No. 07-77

IN THE

# Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA,
*Appellant*,

*v.*

YVONNE KENNEDY, ET AL.,
*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA**

## BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES


JON M. GREENBAUM
ROBERT A. KENGLE
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave. N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

JONATHAN E. NUECHTERLEIN
*Counsel of Record*
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000

## QUESTION PRESENTED

Whether this case is moot, given that (i) the disputed seat on the Mobile County Commission has been filled by a special election that was indisputably valid as a matter of both federal and state law, (ii) a federal court would have no basis to remove the newly elected Commissioner from office, and (iii) state law will preclude any similar dispute from arising among these parties in the future.

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## INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting-rights cases throughout the nation over the past forty-five years, including cases before this Court. *See, e.g.*, *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young* v. *Fordice*, 520 U.S. 273 (1997); *Clark* v. *Roemer*, 500 U.S. 646 (1991); *Clinton* v. *Smith*, 488 U.S. 988 (1988); *Connor* v. *Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting-rights cases in this Court, including *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986); and *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).[1]

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Lawyers' Committee fully supports appellees' position in this case, both on the merits and on the threshold question of whether Governor Riley's delay in filing a notice of appeal bars review on the merits. We are filing this separate brief to point out that merits review is foreclosed not just by that *statutory* jurisdictional bar, but also by an *Article III* bar, because state-law developments have made this case moot. This

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[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief.

Court should await a case that presents an ongoing controversy between the parties before addressing the merits issue presented in this appeal.

The underlying dispute here involves the method of filling a vacancy on the Mobile County Commission. After the Governor appointed Juan Chastang to fill a vacancy that arose in 2005, appellees challenged the appointment under Section 5 of the Voting Rights Act, on the ground that Alabama had not sought preclearance for the voting change that led to the appointment. The three-judge district court agreed with appellees and ultimately, in May 2007, vacated the gubernatorial appointment, thereby creating a new vacancy on the Commission.

Meanwhile, in April 2006, the Alabama Legislature enacted a law that requires "a special election" to be held "[*w*]*henever* a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat." Ala. Act No. 2006-342, § 1 (emphasis added). No party disputes the validity of this statute under either federal or state law. And the statute was triggered when the district court vacated the appointment of Mr. Chastang. A special election was thus held on October 9, 2007, and the voters of Mobile County elected Merceria Ludgood over Mr. Chastang by a margin of 4 to 1.

Because the 2006 legislation resolves any future dispute about the method of filling vacancies on the Mobile County Commission, this case is now moot unless, if the Governor were to prevail on the merits, the federal courts could somehow unscramble the eggs and unseat the popularly elected Ms. Ludgood in favor of the Governor's preferred replacement (presumably Mr. Chastang, despite his overwhelming defeat at the

polls). That remedy is unavailable. The Governor has never stated that he seeks such an outcome, and even if he did, he could not obtain it. The federal courts cannot unseat Ms. Ludgood without thwarting both the will of the Alabama voters who elected her and the will of the Alabama Legislature as reflected in Act No. 2006-342. A federal court has no authority to override state law in this manner unless federal law requires that result, and here it does not.

In short, no matter how the Court might resolve the parties' dispute on the merits, its decision would be merely advisory, because a federal court would have no basis to alter the electoral status quo in Mobile County. In his opposition to appellees' motion to dismiss or affirm, the Governor argued that this case nonetheless presents a live controversy because the Court's resolution of the Section 5 issue would have a decisive precedential impact on similar cases brought by *other* plaintiffs in *other* Alabama counties for which the Alabama Legislature has not yet enacted counterparts to Act No. 2006-342. But it is hornbook law that such precedential effects are insufficient to create a justiciable controversy *in this case*, as required by Article III.

2. If the Court agrees that the case is moot, it should let the decision below stand rather than vacating that decision. As an equitable remedy, vacatur is appropriate only "where a controversy presented for review has become moot due to circumstances unattributable to" the party seeking appellate relief. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (internal quotation marks omitted). Here, the case has become moot for reasons attributable directly to the Governor—not just because he signed Act No. 2006-342 into law, but also because he twice opted not to seek this Court's intervention prior to the elec-

tion in which Ms. Ludgood was overwhelmingly victorious. In these circumstances, the Governor cannot meet his burden of establishing "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26.

3. This Court could dispose of this case on either of two jurisdictional grounds: the statutory ground emphasized by appellees or the Article III ground discussed here. If, however, the Court addresses the merits, it should affirm the district court's determination that Section 5 precludes gubernatorial appointments in these circumstances absent preclearance of the electoral changes caused by the relevant decisions of the Alabama Supreme Court.

## ARGUMENT

### I. THIS CASE IS MOOT

#### A. Resolution Of This Case On The Merits Could Have No Effect On The Electoral Situation In Mobile County

"The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). It is not enough, moreover, that there be a cognizable case when litigation commences. "The rule in federal cases is that an actual controversy must be extant at all stages of review[.]" *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). Hence, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). That rule requires dismissal of this appeal, because newly enacted state law would prevent the federal courts from undoing the results of the recent

Mobile County election even if the Governor were to prevail on the merits (and overcome the statutory jurisdictional bar identified by appellees).[2]

The legal question presented here on the merits is whether the Voting Rights Act requires preclearance of a change in a preexisting and precleared state voting practice when that change is occasioned by a state court interpretation of state election law. But the actual dispute between the parties—*i.e.*, the vehicle for answering that underlying question—concerns the process for filling a vacancy on the Mobile County Commission. When Sam Jones left the Commission to become mayor of Mobile in 2005, Governor Riley asserted the right to appoint a commissioner to serve out Jones's term, whereas appellees maintained that Alabama law required that a special election be held to choose Jones's successor. While the underlying legal question has existed for years, the proper mechanism for filling this seat was the "definite and concrete" controversy (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937)) that gave the federal courts jurisdiction to answer it.

That controversy, however, has been overtaken by subsequent events, as a brief review of the facts reveals. Before Jones left the Commission in 2005, the

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[2] As a jurisdictional issue, mootness must be addressed before the merits, even where (as here) no party argues that the case is moot. *See, e.g.*, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 7-8 (1978). The Court need not consider the question of Article III jurisdiction, however, if it dismisses this appeal on the statutory jurisdictional ground advanced by appellees. *See, e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998); *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984).

Alabama Legislature had twice enacted statutes (in 1985 and 2004) designed in whole or in part to ensure that vacancies on the Mobile County Commission would be filled by popular election rather than gubernatorial appointment. Each time, the Alabama Supreme Court construed state law to preclude the legislation from having that effect. *See Stokes* v. *Noonan*, 534 So. 2d 237 (Ala. 1988); *Riley* v. *Kennedy*, 928 So. 2d 1013 (Ala. 2005); *see generally* Jurisdictional Statement ("J.S.") App. 4a-5a (discussing case background). In 2005, the Governor responded to the latter decision by appointing Juan Chastang to fill Mr. Jones's seat, and appellees filed this suit.

Several months later, in early 2006, the Alabama Legislature enacted yet another statute requiring popular elections to fill Commission vacancies. It provides, in relevant part:

> *Whenever a vacancy occurs* in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy[.]

Ala. Act No. 2006-342, § 1 (emphasis added), *reprinted in* App. 2a. This new provision is substantively identical to the invalidated 1985 legislation. *See id.* § 2; J.A. 114. The Justice Department interposed no objection to the State's eventual preclearance submission, *see* J.S. 6, and no party disputes that this statute is valid under both federal and state law.

The new law had its first application when, in 2007, the district court created an open seat on the Commission by vacating the Governor's 2005 appointment of Mr. Chastang as a violation of the Voting Rights Act.

It is of course disputed whether the district court correctly interpreted federal law in concluding that the appointment was invalid because the State had failed to obtain preclearance of the Alabama Supreme Court's rulings. But whether or not the court's interpretation of federal law was correct, *state* law had been amended by that time to prescribe a popular election to fill the resulting vacancy. The 2006 legislation, enacted while this litigation was pending and after Mr. Chastang's appointment, requires an election "[*w*]*henever* a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat." Ala. Act No. 2006-342, § 1 (emphasis added).[3]

The Governor could have tried to keep that statute from being triggered by asking this Court to intervene promptly in the district court proceedings and thereby prevent the Commission seat from becoming vacant. But the Governor passed up two opportunities to do just that. He did not promptly appeal from the district court's 2006 order concluding that the Chastang appointment required preclearance. And he did not ask this Court to stay the district court's 2007 order vacat-

[3] The Governor has obliquely suggested that the 2007 special election was somehow held pursuant to the invalidated 1985 statute, although he acknowledges that state election officials recognized that the election was in fact held pursuant to the indisputably valid 2006 statute. J.S. 12 & n.5. There is no ambiguity on this point: the election was held pursuant to Act No. 2006-342. *See* Order and Injunction 2, *Kennedy* v. *Davis*, No. 2007-1259 (Cir. Ct. Mobile Cty. June 28, 2007) (ordering probate judge "to proceed with all applicable preparation . . . 14 days from the date the U.S. Department of Justice . . . pre-clears Act No. 2006-342"), *reprinted in* App. 5a.

ing the appointment. *See* Appellees' Br. 21. As a result of the Governor's inaction, the seat became vacant, the vacancy triggered the application of Act No. 2006-342, and a special election was held in October 2007. Merceria Ludgood assumed office after outpolling Mr. Chastang by a margin of nearly four to one. *Id.*[4]

These events preclude the Governor from obtaining appellate relief from the district court's remedy. The disputed seat is now occupied by an individual who was duly elected by the voters of Mobile County, pursuant to a valid state law that required such an election to be held in precisely these circumstances. Even if the Governor were to prevail on the merits of this case, a federal court could not now undo the results of that popular election, and unseat the electorate's overwhelming choice for Commissioner, without overriding state law as reflected in Act No. 2006-342.

As a threshold matter, the Governor does not even appear to seek that outcome, which may well be politically untenable. But even if the Governor did seek to throw Ms. Ludgood out of office, he could obtain no

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[4] The Governor has asserted that the election schedule "d[id] not comply" with Act No. 2006-342, J.S. 6; *accord id.* at 12 n.5, in that the election was held about four months after the vacancy arose, rather than within the 90-day period specified by the statute. But this was the schedule adopted by a state court that sought to apply the statute as faithfully as possible while accommodating the State's need to submit it for preclearance. *See Kennedy* v. *Davis*, *supra* n.3, at 2. The state court's application of Act No. 2006-342 in these circumstances is presumed valid under state law; indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984).

such relief on appeal. Federal courts may upset a State's application of state law only when some provision of federal law requires them to do so. *See, e.g.*, *White* v. *Weiser*, 412 U.S. 783, 795 (1973). Nothing in federal law conflicts with Act No. 2006-342 (which indeed was precleared under Section 5) or with that law's implementation in the 2007 special election. A federal court could no more invalidate the results of that election than it could invalidate the statute itself if, hypothetically, the legislature had enacted the statute in response to the district court's ruling and if that ruling were later reversed. In either case, fidelity to state law requires a federal court to respect the electoral choices of the Alabama people.

In short, no decision by this Court on the merits could have any concrete effect on the electoral situation in Mobile County. This Court thus confronts a mere "difference or dispute of a hypothetical or abstract character." *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 773 (2007). Such "abstract questions" are not "justiciable by a federal court." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979).

### B. The Governor's Arguments Against Mootness Are Meritless

The Governor has advanced several rationales for concluding that the Court should decide this case on the merits even though Act No. 2006-342 and its implementation in the 2007 special election remove any live dispute about the method of filling vacancies on the Mobile County Commission. None of these rationales has merit.

First, the Governor notes that "th[e] 2006 Act did not yet exist . . . when [appellees] initiated this litigation." J.S. 12 n.5. That is true but jurisdictionally ir-

relevant: a federal appellate court has no power to decide a case that becomes moot on appeal, whether because of intervening legislation or other reasons. *See, e.g., Church of Scientology*, 506 U.S. at 12. Likewise, the Governor argues that the 2006 legislation did not exist "when the vacancy arose." J.S. 12 n.5. By "the vacancy," however, the Governor means the vacancy Mr. Jones created in 2005 when he left the Commission to become mayor of Mobile. But the 2006 legislation certainly did exist when the most recent vacancy arose: the 2007 vacancy that triggered the operation of Act No. 2006-342 and led to the 2007 special election. It makes no difference that the 2006 legislation was enacted after (indeed, in response to) the *prior*, 2005, vacancy.

Second, the Governor has argued that the case is not moot because he is confronting a similar legal dispute about the Voting Rights Act in a lawsuit brought by other plaintiffs in another Alabama county, for which the Alabama Legislature has not yet enacted a counterpart to Act No. 2006-342. Opp. to Mot. To Dismiss or Aff. 1-2.[5] The Governor argues, in other words, that this Court should resolve his appeal on the merits, even though doing so could have no effect on Mobile County, simply because the underlying legal question

[5] As the Governor suggested, a vacancy on the Jefferson County Commission arose in November 2007. The Governor filled the vacancy via appointment, but a Jefferson County voter filed suit seeking to have the appointment invalidated and a special election held. *See Plump* v. *Riley*, 2008 WL 192826, at *1 (M.D. Ala. Jan. 22, 2008). The three-judge district court adopted the same interpretation of the Voting Rights Act that the district court in this case did, ruling that the Governor's appointment to the Commission had to be precleared. *See id.* at *3.

has "continuing importance" and arises elsewhere. *Id.* at 2.

That is untenable. "It has long been settled that a federal court has no authority . . . to declare principles or rules of law which cannot affect the matter in issue *in the case before it*." *Church of Scientology*, 506 U.S. at 12 (emphasis added); *see also Barr* v. *Matteo*, 355 U.S. 171, 172 (1957) (per curiam) ("[A]n advisory opinion cannot be extracted from a federal court . . . no matter how much [the parties] may favor the settlement of an important question[.]"). This case, brought by a group of Mobile County voters, involves a dispute about filling vacancies on the Mobile County Commission. Although the "principles of law" the Governor asks this Court to decide might well affect similar cases in other counties, they "cannot affect the matter in issue" in *this* case. *Church of Scientology*, 506 U.S. at 12.[6] Indeed, it would be no more appropriate for this Court to rule on this case to decide a legal question presented in another case than to invalidate a federal law based on a constitutional challenge brought by a now-deceased plaintiff on the theory that other plaintiffs have raised the same challenge in other cases. If anything, the existence of other potential vehicles for answering the underlying legal question makes it even

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[6] *See also PPL Wallingford Energy LLC* v. *FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("[M]ere precedential effect . . . is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." (internal quotation marks omitted)); *Radiofone, Inc.* v. *FCC*, 759 F.2d 936, 938 (D.C. Cir. 1985) (separate opinion of Scalia, J.) ("No one would contend that a person affected by no more than the precedential effect of a district court decision would have standing to appeal that decision[.]").

less appropriate to resolve this case now that it has become moot.

Nor does this case fall within the mootness exception for disputes that are "capable of repetition yet evading review." *See generally Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990). As an initial matter, that exception cannot apply here because it requires "a reasonable expectation that the same complaining party w[ill] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see also Brandt* v. *Bd. of Educ.*, 480 F.3d 460, 464 (7th Cir. 2007) (exception "requires that the claim be repeatable by the same plaintiffs"). But the passage of Alabama Act 2006-342 ensures that appellees (the "complaining part[ies]" here) will not be "subjected to the same action again"—a gubernatorial appointment that supplants a special election in which they, as Mobile County voters, would be entitled to vote.

In any event, even if the "capable of repetition" exception did encompass cases in which *other* complaining parties might bring future suits presenting the same legal issue, there would be no reason to conclude that those future suits would "evad[e] review." This case became moot only because Act No. 2006-342 was enacted and a new commissioner elected pursuant to that statute. (If the 2006 Act had not been passed, this case would not be moot because, if the Governor were to prevail on the merits in this Court, state law would entitle him to fill any vacancy with his own appointee.) There is no basis, however, for concluding that Alabama would promptly enact analogous legislation that would moot similar cases brought in *other* Alabama

counties.[7] And even if there were such a basis, it would mean that the State of Alabama could always be expected to resolve such disputes—and eliminate this set of Voting Rights Act concerns—through its own political process. In those circumstances, the intervention of the federal courts would be both needless and intrusive.

In sum, this case is moot, and the Governor's appeal should therefore be dismissed.

## II. BECAUSE THE GOVERNOR'S VOLUNTARY ACTIONS MOOTED HIS APPEAL, THE DISTRICT COURT'S JUDGMENT SHOULD BE LEFT INTACT

"The established practice of th[is] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to

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[7] *See Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998) (party invoking exception must show "that the [pertinent] time [period] is always so short as to evade review"). For that reason, and because of the same-complaining-party requirement, this case is easily distinguished from those in which the only event that moots a particular controversy is an intervening election, without (as in this case) a state legislative enactment that ensures that the underlying events will not recur. *See, e.g.*, *Norman* v. *Reed*, 502 U.S. 279, 287-288 (1992) (rejecting mootness claim because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical [electoral] time constraints if we should fail to resolve the constitutional issues that arose in 1990" (citing *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969))). It also bears noting that if the Governor loses a similar lawsuit in another county, he could avoid mootness and obtain review in this Court by securing a stay, either from the district court or from this Court. Here, as discussed below, the Governor forfeited his opportunity to seek a stay from this Court.

dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). But this equitable practice applies only "when mootness occurs through happenstance—circumstances not attributable to the parties—or . . . the unilateral action of the party who prevailed in the lower court." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997) (internal quotation marks omitted). Vacatur is not appropriate when "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 25; *see also Anderson* v. *Green*, 513 U.S. 557, 560 (1995) (per curiam). In that event, "the losing party has . . . surrender[ed] his claim to the equitable remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 25.

Here, the Governor is responsible in several independent respects for causing his appeal to become moot, and thus he has forfeited any "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. This Court should therefore allow the decision below to stand.

*First*, the Governor most directly contributed to the mootness of this case by deciding not to file an immediate appeal of the district court's decision of August 18, 2006, which held that the Voting Rights Act required preclearance of the Alabama Supreme Court's decisions in *Stokes* and *Riley*. Had he appealed then, this case almost certainly would have been briefed, argued, and decided during this Court's previous Term, and the district court would not have proceeded, as it did in May 2007, to vacate the appointment of Mr. Chastang before this Court ruled, thereby triggering the operation of Act No. 2006-342.

Significantly, the Governor's decision not to appeal immediately after the August 2006 order precludes the

equitable remedy of vacatur whether or not the Court agrees with appellees (as we do) that the Governor's failure to appeal within sixty days of that decision creates a statutory bar to this Court's jurisdiction. No matter how that statutory issue is resolved, the Governor certainly *could* have appealed immediately after the district court's first decision (*see* Mot. To Dismiss or Aff. 13 (citing cases)); he simply decided not to. Because that decision directly caused this case to become moot, the Governor is no longer entitled to have the adverse judgment vacated. *See Karcher* v. *May*, 484 U.S. 72, 83 (1987) (declining to vacate because "[t]his controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal.").

*Second*, the Governor caused the case to become moot by independently deciding not to seek a stay from this Court of the district court's May 2007 order vacating his appointment of Mr. Chastang. Nothing prevented the Governor from seeking such a stay, and had he secured one, Mr. Chastang would have remained in office, and once again there would have been no vacancy to trigger Act No. 2006-342. Several courts of appeals have deemed vacatur inappropriate in similar circumstances. *See Boullioun Aircraft Holding Co.* v. *Smith Mgmt.*, 181 F.3d 1191, 1198 (10th Cir. 1999) (refusing to vacate in "recognition of appellants' contribution to the mootness of this appeal by failing to seek a stay of the [district court's] order"); *Mahoney* v. *Babbitt*, 113 F.3d 219, 221-222 (D.C. Cir. 1997) (similar); *Arthur* v. *Manch*, 12 F.3d 377, 380-381 (2d Cir. 1993) (similar). To be sure, this Court might have rejected a stay request, but then the Governor could not fairly have been held responsible for the case becoming moot (at

least on this ground). Precisely because he failed to request a stay, he *can* be held responsible for that outcome, and the district court's judgment should not be disturbed.

*Third*, the Governor caused the case to become moot by signing Act No. 2006-342 into law shortly after this lawsuit was filed. *See* App. 3a. Again, if that legislation had not become law, this case would not now be moot, because a reversal of the district court's decision would have led to the invalidation under state law of any special election held pursuant to that decision, and thus would have entitled the Governor to fill the disputed seat with his own appointee. The Governor's decision to sign rather than veto Act No. 2006-342 removed that possibility and thus contributed directly to the mootness of this case.

For each of these independent reasons, the Governor, as "the party seeking relief from the judgment below[,] caused the mootness by voluntary action," *U.S. Bancorp*, 513 U.S. at 24, and that judgment should therefore remain intact. It makes no difference that appellees were themselves legislative sponsors of Act No. 2006-342 and thus also played a role in the events that led to the mootness of this case, as this Court's holding in *U.S. Bancorp* makes clear. There the petitioner argued that the judgment below should be vacated because both parties had entered into the settlement agreement that had mooted the case. The Court rejected that argument, explaining:

> It is petitioner's burden, as the party seeking relief from the status quo . . . , to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur. Petitioner's

> voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.

*Id.* at 26. That reasoning is equally applicable here. Because the Governor has voluntarily forfeited any claim to the "extraordinary remedy of vacatur," *id.*, the district court's judgment should remain undisturbed.

## III. If This Court Reaches The Merits, The District Court's Judgment Should Be Affirmed

If this Court reaches the merits despite the constitutional and statutory obstacles to its jurisdiction, it should affirm for the reasons explained in appellees' brief. Had the Alabama Legislature chosen to repeal Act No. 1985-237 after the Act was precleared and implemented in the 1987 special election, the reversion from an elective to an appointive vacancy procedure unquestionably would have required preclearance. For purposes of Section 5 coverage, it makes no difference that the judicial rather than the legislative branch of Alabama's government prompted the reversion.[8] Section 5 "requires preclearance of *all* voting changes, includ[ing] voting changes mandated by order of a state court." *Branch* v. *Smith*, 538 U.S. 254, 262 (2003) (citations omitted) (emphasis in original). This follows the general rule of *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166 (1985), that Section 5 coverage is

[8] The Governor attempts to frame the issue as involving only state supreme court decisions, but no principled or logical rule would permit Section 5 coverage to hinge upon whether a voting practice was invalidated by a State's highest court or by one of its other tribunals.

not determined by which state official or body makes a change affecting voting, *id.* at 178.[9]

There are also strong policy reasons to reject the Governor's atextual Section 5 exemption. Changes in state and local voting practices are often implemented through state court decisions, and such decisions clearly have the potential to effect the discrimination in voting that animated Section 5 in the first place. *See* Appellees' Br. 5-7 (discussing state courts' historic role in disenfranchising racial minorities).[10] Coverage of judicial actions that lead to voting changes is thus necessary to ensure that Section 5 is not evaded. Indeed, the Governor's proposed exemption would create significant opportunities to exploit state courts as vehicles for evading the Section 5 process—for example, via consent decrees in lawsuits between nominal plaintiffs and state or local officials.[11]

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[9] *See also LULAC* v. *Texas*, 995 F. Supp. 719, 725 (W.D. Tex. 1998) (three-judge court) ("[T]he Texas Supreme Court accomplished by judicial decision the same result that would have occurred had the legislature amended the statute in the same fashion. We see no reason why such a change, which if enacted by the legislature would require § 5 preclearance, should not also require preclearance if it resulted from a state court opinion.").

[10] *See also Branch*, 538 U.S. at 263-264 (holding that Attorney General's request for additional information concerning Section 5 submission of Mississippi Supreme Court's order that state chancery court could engage in redistricting was "not frivolous or unwarranted at the time it was made").

[11] For example, assume that a city annexed an area into which a substantial African-American population then moved. A city resident could bring an action in state court alleging a state constitutional deficiency with the annexation ordinance, and the city could promptly admit liability in a consent decree entered by

Finally, the Governor's claim that the district court's decision presents unique federalism concerns is highly attenuated. The court's decision offended no substantive state interest at all. The two state court decisions at issue did not rest on an inherent conflict between the state constitution and the use of special elections to fill Commission vacancies. Rather, the conflict arose from the *form* of the relevant legislation—*i.e.*, in the primacy of laws of general application to local acts. And it is only conjectural that Section 5 might freeze into place a practice that cannot be harmonized with the state constitution, as the unchallenged adoption and use of Act No. 2006-342 underscores here.

## CONCLUSION

For the foregoing reasons, the appeal should be dismissed as moot, but the judgment below should remain intact. Alternatively, the appeal should be dismissed as time-barred or the district court's judgment should be affirmed on the merits.

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the court, thereby de-annexing (and disenfranchising) the area's residents. *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If the state court's decree were exempt from Section 5 coverage, then the African-American residents of the deannexed area could undo the disenfranchisement only by intervening in the lawsuit to challenge the decree or by filing a separate legal challenge. The result would be to "shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966)—the basic problem that Section 5 was enacted to avoid.

Respectfully submitted.

JONATHAN E. NUECHTERLEIN
*Counsel of Record*
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000

JON M. GREENBAUM
ROBERT A. KENGLE
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave. N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

FEBRUARY 2008

# APPENDIX

**APPENDIX**

ACT No. 2006-342

HB522

78594-4

By Representatives Kennedy, Buskey, Clark and Mitchell (N & P)

RFD: Mobile County Legislation

First Read: 31-JAN-06


HB522

ENROLLED, An Act,

Relating to Mobile County; prescribing procedure for filling certain vacancies on the county commission.

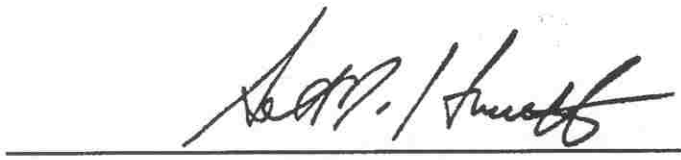
BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1: Whenever a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than 60 days and no later than 90 days after such seat has become vacant. Such election shall be held in a manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.

Section 2: The purpose of this act is to reenact Act 85-237 of the 1985 Regular Session (Acts 1985, P. 137) without change and to reaffirm the Legislature's intention as set forth in that statute.

Section 3: All laws or parts of laws which conflict with this act are repealed.

Section 4: This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.



Speaker of the House of Representatives

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House 14-FEB-06, as amended.

Greg Pappas
Clerk

Senate 30-MAR-06 Passed

APPROVED 4-12-06

TIME 12:30 p.m.

GOVERNOR

Alabama Secretary of State

Act Num....: 2006-342
Bill Num...: H-522

Recv'd 04/12/06 01:30pmJJB

IN THE CIRCUIT COURT
MOBILE COUNTY, ALABAMA

No. 2007-1259

YVONNE KENNEDY, JAMES BUSKEY
& WILLIAM CLARK,
*Plaintiffs*,

*v.*

HONORABLE DON DAVIS,
AS PROBATE JUDGE OF MOBILE COUNTY, ALABAMA,
*Defendant.*

[Electronic Stamp:
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6/28/2007 11:59 AM
CV-2007-001259.00
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK]

**ORDER AND INJUNCTION**

Because of the time-sensitive nature of this matter and the public importance of an early resolution of it—and because such action would not necessarily harm any party or other person—this matter was expedited for final hearing on the merits pursuant to Ala. R. Civ. P. 65(a)(2) and the Court's inherent authority.

The Court concludes that applicable law requires a special election to fill the vacancy currently existing on the Mobile County Commission. The Court further concludes that such a special election should be set at

the earliest practicable opportunity, in order to protect the right of citizens to vote for representatives of their choosing. Accordingly, the Court sets the following schedule after weighing all of the considerations that the parties have brought before the Court.

The Court ORDERS the Defendant, Probate Judge Davis, to submit this Order to the United States Department of Justice for its review under Section 5 of the Voting Rights Act. Because the Department of Justice is very familiar with . . . the current status of this matter. such a submission need not be lengthy, and it should be done at the earliest possible moment. Should the Department of Justice deny preclearance, the parties are directed to inform the Court and to seek further appropriate orders.

The Court ORDERS that the election schedule is as follows, and ORDERS Judge Davis to proceed with all applicable preparation in accordance with this schedule:

i. 14 days from the date the U. S. Department of Justice pre-clears this Order and pre-clears Act. No. 2006-342, Acts of Alabama 2006, the names of all candidates who have qualified with the parties and the parties certification of the candidates to the Judge of Probate shall be due.

ii. The Judge of Probate shall set a date for the Primary Election to be held, said date to be within 51 days of the qualification date; shall have absentee ballots prepared, including overseas military ballots, mailed out and returned by election day, shall prepare other election materials, issue public notices, and appoint and train poll workers for the 1st primary.

iii. if necessary, the Judge of Probate shall set a date for the primary run-off to be held within 42 days of the 1st primary and within said time, the judge of Probate shall complete provisional balloting from 1st primary, receive certification for run-off candidates, prepare absentee ballots, mail and receive said ballots, and prepare other election materials for run-off, providing, however, that if no primary run-off is necessary, the time for holding the general election will be advanced accordingly.

iv. the Judge of Probate shall set a date for the gen[eral election to be] held 42 days after the primary, or primary run off if such run off is necessary. and within said time, complete provisional balloting from run-off primary (if necessary), receive certification for general election candidates, prepare, send out and receive absentee ballots, and prepare other election materials for general election.

v. one (1) week thereafter, the Judge of Probate shall complete provisional balloting for general election and issue canvass results and a certificate of election.

So ordered, this 28th day of June, 2007.

/s/
Circuit Judge