IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

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| FRED L. PLUMP,<br><br>Plaintiff,<br><br>v.<br><br>HONORABLE BOB RILEY, as Governor of the State of Alabama,<br><br>Defendant. | CIVIL ACTION NO.<br>2:07-cv-01014-MEF-CSC |

# Plaintiff's Brief in Opposition to the Motion for Stay Pending Appeal (Doc. 42)

Before giving a detailed response based on the standards for a stay pending appeal found in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), plaintiff presents the following summary of reasons the Court should not grant the current motion to stay pending appeal. These reasons are even more compelling than the reasons for the Court's denial of a similar motion in *Kennedy v. Riley,* Civil Action No. 2:05cv1100-MHT.

1. In *Kennedy*, Governor Riley could claim he was merely implementing a state court judgment; in *Plump*, the Governor is claiming he should be able to ignore a state court judgment.
2. The U.S. Supreme Court's upcoming decision in *Kennedy* (assuming the Court does not dismiss the appeal for failure to appeal on time) will not control the appeal in *Plump*, because:

a. Governor Riley cannot claim here, as he did in *Kennedy*, that the state constitution requires him to appoint someone to fill the Jefferson County vacancy.

b. As Jefferson County Circuit Judge Vowell's ruling shows, Governor Riley was acting on his own assumed authority when he filled the Jefferson County vacancy by appointment, not on the authority of a state court judgment. This important difference will remain even if he wins a reversal in the Alabama Supreme Court.

c. Governor Riley has unilaterally claimed authority to ignore the Alabama Legislature's unambiguous statutory intent to keep the Jefferson County local act in full force and effect. The Jefferson County local act has never been declared unconstitutional and did not have to be "revived" like the Mobile County local act did.

d. In Jefferson County, the practice in force and effect prior to 1964 was gubernatorial appointment only until the next general election, at which a new commissioner was to be chosen by special election.

3. Governor Riley's motion stands federalism on its head by asking this court effectively to overrule the state court decision holding Governor Riley has no appointive authority.

4. Governor Riley's motion stands Section 5 of the Voting Rights Act on its head by shifting the burden of time and inertia to black voters and to local election officials in Jefferson County.
5. Governor Riley's motion stands Section 5 on its head by allowing him to extend implementation of a voting change that cannot be precleared, because it was not authorized by state law.
6. To establish a substantial likelihood of success, Governor Riley must overcome both federal court and state court judgments.

## I. Defendant has not shown a likelihood of success on appeal.

The defendant claims that the upcoming U.S. Supreme Court "ruling in [*Riley v. Kennedy*] may resolve this litigation as well. To the contrary, there are important factual differences in the two cases.

First, the Jefferson County Circuit Court in *Working v. Jefferson County Election Commission* has held that state law does not allow the Governor to appoint a commissioner to a vacancy on the Jefferson County Commission. See *Working* Judgment at 9-13 (attached as Exhibit A).

Second, while the *Kennedy* plaintiffs had to deal with two Alabama Supreme Court rulings holding that the local laws purporting to call for special elections to fill county commission vacancies, there have been no state court decisions invalidating the local law affecting Jefferson County. To the contrary, there is a state circuit court decision upholding the law. See *Working* Judgment.

Third, Ala. Code § 11-3-1(b) and (f), as amended by Act 2007-488, explicitly allows existing local laws governing the filling of county commission vacancies to remain in force and effect. Ala. Code § 11-3-1(b) (replacing § 11-3-6, which has been repealed) begins with virtually the same phraseology that *Riley v. Kennedy* held can only be applied prospectively: "Unless a local law authorizes a special election, any vacancy on the county commission shall be filled by appointment by the Governor." But Ala. Code § 11-3-1(f), added in 2007, provides:

> *Except as specifically provided in subsections (b) and (c), this section applies in all counties and may not be altered or amended by* local *law.* 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. *It is the intent of the foregoing that* a portion of a local law in direct conflict with this section shall be repealed, and *any remaining portions of the local law not in conflict shall remain in full force and effect.*

(Emphasis added.) Thus, by specifying that local laws authorized by subsection (b) calling for vacancies on county commissions to be filled by special election "shall remain in full force and effect," the Legislature has provided the clear expression of retroactive effect called for by *Riley v. Kennedy*.[1] Thus Act 77-784 has never been repealed, so it remains in full force and effect, and the vacancy on the Jefferson County Commission created by Larry Langford's resignation must be filled by special election.

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[1] The State has submitted Act 2007-488 for preclearance, but has told the U.S. Attorney General that the new subsection (f) to § 11-3-1 makes no substantive change in existing practice. Submission No. 2008-0427. We agree as to Jefferson County.

Fourth, the practice in force and effect prior to 1964 in Jefferson County was gubernatorial appointment only until the next general election, at which a new commissioner was to be chosen by special election. See Act 1957-429 (attached as Exhibit B); see also Doc. 21-2 (Table of Local Acts).

## II. The defendant has shown no irreparable injury to himself, nor an absence of injury to the plaintiff and the public.

Under *Hilton v. Braunskill,* the applicant for a stay must show he "will be irreparably injured absent a stay." 481 U.S. at 776. Governor Riley states, "The relevant harm here is to Governor Riley and to the people of Alabama whom he represents." The only interest the Governor has in this is the preservation of his patronage power to make an appointment.

The residents and voters of Jefferson County District 1 are the ones who are harmed, not all "the people of Alabama." District 1 voters have spoken through an election, rejecting decisively the Governor's appointee and choosing William Bell.

Governor Riley asserts that the people of Jefferson County will be harmed by any vacancy on the Jefferson County Commission. Governor Riley can mitigate that harm by asking the Alabama Supreme Court to vacate its interim injunction against the certification of the results of the special election.

## III. This Court has already allowed Governor Riley to violate Section 5 for 90 days; it should not extend that violation.

The purpose of § 5 of the Voting Rights Act was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina v Katzenbach*, 383 US 301, 328 (1966). Congress drafted § 5 to centralize consideration of the substantive preclearance issues in two fora: the District Court for the District of Columbia and the U.S. Attorney General. To reverse the time-consuming, expensive, and legally burdensome case-by-case method of challenging proliferating changes in voting practices case by case, Congress also placed all the burdens of proof and delay on the covered jurisdictions.

Even though the plaintiff argued for immediate vacation of the appointment of Commissioner Bowman, the Court granted Governor 90 days to obtain preclearance. Governor was dilatory: he took 56 days to file his request for preclearance. If this case were so much like *Kennedy*, as the Governor argues, why did it take so long to prepare the preclearance request?

Unless the Governor files his Jurisdictional Statement within the next week, the U.S. Supreme Court will not have the time to consider the appeal before its summer recess.[2] Thus the stay sought by the Governor will extend to October at the earliest.

[2] The undersigned counsel has been told by Chris Vasil, Chief Deputy Clerk of the Supreme Court, that an appellee's or respondent's papers to an appeal or certiorari petition must be filed with the Court no later than 23 May to have any chance of being considered by the Court before the summer recess.

Submitted by,

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CERTIFICATE OF SERVICE

I certify that on 12 April 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

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