22, 2008. J.S. App. 37a. He filed a second notice of appeal from the same judgment nearly two months later than that, on May 20, 2008. J.S. App. 72a.

Both of those notices of appeal were untimely. The district court's January 25 judgment was in fact only interlocutory. It addressed only one of the claims in appellee's complaint. And even as to that claim, the January 25 judgment cannot be treated as final. The timing and nature of the remedy awarded to appellant in the January 25 judgment remained uncertain and in dispute, and in fact remains so to this day. The district court's April 16, 2008, stay did nothing to resolve the additional claims or bring finality to the section 5 claim. Even less, then, can that stay be treated as a final judgment. Thus, any notice of appeal resting on that decision was required to be filed no later than May 16, 2008. The May 20, 2008, notice of appeal was therefore untimely under any theory.

A. The District Court's January 25 Amended Judgment and Its April 16 Order Staying That Judgment Were Both Interlocutory.

1. A decision is "final for purposes of an 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.*

Railroad Co. v. Southern Express Co., 108 U.S. 24, 28-29 (1883); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945).[8]

To be appealable as final, a judgment "should be final . . . as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920); *see also Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Johnson v. California*, 541 U.S. 428, 429-31 (2004) (dismissing, for want of jurisdiction, a case in which the California Supreme Court had ruled on only one of petitioner's three claims because the failure to address all the claims meant that its judgment was not "final" within the meaning of 28 U.S.C. § 1257).

By this standard, the district court's January 25 judgment cannot be considered final since it left several causes of action pending. Appellant's amended complaint expressly raised claims under section 2 of the Voting Rights Act and under the Thirteenth, Fourteenth, and Fifteenth Amendments as well as under section 5. Amended Complaint, Dist. Ct. Dock. No. 5. Appellant acknowledges that "the three-judge court did not resolve all the claims in plaintiff's amended complaint." J.S. at 2; *see also* J.S. App. 25a (stating the district court's January 22 judgment "leaves pending several other claims for relief").

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[8] This Court has found it "instructive in interpreting the parallel term 'final' judgment in § 2101(b)" to look at *Catlin* and other cases interpreting the meaning of "final decision" with respect to 28 U.S.C. § 1291, which governs appeals from district courts to courts of appeals. *Kennedy*, 128 S. Ct. at 1981 n.5.

The district court's January 22 opinion and its January 25 order did not even mention, let alone resolve, those claims. Instead, the district court deferred consideration of those additional federal claims pending the outcome of the State's application for preclearance. If the Department of Justice interposes an objection, those claims will be moot, since the district court will vacate Bowman's appointment. If, on the other hand, the State were to obtain preclearance or this Court were to hold for some reason that preclearance is not required, then the other statutory and constitutional claims would remain live and appellant would be entitled to have them adjudicated. Therefore, the *case* was not terminated by the January 25 judgment. Rather, the ultimate resolution of this litigation depends in part on a contingency. *See Republic Natural Gas Co.*, 334 U.S. at 71 (deeming lower court judgment non-final where "the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation").

The interlocutory nature of the January 25 judgment cannot be altered by the district court's characterization. The court's order that the judgment be docketed as final pursuant to Fed. R. Civ. Pro. 58, J.S. App. at 17a, does not change its lack of finality. As this Court recently reaffirmed in *Riley v. Kennedy*, "[t]he label used by the District Court . . . cannot control [an] order's appealability." 128 S. Ct. at 1981 (quotation omitted).

Fed. R. Civ. P. 54(b) provides the only mechanism for entering a final judgment resolving fewer than all of the plaintiff's claims. That rule states that, in cases involving multiple claims, a

court may direct entry of a final judgment as to one or more but not all of the claims "only if the court expressly determines that there is no just reason for delay." The district court made no such determination in this case, as appellant candidly acknowledges, J.S. 2.

The availability of Rule 54(b) and the availability of review of even interlocutory orders under 28 U.S.C. § 2101(b) undercut appellant's suggestion that this Court should strain to construe a partial judgment as final in order to reach an important legal question. The law provided appellant a straightforward opportunity to appeal the district court's judgment, as long as he filed his notice of appeal within thirty days. He did not do so. Section 2101(b) does not admit of any circumstances in which a clear failure to meet its timeliness requirements may be excused. *Cf. Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (interpreting the parallel language in § 2101(c) as "mandatory and jurisdictional," providing this Court with "no authority to extend the period for filing except as Congress permits"). Indeed, the requirement for timely notice of appeal serves a particularly important function in the context of section 5 coverage litigation. It forces a defendant to decide promptly whether to appeal a finding of coverage, seek preclearance, or do both, rather than allowing the defendant to delay by first pursuing one course and then, if unsuccessful, the other. The thirty-day limit on the filing of a notice of appeal thus ensures that challenges to voting practices are resolved quickly and efficiently.

2. Appellant suggests that the district court's failure to address all the causes of action in appellee's complaint is somehow irrelevant because the other claims would be heard by a single-judge court. *See* J.S. at 3.[9] But he points to no authority for the proposition that a judgment resolving fewer than all of the plaintiff's claims somehow becomes final – rather than simply serving as a basis for interlocutory review – because some of the claims are to be considered by a different-sized panel. He has thus failed to meet his burden of affirmatively establishing this Court's jurisdiction. *See Republic Natural Gas Co.*, 334 U.S. at 71 ("The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction.").

3. Even considering appellee's section 5 claim alone, the three-judge district court's January 25 judgment fails to meet the necessary standard of finality. The district court chose "to afford [Governor Riley] an opportunity to seek federal approval *before ordering relief*." J.S. App. 9a (emphasis added) (quotation omitted). The district court granted declaratory judgment in favor of the plaintiff, but created what appellant rightly recognizes as a "curious" remedial scheme, J.S. 2, that "can only be

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[9] In support of this argument, he cites conflicting authority from other jurisdictions addressing the question whether a three-judge court can hear claims for which a three-judge court is not required. J.S. at 3. Appellant omits, however, a prior decision in the district where this case arose holding that a three-judge court does have discretion to consider all the claims in a lawsuit before it. *See Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 500 (M.D. Ala. 1976) (three-judge court).

described as contingent, springing injunctive relief," *id.* at 4. It allowed the State two weeks to decide whether to seek preclearance, file an appeal to this Court, or do both, and depending on the State's choice and the playing out of the preclearance process purported to order the commission seat vacated sometime between February 5, 2008, and never.

The January 25 judgment thus left the timing and nature of plaintiff's remedy in limbo, contingent upon both Governor Riley's future course of action and the State's ability to obtain preclearance. As appellant acknowledges, "the court's remedy was that the Governor's appointment might be vacated on February 5, 2008, or it might be vacated on April 21, 2008 (90-days from January 22, 2008), or it might not be vacated at all." J.S. at 5. Like the judgment this Court deemed interlocutory in *Kennedy*, the remedial orders in this case did not "conclusively settl[e] the key remedial issue" because, "[f]ar from requiring the Governor to seek preclearance, the District Court expressly allowed for the possibility that he would elect not to do so." 128 S. Ct. at 1981.

While the district court's contingent remedies may have been designed to minimize the likelihood that the court would need to act again on the section 5 claim, they did not foreclose that possibility. Indeed, on April 16, 2008, more than two months after issuing its purportedly final judgment, the district court modified that judgment in response to appellant's April 8, 2008, motion for a stay pending appeal. The decision to grant the stay was not merely "ministerial," for it altered the very substance of the district court's January 25 judgment by

keeping Bowman in office for an additional period of time. It therefore cannot be said that the order "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. at 233.

Recognizing the uncertain status of the January 25 judgment, the Jurisdictional Statement offers a series of dates on which the district court's judgment on the section 5 claim might conceivably have become final. It concludes that the two notices of appeal were timely filed "to the extent that the court's judgment was final on any of these dates." J.S. at 5, 7. But appellant fails to recognize that the district court's judgment *never* achieved finality. The district court's judgment provided that *either* Alabama would obtain preclearance for the appointment of General Bowman, *or* the appointment would be vacated. As a result of the stay granted by this Court on April 18, 2008, neither of those contingencies has yet occurred. The Jurisdictional Statement thus measures the timeliness of this appeal against every yardstick except the one that matters: the district court's non-final, interlocutory order that went into effect on January 25, 2008.

4. The district court's April 16, 2008, order entering a stay of its January 25 judgment was equally interlocutory. Like the earlier order, the April 16 stay left the timing and nature of relief owed to the plaintiff in limbo. Its only effect was to modify the dates on which the contingent remedies might take effect. As appellant notes, after the April 16 order, "the Governor's appointment might have been vacated at any time between April 21, 2008 (the

judgment's original deadline) and May 19, 2008 (the final date authorized by the district court stay), depending on when and how the United States Department of Justice acted." J.S. 6. This Court's grant of a stay pending appeal two days later precluded that order from going into full effect.

B. Since No Notice of Appeal Was Filed Within the Thirty-Day Timeframe Set Out in 28 U.S.C. § 2101(b), This Appeal Must Be Dismissed for Lack of Jurisdiction.

Under 28 U.S.C. § 2101(b), appeals must be taken from interlocutory judgments within thirty days. Appeals not taken within the period set by § 2101(b) 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."); *cf. Missouri v. Jenkins*, 495 U.S. at 45 (describing a parallel time limit in another subsection of § 2101 as "mandatory and jurisdictional").

Appellant did not file his first notice of appeal within thirty days of January 25, 2008. His second notice of appeal was not filed within thirty days of either January 25, 2008, or April 16, 2008. Accordingly, his appeals are untimely and should be dismissed for lack of jurisdiction.

II. ALABAMA WAS REQUIRED TO SEEK PRECLEARANCE FOR THE USE OF GUBERNATORIAL APPOINTMENT TO FILL VACANCIES ON THE JEFFERSON COUNTY COMMISSION.

The Jurisdictional Statement in this case has been overtaken by events. Appellant's argument as to why the district court erred depends on his view that Act 77-784 was unconstitutional as a matter of state law and thus, even though the Act had been precleared and actually used at least twice to fill vacancies through special elections, was void *ab initio* and could not serve as a baseline under section 5. It further depends on his assertion that the appointment authority he would use marks a return to the practice in force or effect in 1964.

The Alabama Supreme Court's decision in *Working v. Jefferson County Election Commission*, __ So.2d __, 2008 WL 2569255 (Ala. June 30, 2008) undercuts both of these assumptions.[10] Presented with an opportunity to hold Act 77-784 unconstitutional, the court squarely refused to do so. Instead, it held that the Alabama Legislature in a simple legislative act had repealed Act 77-784. And having found that Act 77-784 had been repealed by Act 2007-488, the Alabama high court concluded that *that* legislation, codified in Ala. Code § 11-3-1(b), and not the 1977 local act, should govern how the vacancy should be filled. Because the provisions of Act 2007-488 that effected the repeal clearly require,

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[10] The Alabama Supreme Court is, of course "unquestionably 'the ultimate exposito[r] of state law.'" *Kennedy*, 128 S. Ct. at 1985 (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)).

but have not obtained, preclearance, this case falls squarely within the "routine consequence of § 5" that a state must "administer a law it has repealed," unless and until it receives preclearance of the new law. *Riley v. Kennedy*, 128 S. Ct. at 1986. In light of Alabama's clarification of its own law, a straightforward application of this Court's section 5 jurisprudence dictates that the district court's holding should be affirmed.

1. Appellant's attempt to use gubernatorial appointment rather than special election to fill the vacancy on the Jefferson County Commission effected a change to the voting practice then in force or effect in Jefferson County. Prior to the appointment in this case, Ala. Act 77-784, a statute providing for special elections, had governed the filling of vacancies on the Commission. Act 77-784 was enacted and precleared in 1977, and was invoked twice in 1982 to fill vacancies on the Commission. *See* J.S. App. 2a-3a; 6a-7a. Its use to fill those seats was never challenged. The district court thus correctly held that Act 77-784 was the section 5 baseline.

Those facts bring this case into sharp contrast with *Kennedy*. Unlike the local act at issue in *Kennedy*, Act 77-784 has never been declared unconstitutional by the Alabama Supreme Court. *See* J.S. App. 6a. In fact, Act 77-784 had never been the subject of any legal challenge until several individuals contested the legality of the February 5, 2008, special election in Jefferson County, over twenty-five years after the Act was twice used to fill vacancies and after the district court's decision in this case.

The Alabama Supreme Court's decision in *Working* confirms that Act 77-784 was not invalid *ab initio*, in contrast to the local act in *Kennedy*.[11] The plaintiffs in *Working*, joined by Governor Riley, had argued that Act 77-784 violated section 105 of the Alabama Constitution.

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[11] Under Alabama law, Act 77-784 stood in a different relationship to Ala. Const. § 105 than did the Mobile County local act at issue in *Kennedy*. Act 77-784, unlike the 1985 Mobile law, was enacted before the Alabama Supreme Court's decision in *Peddycoart v. City of Birmingham*, 354 So. 2d 808 (Ala. 1978). *Peddycoart* interpreted § 105 to "prohibit[] the enactment of a local act when the subject is already subsumed by the general statute." *Id.* at 813. Recognizing that *Peddycoart* marked an explicit change in its interpretation of § 105, the Alabama Supreme Court expressly declared that its new interpretation would apply only prospectively to laws enacted after the decision – that is, to post-1978 laws. As to all laws then on the books, the Alabama Supreme Court directed that they continue to be governed by pre-*Peddycoart* standards. *Id.* at 814-15. Under those standards, Act 77-784 poses no constitutional difficulty. *See, e.g.*, *Brandon v. Prince*, 74 So. 939 (Ala. 1917) (holding that a local act providing for a different manner of jury selection in Tuscaloosa County than provided by general law did not violate Ala. Const. § 105); *Dunn v. Dean*, 71 So. 709 (Ala. 1916) (holding that a local act providing for the Conecuh County Commission to be composed of more members elected in a different way than that provided by general law did not violate Ala. Const. § 105).

By contrast, the Mobile County local act providing for special elections, Act 85-237, was enacted in 1985, seven years after the *Peddycoart* decision. Because this post-*Peddycoart* local act conflicted with the general state statute providing for gubernatorial appointments, the Alabama Supreme Court held in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), that it violated section 105 and was therefore unconstitutional. The *Stokes* decision did not revisit *Peddycoart's* temporal bifurcation of section 105 judicial standards and therefore did not affect the validity of the many local acts enacted prior to *Peddycoart*.

But in its opinion the Alabama Supreme Court declined to address the constitutionality of Act 77-784. 2008 WL 2569255, at *11 n.11.[12] Instead, the court described Act 77-784 as a "preexisting local law" governing vacancies on the Jefferson County Commission that was later repealed by the state legislature. *Id.* at *11. According to the court, Act 2007-488 supplanted Act 77-784 with a provision calling for at least temporary gubernatorial appointment to fill vacancies. *Id.*

The Alabama Supreme Court's *Working* decision confirms that a straightforward application of section 5 requires submission for preclearance here. Act 2007-488 repealed the "preexisting local law" that served as Jefferson County's section 5 baseline, a law precleared in 1977 and twice invoked without challenge. The 2007 Act, as interpreted by the Alabama Supreme Court, changes the voting practice in Jefferson County from special election to (at least temporary) gubernatorial appointment. Governor Riley's appointment on November 21, 2007, implemented this change in voting practice mandated by the Alabama legislature.

Nor is this a case in which appellant can argue that his appointment of Bowman returns to a provision for filling vacancies on the Commission that is "identical," *Kennedy*, 128 S. Ct. at 1987, to

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[12] The court made clear that the authority to declare a local act void under Ala. Const. § 105 rests exclusively with the courts. *Working*, 2008 WL 2569255, at *5 n.8 ("§ 105 affirmatively directs the judicial branch to decide disputes under that provision."). Governor Riley thus had no authority to ignore Act 77-784 on the basis of his own determination that it was unconstitutional.

the one "in force or effect on November 1, 1964," Alabama's section 5 coverage date, 42 U.S.C. §1973c(a). Ala. Act 57-429, which governed vacancies on the Jefferson County Commission, permitted a gubernatorial appointee to remain in office for the entire unexpired term only if the "vacancy occur[red]" within six months of the next general election. Otherwise, a special election was required. By contrast, section 11-3-1(b) looks to when a governor makes his "appointment" – and *not* to when the vacancy occurs – to determine whether a special election will be required, and it uses a far earlier dividing line to determine whether a special election is required.[13] Thus, section 11-3-1(b) not only changes the length of appointees' potential terms in office, but it is open to a form of gubernatorial manipulation through delay that did not exist under the 1957 local act.[14] Section 5

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[13] The 2007 Act looks at whether "the appointment occurs" at least a certain time before the next general election to set the dividing line between permanent and temporary gubernatorial appointment. Special election is required if the appointment occurs "at least 30 days before the closing of party qualifying." Ala. Code § 11-3-1(b). This trigger date is approximately eight months before the general election (because party qualifying occurs sixty days before the primary election, Ala. Code § 17-13-5(a), which is held on the first Tuesday in June, *id.* § 17-13-3, which is approximately five months before the general election held on the first Tuesday after the first Monday in November, *id.* § 17-14-3). Thus, the 2007 Act permits gubernatorial appointment for an entire unexpired term under circumstances where the 1957 Act would have required a special election.

[14] In this case, for example, appellant purported to appoint Bowman to serve Langford's entire unexpired term – that is, until 2010 – despite section 11-3-1(b)'s command for a special election in 2008.

requires preclearance "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer" a voting-related practice "different from" the baseline. Here, the Alabama Legislature "enact[ed]" a change in how vacancies will be filled, and Governor Riley has "[sought] to administer" an even more dramatic one.

Under this Court's section 5 decisions, the state legislature's repeal of Act 77-784 and the Governor's decision to use appointment rather than election require preclearance. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), this Court 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

Because the 1957 and 2007 systems provide for different terms of office, a direct transition from the former to the latter would have undeniably constituted a change requiring preclearance. *See* 28 C.F.R. 51.13(i) (requiring preclearance of "[a]ny change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices)"). Act 2007-488 therefore cannot be characterized as a return to the practice in force or effect on Alabama's coverage date.

And, needless to say, the 2007 Act also does not represent a return to the "identical" practice provided for by the default state law in effect in 1964, since Ala. Code Tit. 12, § 6 (1958) provided for gubernatorial appointment to fill an entire unexpired term, while the 2007 Act creates a hybrid system.

(1992), this Court reaffirmed that changes from election to appointment remain one of four paradigmatic "typologies" requiring preclearance. *See also Kennedy*, 128 S. Ct. at 1982 (describing it as undisputed that a 'change' from election to appointment is a change 'with respect to voting' and thus covered by § 5"). 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).

There is no question that Act 77-784 is the section 5 baseline in Jefferson County, because it has been "the procedure in fact 'in force or effect,'" *Perkins v. Matthews*, 400 U.S. at 395, and – after the *Working* decision – that baseline practice of special elections cannot be dismissed as a "temporary misapplication of state law," *Young v. Fordice*, 520 U.S. 273, 282 (1997). Thus, in light of *Allen*, Alabama was required to obtain preclearance before implementing Act 2007-488. Because preclearance has not been obtained with respect to sections 11-3-1(b) and 11-3-1(f), Governor Riley's appointment of General Bowman to the Jefferson County Commission was unlawful under section 5.

2. To be sure, the district court's *reasoning*, as opposed to its result, rested in significant part on the since-reversed decision in *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006). But "[i]n the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302

U.S. 238, 245 (1937); *see also Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."). Accordingly, a summary affirmance here would resolve only the question whether the district court's judgment was correct.

It undoubtedly was. The clarification of state law provided by the Alabama Supreme Court's decision in *Working* confirms the district court's holding that the use of gubernatorial appointment to fill an unexpired term on the Jefferson County Commission – either permanently or temporarily – constitutes a change in voting. Thus, this Court should summarily affirm the judgment in this case.

Of course, the district court did not have the benefit of the Alabama Supreme Court's clarifying opinion in *Working* when it reached its decision. If this Court were to conclude that resolution of the section 5 issue in this case for some reason requires additional consideration in light of *Kennedy* and *Working*, then the appropriate course of action might be to note probable jurisdiction and remand the case to the district court to more fully develop the record in light of those opinions.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for lack of jurisdiction or, in the alternative, the district court's judgment should be affirmed.

Respectfully submitted,

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