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

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

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September 22, 2008

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

STATEMENT

This case involves an appeal from a district court decision holding that, before Alabama could abandon a 1977 local act (Ala. Act 77-784) providing for special elections to fill vacancies on the Jefferson County Commission, Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), required the State to obtain preclearance for the new practice. Initially, Alabama took the position that the Governor had the power to appoint a replacement commissioner for the remainder of the unexpired (four-year) term because the use of appointment rather than election involved no change within the meaning of Section 5. But after the district court decision in this case was rendered and appellant had filed his jurisdictional statement, the Supreme Court of Alabama held that the state had in fact repealed Ala. Act 77-784 by enacting new statewide legislation providing for *temporary* gubernatorial appointment followed by a special election. *Working v. Jefferson County Election Comm'n*, 2008 WL 2569255 (Ala. June 30, 2008).[1] Appellee has filed a Motion to Dismiss or Affirm (MDA), arguing both that this Court lacks jurisdiction because the appeal is untimely and that, if there were jurisdiction, this Court should affirm the judgment below.

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[1] The Alabama Supreme Court's decision is reprinted in Appellant's Brief in Opposition to the Motion to Dismiss (BIO) at 6a.

The State, pursuant to the ruling from the three-judge district court that is the subject of this appeal,[2] filed a preclearance submission with the Department of Justice on March 18, 2008, and provided an additional response on July 1, 2008. See MDA at 8.

On July 22, 2008, Christopher Coates, the Chief of the Voting Section of the Department of Justice sent a letter to Alabama Attorney General Troy King regarding the preclearance submission made by the State. The Department had concluded that "it would be inappropriate for the Attorney General to make a preclearance determination" with respect to Alabama's submission in light of the fact that the Alabama statutes interpreted in the *Working* decision involved a "directly related" but "unsubmitted change." BIO 1a.

The "unsubmitted change" concerned recently adopted amendments to Ala. Code § 11-3-1 – specifically subsections (b) and (f). In *Working,* the Alabama Supreme Court held that these two subsections had repealed Ala. Act 77-784 (the provision for special elections in Jefferson County) and had substituted a uniform statewide law providing for the filling of vacancies on county commissions by gubernatorial appointment only until the next biennial election. The Alabama Supreme Court did not hold that the Act 77-784 was unconstitutional under the state Constitution, as the

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[2] The district court ordered the removal of the Governor's appointee unless the Governor appealed to this Court or filed for preclearance by a time certain. See MDA at 7-8; JS at 14a-15a. In addition, the district court granted a declaratory judgment in appellee's favor. On April 18, 2008, this Court granted a stay of the district court's judgment.

Governor had argued, but instead held that it was a "preexisting local law" which had been repealed. *See* MDA at 11-13.

On July 28, 2008, the State submitted additional information to the Justice Department in the form of a request for preclearance of the amendments to Ala. Code § 11-3-1(b) and (f). That submission received preclearance on September 15, 2008.[3]

Thus, the state has now complied completely with the district court's order in this case – by obtaining preclearance for the change in voting law that state law has made. There is nothing left for this Court to resolve.

ARGUMENT

IF THIS COURT HAS JURISDICTION OVER THIS CASE, IT SHOULD DISMISS THE APPEAL AS MOOT.

For the reasons stated in appellee's Motion to Dismiss or Affirm, this Court should dismiss the appeal in this case because the notice of appeal was not timely filed. *See* MDA at 17-25. But if this Court were to conclude that the notice of appeal was filed within the thirty days provided for by 28 U.S.C. § 2101(b), it should dismiss the appeal as moot.

A case becomes moot when "the statute that is the basis for the action is repealed or if the challenged conduct is modified." Eugene Gressman et al., Supreme Court Practice § 193, at 926 (9th ed. 2007); *see also Thorpe v. Housing Auth. of Durham*,

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[3] A copy of that letter has been provided to the Court by the Department of Justice.

393 U.S. 268, 282 (1969) (explaining that the same analysis of mootness applies "where the change was constitutional, statutory, or judicial"). As this Court explained in *City News & Novelty, Inc. v. City of Waukesha,* 531 U.S. 278, 283-284 (2001*),* when a party withdraws its plans to continue the challenged conduct, the appeal becomes moot even if the underlying judgment remains appropriate.

In this case, appellee's complaint challenged the Governor's assertion of the right to fill an unexpired term on the Jefferson County Commission through appointment. It alleged that before any change could be made from the practice of special elections provided for in Ala. Act 77-784, Section 5 of the Voting Rights Act required the State to obtain preclearance. The district court agreed. J.S. App. 10a. The State, pursuant to a state supreme court decision, has changed its practice, and the State has now obtained preclearance for its changed practice.

Thus, appellee has received what he sought in his complaint: compliance with Section 5's preclearance requirement. Moreover, having sought and obtained preclearance from the Department of Justice, the State is now seeking nothing of substance from this Court. Indeed, the State cannot seriously argue, in light of the Alabama Supreme Court's decision in *Working* and its supplemental Section 5 submission, that any decision of this Court would make any practical difference. Given the Alabama Supreme Court's decision in *Working*, the State's subsequent submission of the change required by *Working*'s interpretation of Ala. Code § 11-3-1(b) and (f), and the Department of Justice's preclearance of that change, even if this Court were

to reverse the judgment of the district court, Alabama would continue to be barred from adopting the practice covered by the district court's judgment – gubernatorial appointment to fill the entire unexpired term – because adopting that practice would now constitute an unprecleared change covered by Section 5.

In light of the fact that this case is now moot, the only remaining question is how to dispose of the State's jurisdictional statement. When a party before this Court has "left the fray as a loser, not a winner," it is entirely appropriate for this Court to "dismiss the petition" (or the appeal), "leaving intact the judgment below." *City News & Novelty,* 531 U.S. at 284. Similarly, in *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership,* 513 U.S. 18 (1994), this Court explained that it is appropriate to leave in place an existing judgment, even if the appeal has become moot, where the judgment is

> simply unreviewed by [the loser's] own choice. The denial of vacatur is merely one application of the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

Id. at 25. Here, the State could have preserved its claim that it was not required to seek preclearance by simply awaiting a judgment from this Court on its pending appeal. (Indeed, this Court had stayed the district court's judgment to preserve the status quo pending resolution of the appeal.) Instead, after repeated delays and an intervening decision by its own supreme court, Alabama complied with its preclearance obligations by seeking and obtaining

approval for a switch in its system for filling vacancies on the Jefferson County Commission. At this point, nothing the State might obtain from this Court by way of a decision would change, in the slightest respect, the way in which it fills seats on the Commission. Accordingly, this Court should dismiss the State's jurisdictional statement, leaving intact the judgment below.

CONCLUSION

For the foregoing reasons, if the Court does not grant appellee's earlier-filed motion to dismiss or affirm, the Court should dismiss this appeal as moot.

Respectfully submitted,

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