No. _____

In the

Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama, Appellant,

v.

FRED L. PLUMP, Appellee.

APPLICATION FOR STAY OF THE JUDGMENT OF THE THREE-JUDGE DISTRICT COURT GRANTING "SPRINGING" INJUNCTIVE RELIEF, OR, IN THE ALTERNATIVE, FOR AN INJUNCTION COUNTERMANDING THE RELIEF ENTERED BY THE THREE-JUDGE DISTRICT COURT

To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Eleventh Circuit:

The facts and legal issues presented in this case, set forth more fully below, are similar to those presented in *Riley v. Kennedy*, Case No. 07-77, now pending before this Court. In sum, the District Court here ruled that there was a change in a voting practice or procedure within the meaning of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and that the Governor's appointment and/or the state-court decisions on which that appointment was based—namely *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005)—must be precleared

in order for the Governor's appointee to remain in office. *See* Memorandum Opinion, attached as Exhibit A; Judgment, attached as Exhibit B; Order, attached as Exhibit C; Amended Judgment, attached as Exhibit D. The District Court further entered a "springing" injunction, ordering that *if* Governor Riley seeks preclearance, and *if* preclearance is not granted by April 21, 2008, then the appointment is vacated on that date without further order of the District Court.[1] *See id.*

The State of Alabama has requested administrative preclearance from the United States Department of Justice, and Governor Riley has, in an abundance of caution, appealed the District Court's judgment to this Court (doc. 39). Governor Riley also sought a stay in the District Court (doc. 42), and, on April 16, 2008, the Court stayed the Amended Judgment "until the earlier of sixty days from the date of the preclearance submission, or the date of the written response by the Attorney General to [the] preclearance submission." *See* Order, attached as Exhibit E. Thus, the injunction vacating Governor Riley's appointment could spring into effect on April 21, 2008 or at any time thereafter until on or about May 19, 2008, barring any subsequent stay.

For reasons set forth below, Governor Riley is likely to prevail on the merits of his appeal. Moreover, he and the citizens of Jefferson County will

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[1] If Governor Riley had chosen to appeal immediately rather than seek preclearance, the appointment would have been vacated on February 5, 2008. *See id.*

suffer irreparable harm if the stay is not granted because, if the appointment is vacated, the seat will, by virtue of a stay entered in related state-court litigation remain, vacant at least until a decision from this Court and/or the Alabama Supreme Court. Finally, the balance of equities weighs in favor of granting Governor Riley the relief he seeks.

I. Procedural History of This Case.

Proceedings in both federal court and state court are relevant to an understanding of the present litigation and the reasons why Governor Riley should be granted the relief sought. These are addressed below.

A. District Court History of the Present Case.

Introduction: A vacancy arose on the Jefferson County Commission when one of its members resigned. As is the case for Mobile County, which is the subject of *Riley v. Kennedy*, Case No. 07-77, there is a local law for Jefferson County (Act No. 77-784) providing that vacancies on the county commission are filled by special election. On the authority of *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988) (holding that Mobile County's local law violated § 105 because it was "a local law on the same subject as the previously enacted general law"), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005) (holding that an amendment to the general law allowing for local laws was not retroactive), Governor Riley contends that the Jefferson County local

law violates the Alabama Constitution, Article IV, § 105.[2] Thus, pursuant to the general law of Alabama, vacancies on the Jefferson County Commission must be filled by gubernatorial appointment. Ala. Code § 11-3-6.

1. *November 13, 2007.* A vacancy arose on the Jefferson County Commission when Larry Langford, who is African-American, resigned in order to assume the office of Mayor of the City of Birmingham, Alabama. *See* Stipulations (doc. 19), ¶ 7.

2. *November 16, 2007.* Plaintiff Fred L. Plump filed his complaint, alleging that Governor Riley had violated, or was about to violate, Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (doc. 1).

3. *November 21, 2007.* Governor Riley appointed General George F. Bowman to fill the vacant seat. Commissioner Bowman, who is African-American, is a retired two-star general in the United States Army and the son of a Tuskegee Airman. *See* Stipulations, ¶¶ 19-20.

4. *November 27, 2007.* Plaintiff filed his First Amended Complaint, alleging violations of Sections 2 and 5 of the Voting Rights Act and violations of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution (doc. 5).

5. *November 27, 2007.* Along with his First Amended Complaint, Plaintiff filed a Motion for Preliminary Injunction (doc. 6). That

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[2] Section 105 of the Alabama Constitution provides that "[n]o special, private, or local law . . . shall be enacted in any case which is provided for by a general law." Ala. Const. Art. IV, § 105.

motion was based entirely on the Section 5 claim, and Plaintiff asked, *inter alia*, that Governor Riley's appointment of Commissioner Bowman be vacated.

6. *November 29, 2007.* A three-judge District Court was designated (doc. 8).

7. *December 2007.* Governor Riley disputed the Plaintiff's claims and argued, among other things, that preclearance is not required because: (i) a state court decision construing state law is not a "change" in a voting practice or procedure pursuant to Section 5; (ii) the State of Alabama was merely reverting to the baseline voting practice in effect on November 1, 1964; (iii) any prior practice of filling vacancies by special election had been abandoned when then-Governor Don Siegelman, a Democrat, made an appointment in 2001 to fill a vacancy on the Jefferson County Commission (no party challenged that appointment on Section 5 grounds). *See* Answer to Amended Complaint (doc. 12); Defendant's Response in Opposition to Plaintiff's Motion for Preliminary Injunction (doc. 18).

8. *December 18, 2007.* The District Court entered an order setting oral argument on the Motion for Preliminary Injunction. *See* Orders (doc. 16, 23). The Court also set a briefing schedule on the motion (doc. 16).

9. *January 15, 2008.* The District Court heard oral argument on the Plaintiff's Motion for Preliminary Injunction.

10. *January 22, 2008.* The District Court entered a Memorandum Opinion, attached as Exhibit A, in which it granted the Plaintiff's request for declaratory judgment and denied the request for injunctive relief. The Court also entered a Judgment, attached as Exhibit B, which it labeled final.

11. *January 25, 2008.* The District Court entered an Order and an Amended Judgment, attached as Exhibits C and D, respectively. In pertinent part, the Amended Judgment provides:

> (1) Declaratory Judgment is entered in favor of the Plaintiff Fred L. Plump and against Defendant Governor Bob Riley.
>
> (2) The Defendant has 90 days from the date of the original Judgment, January 22, 2008, to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.
>
> a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. If the Defendant notifies the court on or before February 5, 2008 that he intends to appeal, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court.
>
> b. If the Defendant chooses to seek preclearance, he shall so notify the court in writing on or before February 5, 2008. In that event, if preclearance is not obtained by 90 days from the date of the original Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated 90

days from January 22, 2008 without further order of this court.

c. If the Defendant does not notify the court on or before February 5, 2008 which action he chooses to take, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court.

Amended Judgment, attached as Exhibit D. The Amended Judgment, like the original Judgment, is labeled as final.

12. *February 5, 2008.* Governor Riley gave notice that preclearance would be sought, while reserving his right to appeal the District Court's judgment. (doc. 34).

13. *March 20, 2008.* The State of Alabama's submission seeking administrative preclearance was delivered to the United States Department of Justice. The preclearance submission, which took notice of several events that had occurred after the Amended Judgment was entered in this case, requested expedited consideration and a decision by April 21, 2008 (90 days after the entry of the January 22, 2008 Judgment). A copy of the submission was filed with the District Court as an attachment to doc. 38.

14. *March 22, 2008.* Out of an abundance of caution, Governor Riley filed his Notice of Appeal to this Court (doc. 39).

15. *April 8, 2008.* Governor Riley filed a Motion for Stay Pending Appeal in the District Court (doc. 42).

16. *April 12, 2008.* Plump filed his Plaintiff's Brief in Opposition to the Motion for Stay Pending Appeal in the District Court (doc. 44).

17. *April 16, 2008.* The District Court ruled on Governor Riley's stay motion as follows:

> 1. The Motion for Stay Pending Appeal (Doc. #42) is DENIED.
>
> 2. The Amended Judgment entered in this case is STAYED until the earlier of sixty days from the date of the preclearance submission, or the date of the written response by the Attorney General to [the] preclearance submission. If at the end of 60 days from the date of the preclearance submission, the [United States] Attorney General should fail to make a determination as to preclearance, but instead seeks additional information, the court will entertain an additional stay at that time.

Order, attached as Exhibit E.

18. As of this date, the United States Department of Justice has not responded to Governor's Riley request for preclearance.

B. History of Related State-court Litigation

Introduction: Governor Riley's appointment of General Bowman also spawned state-court litigation as some challenged the Governor's conclusion—grounded in, and faithful to, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005)—that Alabama law required vacancies on the Jefferson County Commission to be filled by appointment. *Working, et al. v. Jefferson County Election Commission, et al.*,

CV 08-900316, Circuit Court of Jefferson County, Alabama. On February 5, 2008, a special election was held to fill the same vacancy that Governor Riley had filled by appointing Commissioner Bowman, and various parties litigated the validity of both the appointment and the special election under Alabama law. Governor Riley intervened in the action as a plaintiff and argued that his appointment was valid under Alabama law because Act No. 77-784 violated the Alabama Constitution. The opposing parties include the Jefferson County Election Commission (the body required by Act No. 77-784 to call special elections); Fred Plump, the Appellee in this case; and William Bell, who according to unofficial results received the most votes in the challenged February 5 election. Selected key events in the state-court litigation are set out below.

1. *January 31, 2008.* Citizens of Jefferson County filed a Verified Complaint in *Working, et al. v. Jefferson County Election Commission, et al.*, CV 08-900316, Circuit Court of Jefferson County, Alabama.

2. *February 5*, 2008. A special election was held.

3. *February 14, 2008.* After an interlocutory appeal, the Alabama Supreme Court entered an order enjoining local officials from canvassing or certifying the results of the special election. *See* Order, attached as Exhibit F.

4. *February 20, 2008.* The Alabama Supreme Court remanded the action to the Circuit Court for a determination of the merits. *See* Order, attached as Exhibit G.

5. *March 18, 2008.* In spite of the clear decisions from the Alabama Supreme Court holding that local laws such as Act No. 77-784 violate the Alabama Constitution, *see Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988); *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), the Circuit Court entered a judgment declaring that Alabama law required vacancies on the Jefferson County Commission to be filled by special election.

6. Governor Riley and other parties challenging the validity of the election immediately appealed to the Alabama Supreme Court.

7. *April 8, 2008 and April 15, 2008.* Governor Riley and aligned parties filed their briefs to the Alabama Supreme Court, arguing that the judgment of the Circuit Court should be reversed.

8. The *Working* case remains pending in the Alabama Supreme Court.

9. Governor Riley expects the Alabama Supreme Court to rule promptly after the opposing parties file their briefs, and further expects the Alabama Supreme Court to follow its clear decisions in *Stokes v. Noonan* and *Riley v. Kennedy* by declaring that Act No. 77-784 violates the Alabama Constitution.

II. Standards for Granting a Stay.

Justice Kennedy outlined the requirements for a stay in *Lucas v. Townsend*, 486 U.S. 1301 (1988), as follows:

> The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief. In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public.

Id. at 1304 (internal citations omitted). As shown below, Governor Riley satisfies each of these requirements.

III. Application of the Stay Standards to this Appeal.

A. Probable Jurisdiction.

This appeal arises under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Section 5 specifically provides that "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c(a).

The District Court entered its Judgment on January 22, 2008, *see* Exhibit B, and its Amended Judgment on January 25, 2008, *see* Exhibit D.

In each document, the District Court specifically characterizes its judgment as final. To avoid any conceivable jurisdictional objection (of the sort raised by the appellees in *Riley v.* Kennedy, No. 07-77), Governor Riley filed his notice of appeal on March 22, 2008, doc. 39, within 60 days of the entry of the Judgment and Amended Judgment. *See* 28 U.S.C. § 2101(b) ("Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.").

Governor Riley has expressed doubt about the finality of the Judgment and Amended Judgment in that they call for injunctive relief (in the form of vacating the appointment) to spring into being in the future, contingent upon whether preclearance is obtained. Adding the District Court's stay order to the analysis means that appointment may be vacated any time between April 21, 2008 and on or about May 19, 2008; if preclearance is obtained, the appointment will not be vacated at all. Given the existence of those contingencies, the judgment, it seems to the Governor, lacks finality. Nonetheless, out of an abundance of caution, Governor Riley filed his Notice of Appeal within 60 days of the original Judgment.

If and when the appointment is vacated, it is Governor Riley's intention to file a new notice of appeal in order to avoid any question about this Court's jurisdiction over his appeal. To the extent that the District

Court's Amended Judgment currently lacks finality, Governor Riley asks for an injunction countermanding the relief entered by the three-judge District Court effective upon, and conditioned on, his filing of a new notice of appeal after the appointment is vacated (by operation of the previously entered Amended Judgment). To the extent that the District Court's Amended Judgment is final now, as the District Court says it is, any stay should be effective immediately.[3]

B. The Case Was Erroneously Decided Below.

For many of the same reasons Governor Riley argued before this Court in *Kennedy v. Riley*, Supreme Court No. 07-77, the District Court erred by ruling that preclearance was required here.

In the *Riley v. Kennedy* appeal, in Part II of the Brief of Appellant, Governor Riley explained at length and in detail that State court rulings such as *Stokes v. Noonan* and *Riley v. Kennedy*, in which the state court is simply performing its *Marbury v. Madison* function in interpreting state law, do not represent "changes" for purposes of Section 5. Moreover, Governor Riley explained that the federalism implications of a contrary ruling would be profound, and the result entirely unworkable. The States of Florida, South Carolina, Alaska, Louisiana, New Hampshire, New Mexico, South Dakota,

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[3] The District Court's resolution of this case suffers from another fatal defect, as well. The Court has purported to enter a final judgment when the motion pending before it was for a preliminary injunction; no dispositive motions have been filed. (There has been no movement at all on the Plaintiff's non-Section 5 claims.) This error, however, would not seem to impact the jurisdiction of this Court.

and Virginia filed an *amicus* brief in support of Governor Riley on the issue of whether state court interpretations of state law are within the scope of Section 5. Governor Riley's and his amici's arguments apply in this case as well, nearly in their entirety.

In *Riley v. Kennedy*, in Part III of the Brief of Appellant, Governor Riley offered an alternative basis on which to reverse the District Court. The argument was that Mobile County's local law had never been "in force or effect" under *Young v. Fordice*, 520 U.S. 273 (1997), because the local law had been challenged at the earliest possible opportunity and had not survived that challenge. The facts in the present case are somewhat different and, perhaps, not quite as strong as those in the *Kennedy* litigation; nonetheless, the practice of filling vacancies on the Jefferson County by special elections was abandoned as promptly as possible. Here, the Jefferson County local law (Act No. 77-784) was passed in 1977, and two special elections were held pursuant that local law in 1982, without any legal challenge being brought. In 2001, however, when another vacancy arose on the Jefferson County Commission—the first since the Alabama Supreme Court's decision in *Stokes v.* Noonan—then-Governor Siegelman, made an appointment to fill the vacancy and that appointment was not challenged.[4] In appointing General

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[4] Then-Governor Siegelman, a Democrat, made an appointment to a vacancy arising in a Democratic district and the appointment was not challenged. Governor Riley, a Republican, made an appointment to a vacancy arising in a Democratic district and the appointment was challenged in the present litigation.

Bowman to fill the most recent vacancy, Governor Riley was merely continuing the practice of his predecessor, and acting in accordance with the requirements of the Alabama Constitution, as explained by the Alabama Supreme Court in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005).[5]

In addition, the following arguments are among those also available to Governor Riley. First, the plain language of Section 5 provides that preclearance is required only when a covered jurisdiction seeks to enforce a practice or procedure different from that in effect on its coverage date. *See* 42

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[5] It is true that an Alabama Circuit Court has ruled that state law calls for special elections, not appointments. However, the Circuit Court was in error, and its judgment *is currently on appeal to the Alabama Supreme Court.* (Likewise, the Circuit Courts erred in both *Stokes v. Noonan* and *Riley v. Kennedy*. Notably, each time, the Alabama Supreme Court reversed the Circuit Court's erroneous interpretation of state law.)

As Governor Riley has pointed out on appeal in the state court litigation, a general law (applying to the entire State of Alabama) provides that a vacancy on a county commission is to be filled by appointment of the Governor. Ala. Code § 11-3-6 (1989), as amended by Act No. 2004-455. A local law, Act No. 77-784, applies only to Jefferson County and provides that such a vacancy should be filled by special election. The Alabama Supreme Court has ruled that such local laws violate § 105 of the Alabama Constitution, *see Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), including when the general law allows for local exceptions but when the exception is prospective only and was added to the general law after passage of the local law, *see Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005).

The local law at issue in *Stokes v. Noonan* and *Riley v. Kennedy* (Act No. 85-237) applied to Mobile County, but in every important way it is like Act No. 77-784: It is a local law providing one means of filling vacancies when a general law provides another. Jefferson County's Act No. 77-784 is therefore unconstitutional in the same way Mobile County's Act No. 85-237 was.

U.S.C. § 1973c ("Whenever [Alabama] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting *different from that in force or effect on November 1, 1964* [preclearance is required].") (emphasis added). The practice for filling vacancies on the Jefferson County Commission on November 1, 1964 was gubernatorial appointment—the same practice challenged here.[6]

The plain language of Section 5 also speaks to a covered jurisdiction "enact[ing] or seek[ing] to administer" a changed practice or procedure. When state courts perform their *Marbury v. Madison* function of interpreting state laws, they are neither enacting nor administering a changed practice or procedure. *Cf. Branch v. Smith*, 538 U.S. 254, 264 (2003) ("Clearly the State Chancery Court's redistricting plan was not 'enacted' by the State of Mississippi. An 'enactment' is the product of legislation, not adjudication.") (citing dictionaries); *Webber v. White*, 422 F. Supp. 416, 427 (D.C. Tex. 1976) ("The Act, itself, in 42 U.S.C. s 1973c, uses the terms 'shall enact' and 'seek to administer.' The limitation of the applicability of this section to legislative, executive, and administrative actions is self-evident from the use of these

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[6] The Plaintiff can be expected to argue that the practices are not the same because the term of the appointment was allegedly different. *See* doc. 44 at 5 & Exhibit B thereto (a 1957 local law provided for gubernatorial appointment only until the next general election held at least six months after the vacancy arises). Assuming *arguendo* that the Plaintiff is correct that the term of the appointment would have been different, that would be a separate change. This case, like *Riley v. Kennedy*, has heretofore been about the fact of a gubernatorial appointment, not the length of the appointed term.

terms. The legislative history of s 5 of the Voting Rights Act of 1965 indicates that Congress feared the ingenuity of those in legislative and executive positions who were bent on preventing Blacks from voting. *See* H.R.Rep. No. 89-439 at 10-11; S.Rep. No. 89-162, pt. 3 at 8 & 12, U.S.Code Cong. & Admin.News 1965, p. 2437. There is no indication in the legislative history that Congress sought the Attorney General's review of state judicial law-making."). *See also Riley v. Kennedy*, Case No. 07-77, Brief of Appellant at 31-34 (explaining the purpose and legislative history behind Section 5). *But cf. Branch*, 538 U.S. at 265 (where a state court drew a redistricting plan because the legislature had failed to timely do so, the state was seeking to administer the changes—the court-drawn plan—when it submitted the plan for preclearance).

Governor Riley may make additional arguments as well, at the appropriate time. For present purposes, it is necessary only that Governor Riley demonstrate that the District Court erred, and he has done that.

C. Irreparable Harm.

Governor Riley is asking for a stay *before* another of his appointees is ousted from office. It is true that if Commissioner Bowman is ousted by the District Court's judgment, and if this Court ultimately reverses that judgment, Commissioner Bowman could be re-seated. However, the harm of the springing injunction would remain. Governor Riley would again suffer the harm of having his appointment, made pursuant to state law as he

understands it, vacated by a federal court. That harm would be exacerbated here if Commissioner Bowman were ousted even as the Alabama Supreme Court has before it—in the form of Governor Riley's appeal in the *Working* litigation—the opportunity to confirm that understanding. If the Alabama Supreme Court rejects Governor Riley's position—which, of course, he hopes it will not, and which would be a stark reversal of the Alabama Supreme Court's previous decisions—such a ruling would likely moot this case. That is because the Alabama Supreme Court would likely vacate the appointment, without the substantial federalism costs attendant to the same action being performed by the federal courts.

Moreover, the harm to Governor Riley is exacerbated further because it is not at all clear that the District Court did not commit error in advancing to the permanent relief stage of the litigation when it was a motion for preliminary injunction that was pending and had been briefed and argued. *See supra* page 13 n.3, doc. 31 at 2-3. This fact, when combined with the *Kennedy* litigation pending in this Court and the *Working* litigation pending in the Alabama Supreme Court, makes it appear that the imminent ouster of Governor Riley's appointee is being effected with undue haste.

In addition, if relief from the District Court's Amended Judgment is not granted and the appointment is vacated while the Alabama Supreme Court's stay is in place, the office of Jefferson County Commissioner, District 1, will simply remain empty. The citizens of that district will be

unrepresented on the five-member commission until such time as one court or the other lifts its stay; that harm cannot be undone.

According to the Jefferson County Commission's website, "The major responsibilities of the Commission are: [to a]dminister the County's finances[; to s]erve as custodians of all of the County's property[; to c]ollect taxes as set by [S]tate law[; to a]llocate resources for the construction of buildings, roads and other public facilities[; to p]rovide for the delivery of services that by law are the County's responsibility (such as sewer service and law enforcement) [; and to m]ake appointments to various governmental boards and agencies." *See* http://www.jeffcointouch.com/jeffcointouch/ieindex.asp (last visited on April 17, 2008). Commissioner Bowman is Commissioner of Health and Human Services, *see id.*, and ousting him from that position would presumably leave the remaining commissioners responsible for performing those important functions as well. Moreover, Jefferson County, Alabama's largest county and the county wherein the City of Birmingham lies, is in a fiscal crisis. Ousting Commissioner Bowman would do nothing to seat any replacement, it would only leave Jefferson County with one fewer Commissioner working to resolve the crisis. Better to leave Commissioner Bowman in office until this matter is decided in both the state and federal courts.

D. Balance of the Equities.

If this Court grants the requested relief and Commissioner Bowman remains in office, any alleged harm that the stay would cause to other parties does not outweigh the harm that would result if the relief is not granted. If the Alabama Supreme Court determines that its decisions in *Stokes v. Noonan* and *Riley v. Kennedy* somehow do not apply in Jefferson County as they do in Mobile County and that Alabama law calls for an election, then this federal case is likely mooted, the Alabama Supreme Court will lift its stay, and an elected Commissioner will assume the office (but he cannot assume office until the Alabama Supreme Court lifts its stay). Or, if this Court affirms the District Court's judgment and if the appointment is not precleared, then the vacancy could be filled by an approved method.

The available choices, however, do not include seating an elected commissioner immediately. That is not presently permitted by Alabama law. The choice is leaving Commissioner Bowman in office, so that the citizens of District 1 will be represented while these issues are decided, or having an empty office, which does no one any good.

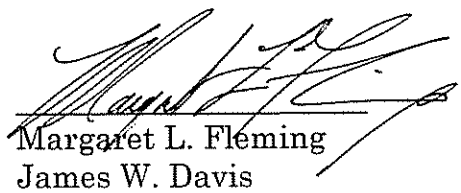
The relief Governor Riley requests will not harm any other party or the public interest, certainly not to the extent that such harm would outweigh the irreparable harm that would result if the relief is not granted.

IV. Conclusion.

For these reasons, Governor Riley respectfully requests that this Court enter an order staying the judgment of the three-judge District Court granting "springing" injunctive relief. In the alternative, if the injunctive relief has already sprung into being, Governor Riley respectfully requests that this Court enter an order countermanding the District Court's "springing" injunction.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL
BY:



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