No. 07-77

In the

Supreme Court of the United States

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

v.

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,
Appellees.

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

BRIEF OF HONORABLE BOB RILEY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ALABAMA, IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION

Section 5 prohibits a covered jurisdiction, like Alabama, from "enact[ing] or seek[ing] to administer any . . . standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, absent preclearance. Voting changes are measured against the statutory baseline practice, unless that baseline has moved. This case presents the question whether a letter from the United States Department of Justice interposing no objection to an unconstitutional local law advances the baseline, and freezes it. The district court erroneously held that it did so, thereby preventing the State from abandoning its unconstitutional practice, absent a second preclearance letter.

Applying Section 5 involves a delicate balancing of State and federal power. For a voting change to be legally enforceable, it must be precleared, and it must also be valid under applicable State law. If that were not so, election officials could adopt unconstitutional practices and, as long as USDOJ interposed no objection, commandeer the State Constitution. The district court's decision upsets the delicate balance, making Section 5 more vulnerable to a constitutional challenge.

1. Given the statewide applicability of the Alabama Supreme Court's decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, there is no basis for the Kennedy Appellees' suggestion that this appeal borders on moot. M.D.A. 15, n.12. This litigation, and the decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, arose in Mobile County, but their consequences do not end there. While the State's initial submission for preclearance limited the scope of the change submitted to the Mobile County Commission, *see* Notice of Filing Preclearance Submission, Docket No. 30, Ex. A at 6 (Nov. 9, 2006), the request for reconsideration made it abundantly clear that *Stokes v. Noonan* and *Riley v. Kennedy*, "like all decisions of [the Alabama Supreme] Court, are

applicable throughout the State," *see* Status Report of Governor Riley, Docket No. 42, Ex. A at 2, 14 (Jan. 30, 2007).

Similar local laws in Jefferson County, Randolph County, Houston County, and Etowah County were identified during this litigation, as was a *sui generis* Macon County local law. Status Report of Governor Riley, Docket No. 42, Ex. A at 8 (Jan. 30, 2007); Trial Brief of Governor Riley, Docket No. 16 at 2 n.2 (Feb. 3, 2006). The Kennedy Appellees relied on a vacancy in the Etowah County Commission "[t]o see the nature of the 'change' wrought by the *Riley v. Kennedy* decision." Plaintiff's Trial Brief, Docket No. 15 at 3 (Jan. 20, 2006).[1] They noted an Attorney General's opinion concerning a Houston County vacancy in support of their argument that "the Alabama Supreme Court's interpretation of Act 2004-455 [in *Riley v. Kennedy*] has statewide application." Plaintiffs' Trial Brief in Reply, Docket No. 17 at 4-5 (Feb. 10, 2006).

The vacancies in Etowah County and Houston County have passed, but a vacancy is imminent in Jefferson County. The underlying facts and legal situation are not identical each time a vacancy arises. Nonetheless, a showing that the preclearance status of that *Stokes v. Noonan* and *Riley v. Kennedy* is moot has not been made.

Moreover, the fundamental question of whether Alabama Supreme Court decisions holding State statutes unconstitutional require preclearance is one of continuing importance. That Court now has before it another constitutional challenge to a precleared Act.

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[1] "In Mobile County, the decision in *Riley v. Kennedy* continued the status quo established by *Stokes v. Noonan*." J.S. 16. Before and after *Riley v. Kennedy*, vacancies in the Mobile County Commission were to be filled by gubernatorial appointment on the strength of *Stokes v. Noonan*. Under State law, that scenario held true until the passage of Act No. 2006-342, which essentially re-enacted Act No. 85-237. *See* J.S. 12, n.5; M.D.A. 5 & App. 1a.

2. The Kennedy Appellees misread the district court's August 2006 Order, finding finality where there was none. They assert "[t]he the judgment became final on August 18, 2006, when the court conclusively resolved the merits of the appellees' complaint, *ordered the Governor to obtain preclearance*, and directed that its order be entered as a final judgment." M.D.A. 11 (emphasis added). In fact, the district court never "ordered the Governor to obtain preclearance," M.D.A. 11, or to do anything else, notwithstanding the Kennedy Appellees' repeated assertions to the contrary. *See* M.D.A. 7 ("the district court . . . *ordered the State of Alabama to obtain preclearance in accordance with § 5*") (emphasis added); M.D.A. 13 ("This Court has routinely heard appeals in cases in which the three-judge court has done nothing more or less than what the district court initially did *in this case*—that is, declare that a change required preclearance *and order that the change be precleared before implementation of voting changes*.") (emphasis added; citing cases in which injunctions issued).[2]

Here, no injunction has ever issued against Governor Riley. The district court's August 2006 Order stated:

> The plaintiffs suggest *rather than enjoin enforcement of Stokes v. Noonan and Riley v. Kennedy*, or otherwise consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission, we should give the State 90 days to obtain the necessary preclearance. We agree. An appropriate judgment will enter.

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[2] *City of Monroe v. U.S.*, 522 U.S. 34 (1997) (per curiam) *reversing U.S. v. City of Monroe*, 962 F. Supp. 1501, 1520 (M.D. Ga. 1997) (three-judge court) ("Accordingly, an order will issue providing the injunctive relief requested."); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 36 (1978) ("The District Court therefore enjoined enforcement of Rule 58 pending compliance with the preclearance requirements of § 5."); *Georgia v. U.S.*, 411 U.S. 526, 528 (1973) ("the District Court issued the requested injunction").

J.S. App. 8a (emphasis added; paragraph break omitted). The Judgment gave Governor Riley an opportunity—not a command—to seek preclearance. It provided:

> (2) The State of Alabama has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c; if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy. Defendant Riley is to keep the court informed of what action, if any, the State decides to take and the result of that action.

J.S. App. 9a-10a. When USDOJ denied preclearance, the district court completed the *City of Lockhart* analysis, *see* J.S. 2, concluding the core proceedings of this litigation with an order vacating the appointment of Juan Chastang, J.S. App. 1a-2a.

The Kennedy Appellees contend that "[i]t is enough that the court made clear that it was 'end[ing] the litigation on the merits,' *Catlin v. United* States, 324 U.S. 229, 233 (1945)." M.D.A. 12. Admittedly, the district court entered judgment for Kennedy Appellees, and directed the clerk to close the case. *See* J.S. App. 9a-10a. Still, given that no injunction had been entered and the Governor was to report to the Court on any preclearance proceedings, it was far from "clear that [the court] was 'end[ing] the litigation on the merits.'" M.D.A. 12 (quoting *Catlin*, 324 U.S. at 233).

In any event, the language that the Kennedy Appellees quote from *Catlin* does not support the proposition they advance, namely that clarity from the court would be dispositive. Instead, what *Catlin* said is: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. Here, the litigation was not resolved; it was in limbo, awaiting a preclearance determination.

The Kennedy Appellees also assert that policy requires the Governor protect the State's interests on their timetable by appealing the district court's August 2006 Order. M.D.A. 14-15. In support of this argument, they cite only Section 5 itself, which clearly calls for a three-judge district court and a direct appeal to this Court, but does not say why that procedure was adopted.[3] M.D.A. 14-15; J.S. App. 14a-15a. The Kennedy Appellees provide no citations in support of their position that the particular policy concerns they advance are the ones that motivated Congress. Moreover, they seem unconcerned with lengthy delay in these proceedings that would have resulted from an early appeal. Had administrative preclearance been timely forthcoming—as it should have been—the administrative preclearance route would have proven shorter than an appeal to this Court.

Governor Riley's appeal was timely. This Court has jurisdiction to resolve the important questions presented by this appeal.

3. The Kennedy Appellees' attempt to assuage the constitutionality concerns inherent in their position by suggesting that it is not the decisions of the Alabama Supreme Court that must be precleared—but their implementation—misses the mark. M.D.A. 17 ("As a technical matter, it is not the [C]ourt's *decision* that must be precleared; rather it is the use of the election practice mandated by the [C]ourt's decision that requires preclearance."). They cite no authority for their point and they offer no logic. They say it and move on, apparently hoping to casually mitigate the image of a federal official holding the authority to trump the otherwise Supreme power of a State's highest Court to say what the law of that State is.

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[3] *Cf. Webber v. White*, 422 F. Supp. 416, 424 (N.D. Tex. 1976) ("The Senate Report contains a fairly detailed analysis of the history and purpose of the three-judge court acts. It notes that the purpose for requiring three judges in cases where the federal injunctive power might be used to enjoin state statutes and regulatory programs was for the states' benefit.").

In fact, the intrusive nature of the construction of Section 5 put forward by the Kennedy Appellees in this case cannot be overstated.

The Kennedy Appellees elucidated on their position during oral argument before the district court, saying:

> Court decrees, of course, can be considered to be changes, and I find that a *useful* way to think about court changes -- excuse me -- court decrees, that is *state court decrees as being the seed for a change* is to think of it *not that it's the Court making the change*, but rather the law says that any time a state official seeks to administer a change, it has to be precleared. And it's the seeking to administer it that is the triggering event, I think, for purposes of Section 5 of the Voting Rights Act. *I think that avoids the problem that [counsel for Governor Riley] raises that this amounts to a federal interference with the state court system or imposition on the state's Tenth Amendment rights or something like that.*

Transcript, Oral Argument Before A Three Judge Panel, 4-5 (March 29, 2006) (emphasis added). In other words, the asserted characterization is "useful" in wedging judicial decisions into the language and construct of § 5 [4], and it may

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[4] *Cf. Branch v. Smith*, 538 U.S. 254, 264 (2003) ("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 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. There is no indication in the legislative history that Congress sought the Attorney General's review of state judicial law-making.") (citations omitted). *But see Branch*, 538 U.S. at 265 (where a State Court drew a redistricting plan because the Legislature had not, the

promote denial of any constitutional concerns that such action might otherwise invoke.

In reality, this construction is equally dangerous in its own way. It begins with the proposition that the constitutional decisions of the Alabama Supreme Court have no force of their own. From there, the Kennedy Appellees move to the proposition that whenever State or local officials are "encouraged" by a decision of the Alabama Supreme Court to make a change with respect to voting, it is that change that requires preclearance. What that change is as a factual matter may be different throughout the many political subdivisions of the State, resulting in an incomprehensible patchwork of legal authority.

In this case, USDOJ treated *Stokes v. Noonan* and *Riley v. Kennedy* as a change from election to gubernatorial appointment in a Democratic district (Mobile County District 1) at a time when a Republican holds the power of appointment. *See* M.D.A. App. 4a, 5a-6a. Presumably, USDOJ would not have found retrogression had the vacancy arisen in a district populated by White Republicans. Hence, these decisions of the Alabama Supreme Court might apply in such a district, while barred by federal law from application in Mobile County's District 1.

That such a result could obtain is all the more offensive to State sovereignty and federalism principles because *Stokes v. Noonan* and *Riley v. Kennedy* are clearly based on valid, race-neutral, generally applicable principles of law. There is no hint of racial animus in those decisions, and the Alabama Supreme Court has no control over whether the effect of the decisions is retrogressive.

Compliance with the burdensome requirements of Section 5 is difficult enough without the added burden of anticipating every potential constitutional challenge to every

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State was seeking to administer Court-drawn plan when it submitted the plan for preclearance).

State or local law or practice concerning voting. Even when the constitutional challenges are known, the manner in which the issues will be resolved by the Court cannot be known in advance of the Court's decision. Governor Riley's position, that preclearance makes a valid State law enforceable, but does not validate an otherwise invalid State law, offers a less intrusive, less constitutionally-suspect manner of interpreting Section 5.

4. The Kennedy Appellees' workability argument, namely that the Governor "would have this Court hold that [S]tate statutes do not become § 5 benchmarks until they are (1) duly enacted, (2) precleared, (3) subjected to [S]tate court challenge, and (4) upheld by the [S]tate [S]upreme [C]ourt," is a straw man. M.D.A. 25. In fact, Governor Riley would recognize "contingent preclearance," such that enactment and preclearance are sufficient to render a State law enforceable, unless and until the State law is held unconstitutional. At that point, the law would be void, and the preclearance letter would be of no effect. *See* Trial Brief of Governor Riley, Docket No. 16, 3 n.3, 4 (Feb. 3, 2006); Supplemental Brief of Governor Riley, Docket No. 21, 4-5 (Apr. 25, 2006).

The Governor takes this position because, "[i]f that were not the case, the Voting Section of the Civil Rights Division of the United States Department of Justice, not a State's Legislature, would be making [S]tate law." Trial Brief of Governor Riley, Docket No. 16, 4-5 (Feb. 3, 2006). Indeed, in the district court, Governor Riley pointed out that "[r]equiring the State to submit *Stokes v. Noonan*, or *Riley v. Kennedy*, for preclearance begs the question what would happen if USDOJ . . . objected. The State might then be compelled to conduct a special election under a [S]tate law that is unconstitutional and cannot be revived retroactively." Supplemental Brief of Governor Riley, Docket No. 21, 5 (Apr. 25, 2006); *see also* J.S. 12 n.5. Such a result is in tension with the Tenth Amendment, and with general principles of State sovereignty and federalism.

Thus, it is the Kennedy Appellees' construction of Section 5 that raises grave constitutionality and workability concerns. Under their view, any precleared and implemented State law or practice would be invincible to a State law challenge, absent the approval of USDOJ or the District Court for the District of Columbia. It is not difficult to imagine how such a construction would lead the State powerless to protect the integrity of State and federal law.

For example, local election officials in County X decide to enhance minority strength at the polls by henceforth giving minority voters two ballots for all federal, State, and county elections—a One Man-Two Votes rule for minority voters. Should those local election officials submit the change in practice for preclearance, it can hardly be suggested that the change would be retrogressive. *See* 42 U.S.C. § 1973c (reproduced at J.S. App. 14a-15a); M.D.A. App. 5a-6a. Accordingly, preclearance would be appropriate and expected. An election is held, and the One Man-Two Votes rule is implemented.

Thereafter, responsible State officials learn of the precleared, implemented practice and bring suit in State Court to have the practice declared unconstitutional and the local election officials enjoined. The Kennedy Appellees would have the State submit its favorable Court decision for preclearance. Though there can be no doubt that the One Man-Two Votes rule is unconstitutional under State and federal law, there can also be no doubt that returning minority voters in County X to a single vote is retrogressive if the One Man-Two Votes rule is the benchmark.

As compelling as that scenario is, the problems with the Kennedy Appellees' analysis do not end there. If the State officials sued in federal court instead, the favorable decision of the federal court—even this Honorable Court—would seemingly also require preclearance because the Court would have agreed with the State, a covered jurisdiction. *See* 28 C.F.R. § 51.18(a) ("Changes affecting voting that are ordered

by a Federal court are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority."). That cannot be what Congress intended. Section 5 must not be interpreted to allow unlawful changes to move the baseline.

As set out in Governor Riley's Jurisdictional Statement, Alabama's general law provides that vacancies on county commissions be filled by gubernatorial appointment. Mobile County's local law, passed in 1985, was an unconstitutional attempt to deviate from that general law. *Stokes v. Noonan.* Moreover, that local law was not revived when Act No. 2004-455 amended the general law to allow for newly enacted local laws. *Riley v. Kennedy.* Hence, when Sam Jones vacated his county commission seat to become Mobile's Mayor in 2005, gubernatorial appointment was the only method of filling that seat authorized by Alabama law. Governor Riley properly exercised his authority to appoint Juan Chastang to the seat.

The preclearance and implementation of an unconstitutional local law ought not have the legal effect of prohibiting Governor Riley's action in returning Mobile County to the rule of law—particularly the law that governed on Alabama's coverage date. But that is exactly what has happened in this case. The result is a patchwork application of two decisions of the Alabama Supreme Court, instead of a uniform State-wide application of the rule of law.

CONCLUSION

This Court should deny the Motion to Dismiss or Affirm, and note probable jurisdiction or, in the alternative, summarily reverse the District Court's judgment.

Respectfully submitted,

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