No. 07-77

In the Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA, APPELLANT

v.

YVONNE KENNEDY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES IN PART

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QUESTIONS PRESENTED

Section 5 of the Voting Rights Act requires preclearance "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on the jurisdiction's coverage date. 42 U.S.C. 1973c(a) (2006). The questions presented are:

1. Whether appellant's notice of appeal—which was filed within 60 days of the entry of an injunction but more than 60 days after the district court issued a declaratory order—was timely.

2. Whether the implementation of a change affecting voting concerning a state law that was previously precleared and enforced is exempted from Section 5 simply because it is precipitated by a state court decision declaring that the state law violates the state constitution.

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INTEREST OF THE UNITED STATES

This appeal concerns the types of changes affecting voting that are subject to preclearance under Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c (2006). The Attorney General is responsible for reviewing electoral changes submitted for administrative preclearance and for defending actions seeking judicial preclearance; he also has authority to initiate suits to prevent the implementation of unprecleared changes. See 42 U.S.C. 1973c (2006); 42 U.S.C. 1973j(d). After the district court ruled that the voting change at issue in this case was subject to preclearance, the Attorney General reviewed the change and declined to preclear it.

STATEMENT

1. Section 5 of the VRA provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative or judicial preclearance. 42 U.S.C. 1973c(a) (2006). Alabama and its political subdivisions are covered jurisdictions under Section 5, and their coverage date is November 1, 1964. See 28 C.F.R. Pt. 51, App.; 28 C.F.R. 51.6. A change in the method of filling government posts from election to appointment triggers Section 5's preclearance requirement. See 28 C.F.R. 51.13(i); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569-570 (1969).

A covered jurisdiction may seek administrative preclearance for a voting change by applying to the Attorney General. See 42 U.S.C. 1973c(a) (2006). Alternatively, a jurisdiction may seek judicial preclearance by bringing a declaratory-judgment action in the United States District Court for the District of Columbia. See *ibid.* In either case, preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* A change has a discriminatory effect "if it will lead to a retrogression in the position of members of a racial * * * minority group * * * with respect to their opportunity to exercise the electoral franchise." 28 C.F.R. 51.54(a); see *Beer* v. *United States*, 425 U.S. 130 (1976).

If a covered jurisdiction attempts to implement a change affecting voting without obtaining preclearance, the Attorney General or a private party may bring an action for declaratory and injunctive relief to prevent

implementation of the unprecleared change. See 42 U.S.C. 1973j(d); *Allen*, 393 U.S. at 554-555. Such an action must be heard by a three-judge district court. See 42 U.S.C. 1973c(a) (2006).

2. a. As of November 1, 1964, the relevant date for Alabama under Section 5, Alabama law authorized the governor to make appointments to fill vacancies on county commissions. See Ala. Code § 12-6 (1959); see also Ala. Code § 11-3-6 (1977) (recodifying the authorization in slightly modified form).

b. In 1985, the Alabama legislature enacted Act No. 85-237, 1985 Ala. Laws 137 (the Act), which required that a special election be held to fill any vacancy on the Mobile County Commission so long as at least 12 months remained in the term of the vacant seat. The Attorney General precleared the Act under Section 5. J.S. App. 4a.

In 1987, a vacancy occurred on the Mobile County Commission, and the governor called a special election as required by the Act. The procedures for conducting the special election were submitted by the State and precleared by the Attorney General under Section 5. Letter from Wm. Bradford Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Glen Browder, Secretary of State of Alabama (June 22, 1987). Shortly before the election, Willie Stokes brought an action in state court challenging the constitutionality of the Act. The trial court rejected his claim and allowed the special election to proceed.

On appeal, the Alabama Supreme Court reversed. *Stokes* v. *Noonan*, 534 So. 2d 237 (Ala. 1988). It held that Act No. 85-237 violated the Alabama Constitution, which provides that no "local law * * * shall be enacted in any case which is provided for by a general law."

Ala. Const. Art. IV, § 105. Because a general Alabama law specified that vacancies in county commissions would be filled by gubernatorial appointment, the court held that the Act could not prescribe a different procedure for Mobile County. See *Stokes*, 534 So. 2d at 239.

By the time of the Alabama Supreme Court's decision, the special election had already been held, and Sam Jones had won. J.S. App. 4a. Shortly after the decision, Alabama's governor appointed Jones to the commission seat for which he had campaigned (and won) in the election. J.A. 27. Alabama did not seek preclearance of the voting change worked by *Stokes*. J.S. App. 4a.

c. In 2004, the Alabama legislature enacted Act No. 2004-455, 2004 Ala. Laws 809, which amended Alabama Code § 11-3-6 (1989) to provide that, "[u]nless a local law authorizes a special election, in case of a vacancy [on a county commission], it shall be filled by appointment by the governor." The Attorney General precleared Act No. 2004-455 under Section 5. J.S. App. 5a.

The next year, another vacancy occurred on the Mobile County Commission. J.S. App. 5a. Appellees, three residents of Mobile County, brought an action in state court seeking a declaration that the vacancy must be filled by special election. Joint Stipulation of Fact 2. The key issue in that litigation was the meaning of Act No. 2004-455. Appellees contended that it revived Act No. 85-237, which the Alabama Supreme Court had invalidated in *Stokes*. But appellant and other defendants argued that it merely authorized the Alabama legislature to enact local laws *in the future* to permit special elections for vacancies on county commissions. See J.S. App. 26a-27a. The trial court held that the vacancy on the Mobile County Commission should be filled by spe-

cial election, and appellant appealed to the Alabama Supreme Court. *Id.* at 26a.

While the appeal was pending, Mobile County's probate judge sought and obtained preclearance of certain procedures (including a schedule) for holding the special election. J.A. 22; Joint Stipulation of Fact Exh. I. Under the precleared schedule, the general election was to take place in early January 2006. *Id.* Exh. I, Attach. B at 5. That special election did not occur, however, because in November 2005, the Alabama Supreme Court held that Act No. 2004-455 applied only prospectively and did not revive Act No. 85-237. *Riley* v. *Kennedy*, 928 So. 2d 1013 (Ala. 2005). The court concluded that Governor Bob Riley, appellant, had authority to make an appointment to fill the vacancy. *Id.* at 1017. A few days later, the governor appointed Juan Chastang to the Commission. J.S. App. 5a.[1]

3. a. Appellees then brought this action, claiming that the governor lacked authority to fill vacancies on the Mobile County Commission unless the State obtained Section 5 preclearance of the change from elec-

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[1] In response to the 2005 court decision, the Alabama legislature enacted a statute reinstating special elections as the method of filling vacancies on the Mobile County Commission. Act No. 2006-342, 2006 Ala. Laws 913. The Attorney General precleared that statute in July 2007. Letter from John Tanner, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to John J. Park, Jr., Special Ass't Att'y Gen., State of Alabama (July 10, 2007). Thus, regardless of the outcome of this appeal, future vacancies on the Mobile County Commission will be filled by special election rather than gubernatorial appointment. The case is not moot, however, because if appellant were to prevail, Chastang—who lost his seat as a result of this litigation, see pp. 7-8, *infra*—could be reinstated to complete his term, which runs through November 2008.

tion to appointment. A three-judge district court was convened to consider plaintiffs' claim. J.S. App. 3a.

On August 18, 2006, the district court held that there had been a change from election to appointment that could not be implemented unless it was first precleared under Section 5. J.S. App. 3a-8a. The court concluded that Act No. 85-237 was the appropriate baseline for determining whether there had been a change, because the Act had received preclearance and was "put in force and effect" when a special election was held in 1987 to fill a vacancy on the Mobile County Commission. *Id.* at 7a. The court rejected appellant's argument that Act No. 85-237 could not serve as the baseline because the Alabama Supreme Court had declared that law unconstitutional. *Ibid.* The court explained that it was "required to determine the baseline 'without regard for [its] legality under state law.'" *Ibid.* (quoting *City of Lockhart* v. *United States*, 460 U.S. 125, 133 (1983) (*Lockhart*)).

The district court emphasized that it was "in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in these two cases, or that the governors acted in accordance with state law in making the appointments" to the Mobile County Commission. J.S. App. 8a. Rather, the court stated, it was simply holding that federal law required that the change precipitated by those decisions be precleared before it was "implemented." *Ibid.*

The district court did not enter an injunction. Instead, it gave the State 90 days in which to seek preclearance. J.S. App. 8a, 9a. Its order stated that "if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy." *Id.* at 9a.

b. Appellant did not immediately appeal the district court's decision. Instead, he sought administrative preclearance of the change from election to appointment. Motion to Dismiss or Affirm (MDA) App. 2a-3a. The Attorney General interposed an objection to the change through the Assistant Attorney General for the Civil Rights Division. *Id.* at 2a-8a. He concluded that the State had failed to meet its burden of proof in establishing that the change in the method of filling vacancies on the Mobile County Commission—from election to appointment—was not retrogressive. *Id.* at 6a. He explained that, because they constitute over 63% of the population and registered voters in the district at issue, African-American voters "enjoy the opportunity to elect minority candidates of their choice to the County Commission," and, indeed, enjoyed that power "in the 1987 special election in which Act 85-237 was first implemented." *Ibid.* By contrast, "[t]here is no dispute that the change [from election to appointment] would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters" of the district at issue. *Ibid.*

In concluding that appellant had not met his burden of showing "that the change is not retrogressive," MDA App. 6a, the Assistant Attorney General determined that Act No. 85-237 was the appropriate benchmark to use in conducting the retrogression inquiry. *Id.* at 5a. On this point, his reasoning mirrored the district court's analysis. *Ibid.* Appellant sought reconsideration, which was denied. *Id.* at 9a-19a.

c. On May 1, 2007, the district court entered an order vacating appellant's appointment of Chastang to the Mobile County Commission. J.S. App. 1a-2a. The court

concluded that, without preclearance of the change from special elections to gubernatorial appointment, Chastang's appointment was "unlawful under federal law." *Id.* at 2a. A special election was held to fill the resulting vacancy on the Commission; Chastang ran in the election but was defeated. MDA 8-9.

d. Appellant filed a notice of appeal on May 18, 2007. J.S. App. 11a-13a.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction over this appeal because the notice of appeal was filed within 60 days of the final judgment and is therefore timely. Although the district court entered an earlier order in which it granted declaratory relief, that order was not final because it left unresolved the question of an appropriate remedy. The time for filing a notice of appeal did not begin to run until the district court entered its later remedial order and the judgment therefore became final.

II. Under the text of Section 5 of the VRA, this Court's decisions interpreting Section 5, the Attorney General's Section 5 regulations, and longstanding practice in administering Section 5, Alabama was required to seek preclearance of the change in the method of filling vacancies on the Mobile County Commission from election to appointment before that change was implemented by state officials.

Appellant contends that Section 5 is inapplicable because the change in question was precipitated by decisions of the Alabama Supreme Court. But the text of Section 5 does not make exceptions based on the *source* of the change in state law; rather, the statutory preclearance requirement is triggered "[w]henever" a covered jurisdiction enacts or seeks to administer "any"

change in a voting practice or procedure from that "in force or effect." 42 U.S.C. 1973c(a) (2006). And this Court has accordingly held that Section 5 applies to "*all* voting changes," including those that are "mandated by order of a state court." *Branch* v. *Smith*, 538 U.S. 254, 262 (2003). Thus, whether the source of the change is a statute, a regulation, or a court decision, Section 5 requires preclearance before officials in a covered jurisdiction may implement a change affecting voting.

Appellant argues that no change in voting practices occurred in this case because, although an Alabama statute previously called for vacancies on the Mobile County Commission to be filled by special election, that statute was later declared unconstitutional by the Alabama Supreme Court. But this argument also is contradicted by settled precedent. As this Court has held, whether a particular practice is a change must be judged by reference to the most recent practice that was "*in fact* 'in force or effect.'" *Perkins* v. *Matthews*, 400 U.S. 379, 394-395 (1971). The invalidity of the old practice under state law is irrelevant in determining whether the new practice represents a change. Here, the statute calling for special elections was actually "in force or effect" because it was not only precleared, but actually used to hold an election.

Construing Section 5 to reach all changes affecting voting, regardless of the source of the change, does not, as appellant suggests, necessarily intrude unduly on the prerogatives of state courts. As the district court below emphasized, preclearance in these circumstances does not call for federal review of the accuracy of state decisions under state law, but asks only whether a change in state law may be implemented by state officials without violating Section 5's non-retrogression command. That

federal command indeed intrudes on the sovereignty of covered jurisdictions (for historical reasons that this Court has recognized and found justified), but there is nothing unique about changes precipitated by a state court—as opposed to a state legislature or regulatory body—that warrants carving an exception out of Section 5's unambiguous terms. Although a state judicial decision may suggest that the baseline procedure is not a permissible option under state law, state legislative or executive action could equally be prompted by such a view, and that is not a basis to exempt the actions of any branch of state government from preclearance.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL

This Court has jurisdiction over appeals from final judgments of three-judge district courts in cases brought under Section 5 of the VRA. See 42 U.S.C. 1973c(a) (2006). To invoke the Court's jurisdiction, an appellant must file a notice of appeal within 60 days of the judgment. See 28 U.S.C. 2101(b). In this case, the district court entered a final judgment on May 1, 2007, when it vacated Juan Chastang's appointment as a Mobile County Commissioner. J.S. App. 1a-2a. The notice of appeal was filed 17 days later and is therefore timely. *Id.* at 11a-13a.

Appellees contend (Br. 25-28) that the district court's August 2006 decision was a final judgment that triggered the 60-day deadline of Section 2101(b), meaning that the notice of appeal was seven months too late. They note (Br. 27) that the district court directed the clerk to enter the August 2006 decision as "a final judgment." J.S. App. 10a. A court's characterization of its own decision is not dispositive, however, and an appel-

late court must decide for itself whether an order is final. See *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 741-742 (1976).

The August 2006 decision was not final. Although that decision determined that the State had violated Section 5, it left unresolved the question of an appropriate remedy. See J.S. App. 9a-10a. "[A] decision is not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Cunningham* v. *Hamilton County*, 527 U.S. 198, 204 (1999) (internal quotation marks and citation omitted). In particular, a decision is not final when it determines liability but does not resolve all of a plaintiff's requests for relief. See *Liberty Mut. Ins. Co.*, 424 U.S. at 742. In their complaint, appellees sought both declaratory and injunctive relief, including an order forbidding anyone appointed by the governor from serving on the Mobile County Commission unless the State first obtained preclearance. J.A. 11. But in its August 2006 decision, the district court did not issue an injunction. Instead, it deferred resolution of an appropriate remedy, promising to "revisit the issue" in the event that the State failed to obtain preclearance within 90 days. J.S. App. 9a.

Contrary to appellees' suggestion (Br. 27), the district court did not "order" the State to seek preclearance. The court simply made clear that, before it would "consider taking any action regarding the appointment of Juan Chastang," it would "give the State 90 days to obtain the necessary preclearance." J.S. App. 8a. Had the State failed to seek preclearance, appellant would not have been subject to contempt sanctions; the court would merely have "revisit[ed] the issue of remedy," *id.*

at 9a, as it ultimately did once preclearance was sought and denied. Because the August 2006 judgment did not include the injunction that plaintiffs requested (and later obtained), it was not final.

Adopting appellees' jurisdictional theory would encourage piecemeal appeals in Section 5 cases. By contrast, allowing a defendant to postpone appeal while it seeks preclearance of a particular change may obviate the need for appellate review; if preclearance is granted, the case will likely be moot. See, *e.g.*, *Berry* v. *Doles*, 438 U.S. 190, 192-193 (1978). Avoiding unnecessary appellate litigation is particularly important where, as here, the parties have a right of direct appeal to this Court. Cf. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 470 n.12 (1985). In addition, the fact that Section 5 litigation often involves sensitive issues also counsels against encouraging unnecessary appeals in those cases.

II. THE DISTRICT COURT CORRECTLY HELD THAT ALABAMA IMPLEMENTED A CHANGE AFFECTING VOTING THAT IS SUBJECT TO SECTION 5 PRECLEARANCE

Appellant incorrectly characterizes the change at issue in this case, consistently describing the relevant governmental action as "two decisions" of the Alabama Supreme Court. It is not the decisions themselves, however, that are subject to Section 5 preclearance. Rather, it is the change affecting voting that resulted from the implementation of those decisions—namely, the change in the method of filling vacancies on the Mobile County Commission from election to appointment as manifested by the governor's appointment. The text of Section 5 and this Court's precedents make clear that such a change is subject to preclearance, and appellant's efforts to resist that conclusion are unavailing.

A. Section 5 Applies To All Changes Affecting Voting, Even When Those Changes Are Triggered By State Courts

Section 5 requires covered jurisdictions to obtain preclearance "[w]henever" they "enact or seek to administer any" change affecting voting. 42 U.S.C. 1973c(a) (2006). Congress's use of capacious language like "whenever" and "any" reflects its intent to reach *all* changes in voting procedures or practices that covered jurisdictions may "enact or seek to administer." See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning.").

The use of the disjunctive—"enact" *or* "seek to administer"—implies that those terms have different meanings in the statute. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993). And in ordinary usage, "administer" has a meaning that is different from and broader than "enact." The word "enact" ordinarily refers to the process by which a legislative body votes a bill into law. See *Black's Law Dictionary* 567 (8th ed. 2004) (*Black's*) ("[t]o make into law by authoritative act; to pass"); *Webster's Third New International Dictionary of the English Language* 745 (1986) (*Webster's*) ("to establish by legal and authoritative act: make into a law; *esp*: to perform the last act of legislation upon (a bill) that gives the validity of law"); see also *Branch*, 538 U.S. at 264. The word "administer," by contrast, more commonly refers to the implementation of an established legal requirement. See *Webster's* 27 ("to direct or superintend the execution, use, or conduct of"); *Black's* 46 (defining "administration" as "[t]he management or performance of the executive duties of a government"). In other words, it "encompasses nondiscretionary acts" by officials "endeavoring to comply with the

superior law of the State." *Lopez* v. *Monterey County*, 525 U.S. 266, 279 (1999).

When a state official attempts to implement a practice affecting voting that is different from a practice previously administered in that jurisdiction, the official "seek[s] to administer" a change affecting voting, and he or she must submit it for preclearance. Section 5 makes no distinction among the numerous potential sources of such a change—whether an agency makes the change on its own motion or because of an intervening state court decision. Accordingly, the statute explicitly requires preclearance before a state official may implement a voting change ordered by a state court.

That is not a novel proposition. This Court has previously recognized that Section 5 "requires preclearance of *all* voting changes * * * and there is no dispute that this includes voting changes mandated by order of a state court." *Branch*, 538 U.S. at 262. Thus, in *Branch*, the Court concluded that a redistricting plan imposed by a Mississippi state court was subject to Section 5 preclearance. *Id*. at 265. As the Court explained, "[t]here is no doubt that the State was 'seek[ing] to administer' the changes" mandated by the state court's decision. *Ibid.*; see *LULAC* v. *Texas*, 995 F. Supp. 719, 725 (W.D. Tex. 1998) (three-judge court).

Similarly, in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), this Court concluded that a Mississippi Supreme Court decision had resulted in a change affecting voting that was subject to Section 5 preclearance. *Id*. at 265 & n.16, 270. In that case, county officials refused to implement a state statute requiring election of school board members from single-member districts. After the Mississippi Supreme Court upheld the statute's core requirement that board members be elected by district, a state

trial court ordered that elections be held, and it further required that a run-off be held if no candidate received a majority. The county officials submitted the court-ordered change to the Attorney General, who interposed an objection to the run-off requirement. The Mississippi Supreme Court then ordered that elections be held under the state statute, without regard to whether the county had obtained Section 5 preclearance. *Id.* at 257-261. This Court reversed. Concluding that "the [court-ordered] change in election procedure [was] subject to § 5," *id.* at 270, the Court observed that "the presence of a court decree does not exempt the contested change from § 5." *Id.* at 265 & n.16.

These decisions—interpreting and giving effect to the broad terms of Section 5—resolve the question here as a matter of *stare decisis*. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) ("[C]onsiderations of *stare decisis* have special force in the area of statutory interpretation.").

B. Act No. 85-237 Is The Relevant Baseline For Identifying A Change In Voting Practices Under Section 5

"To determine whether there have been changes with respect to voting" under Section 5, a court "must compare the challenged practices with those in existence before they were adopted." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 495 (1992). This Court has often used the term "baseline" to refer to the "status quo that is proposed to be changed." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). Applying that well-settled law, the district court correctly held that Act No. 85-237, which mandates special elections to fill vacancies on the Mobile County Commission, is the relevant baseline for determining whether a gubernatorial appointment to the

commission represented a voting change that was subject to Section 5 preclearance. And using that baseline, the court was correct to hold that a change took place.

1. The appropriate Section 5 baseline is the practice currently "in force or effect"

Appellant suggests (Br. 26-27) that when a covered jurisdiction reverts to a practice that was in place on its coverage date (in Alabama's case, November 1, 1964), the change might not be covered by Section 5, since the practice would not be "different from that in force or effect on November 1, 1964." 42 U.S.C. 1973c(a) (2006). That suggestion should be rejected. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Appellant's suggested reading would have the perverse result of leaving some minor retrogressive changes subject to Section 5 scrutiny, while creating a safe harbor for jurisdictions to regress all the way back to their 1964 practices, thus encouraging the very retrogression that the statute aims to prevent.

By setting a coverage date in Section 5, Congress merely established the first baseline against which the potentially discriminatory nature of future practices would be judged, with the natural assumption, if not expectation, that the baseline would advance as voting practices progressed in covered jurisdictions. Nothing in the statute or its history supports an interpretation that would permit covered jurisdictions to make discriminatory changes affecting voting as long as those changes did not institute voting practices that were worse than those in place in 1964. Adopting that interpretation

more than 40 years after the passage of Section 5—during which time covered jurisdictions have made considerable strides in their ongoing effort to improve voting practices—could have a significant retrogressive effect on voting practices in such jurisdictions.

Every court to consider the issue has concluded that a reversion to a voting practice in place on the Section 5 coverage date is a change subject to preclearance. See *Gresham* v. *Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga.) (three-judge court), vacated *sub nom. Poole* v. *Gresham*, 488 U.S. 978 (1988), reinstated opinion aff'd, 495 U.S. 954 (1990); *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three-judge court), aff'd, 456 U.S. 1002 (1982); *NAACP, DeKalb County Chapter* v. *Georgia*, 494 F. Supp. 668, 677 (N.D. Ga. 1980) (three-judge court). Although this Court has not directly confronted the issue, it has never suggested that reversions to practices in place on the coverage date are exempt from the statute. To the contrary, the Court has stated categorically that, "[i]n § 5 preclearance proceedings * * * the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied." *Bossier Parish Sch. Bd.*, 528 U.S. at 334; see *Presley*, 502 U.S. at 495 ("*Absent relevant intervening changes*, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.") (emphasis added). In determining the appropriate baseline in *Young* v. *Fordice*, 520 U.S. 273 (1997), for example, this Court noted that the statute's coverage date "often, as here, is not directly relevant, for differences once precleared normally need not be cleared again." *Id.* at 281. Instead, "[t]hey become part of the baseline standard for purposes of determining whether a State has 'en-

act[ed]' or is 'seek[ing] to administer' a 'practice or procedure' that is 'different' enough itself to require preclearance." *Ibid.*

In addition, the Attorney General has consistently rejected an interpretation of Section 5 that would exclude from the preclearance requirement any change that merely reverts to a practice in place on November 1, 1964. Under a regulation in place since 1987, a voting change is subject to preclearance "even though it * * * returns to a prior practice or procedure." 28 C.F.R. 51.12. In promulgating that regulation, the Attorney General explained that the rule was intended "to make explicit that a voting change that returns a jurisdiction to a practice that was previously in effect (*e.g.*, to that in use on November 1, 1964) is subject to the preclearance requirement." 52 Fed. Reg. 488 (1987). That regulation reflects an interpretation of Section 5 that is entitled to "substantial deference." *Lopez*, 525 U.S. at 281.

Significantly, Congress has twice reauthorized or amended parts of the VRA since that regulation without changing the relevant language of Section 5. See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 38 (1978). In reauthorizing the statute, Congress should be presumed to have endorsed the settled construction that reversions to pre-1964 practices are not exempt from Section 5.

2. An existing practice's invalidity under state law is irrelevant

Appellant contends (Br. 36-38) that Act No. 85-237 cannot serve as the Section 5 baseline because the Alabama Supreme Court declared the act unconstitutional under state law. However, the text of Section 5 focuses the inquiry on whether there has been a change from a practice that was "in force or effect." A practice is "in force or effect" if it is actually carried out by state officials, whether or not it is later found to be unlawful. Cf. *Black's* 794 (defining "in force" as "[i]n effect; operative"). Accordingly, this Court has made clear that a covered jurisdiction must obtain preclearance before changing any voting practice that is "*in fact* 'in force or effect,'" even if the motivating reason for the change is that the existing practice violates state law. *Perkins*, 400 U.S. at 394-395; accord *Lockhart*, 460 U.S. at 132-133.

a. In *Perkins*, this Court held that the City of Canton, Mississippi, was required to obtain preclearance before holding at-large elections for aldermen in 1969. The use of an at-large system represented a change because, in the 1965 election, the city had selected aldermen by ward. *Perkins*, 400 U.S. at 394-395. The Court held that preclearance was necessary even though the ward-based system used in 1965 had violated a pre-existing state statute requiring at-large elections. *Id.* at 394. Concluding that "the procedure *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards," the Court held that the 1969 change was subject to preclearance, even though it was designed to bring the city into compliance with state law. *Id.* at 394-395.

Later, in *Lockhart*, this Court reaffirmed that the validity under state law of a jurisdiction's voting-related practice is "essentially irrelevant" to the Section 5 inquiry, 460 U.S. at 132, because "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *Id.* at 133. The issue in that case was whether voting changes that the City of Lockhart, Texas, implemented in 1973 were retrogressive as compared to the voting system in place on November 1, 1972, Texas's coverage date under Section 5. *Id.* at 127-130, 132-133. In deciding the retrogression question, the district court had determined that the relevant baseline was the voting system authorized under state law, not the system that the city actually used before 1973. *Id.* at 130, 132. This Court rejected that analysis, emphasizing that "[t]he proper comparison is between the new system and the system *actually in effect* on November 1, 1972, *regardless of what state law might have required*." *Id.* at 132 (emphasis added; footnote omitted).

Congress ratified the holdings in *Perkins* and *Lockhart* when it reauthorized Section 5 in 1975, 1982, and 2006, without changing the relevant language of Section 5. The general presumption that Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that statute without altering the relevant language is particularly appropriate here because "in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the 'broad interpretations to the scope of Section 5' in * * * *Perkins*." *White*, 439 U.S. at 39 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 16 (1975), and H.R. Rep. No. 196, 94th Cong., 1st Sess. 9 (1975)).

b. Appellant offers two theories for distinguishing *Perkins* and *Lockhart*, but neither is persuasive. First, he points out (Br. 40) that the cases did not involve "a state supreme court's authoritative determination of state law." That is true but beside the point. An authoritative judicial opinion is just one way of removing any legitimate dispute about a provision's validity under state law. In *Perkins*, even without such an opinion, there was no dispute that the practice of ward-based elections was, in fact, unlawful under Mississippi law. See 400 U.S. at 394 & n.12. In light of that lack of dispute, a state-court declaratory judgment action could have confirmed the invalidity of ward-based elections. Nothing in this Court's opinion in *Perkins* suggests that the preclearance requirement could have been sidestepped simply by bringing such an action.

Second, appellant notes (Br. 41-43) that neither *Perkins* nor *Lockhart* involved invalid state statutes that were precleared after the coverage date of Section 5. He reasons (Br. 42) that, although "Congress had good reason in 1965 to freeze into place" practices then in force, "the same logic doesn't hold" with respect to practices that were "not enacted or implemented until long *after* November 1, 1964." That argument is simply a variation on appellant's suggestion that Section 5 might permit retrogression to practices that were in place on a jurisdiction's coverage date—a suggestion that is at odds with the settled administrative and judicial construction of the statute. See pp. 17-18, *supra*. Moreover, if anything, the fact that the change is from a *precleared* practice makes it more natural to presume that preclearance will be required before implementing any departure from that practice.

c. Appellant also contends (Br. 35-38) that using Act No. 85-237 as a baseline conflicts with this Court's decision in *Abrams* v. *Johnson*, 521 U.S. 74 (1997). That is incorrect. In *Abrams*, a federal district court devised a redistricting plan to replace the legislative plan that this Court had declared unconstitutional in *Miller* v. *Johnson*, 515 U.S. 900 (1995). See *Abrams*, 521 U.S. at 77-78, 82-86. In rejecting a Section 5 challenge to that plan, this Court refused to use as a benchmark the earlier redistricting plan that had been declared invalid in *Miller*, explaining that "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." *Id*. at 97. *Abrams* is inapposite here because the plan that this Court rejected as a benchmark in that case was invalid under the *federal* Constitution. The Section 5 analysis is not so limited by state law. Indeed, the point of the VRA was to end discriminatory state voting practices, many of which were based on provisions of state constitutions and judicial constructions of such provisions. See, *e.g.*, Ala. Const. Art. VIII, § 181 (repealed 1965) (prescribing literacy test).

3. Act No. 85-237 is an appropriate baseline because it was "in force or effect" before the voting change at issue here

Finally, relying on *Young* v. *Fordice*, *supra*, appellant contends (Br. 51-56) that Act No. 85-237 cannot serve as the baseline because it was never "in force or effect." That argument is also unavailing.

In *Young*, Mississippi's secretary of state devised a new voter-registration plan in anticipation that the state legislature would pass a bill authorizing the new procedures. While the proposed legislation was pending, the Attorney General precleared the proposed plan, and some of Mississippi's registrars began using it to regis-

ter voters. It soon became clear that the Mississippi legislature would not enact the legislation necessary to make the plan valid under state law, and at that point, Mississippi officials notified registrars to stop using the new procedures. *Young*, 520 U.S. at 277-278, 282-283. This Court held that the precleared plan was never in force or effect and thus could not serve as a Section 5 baseline, emphasizing that "the State held no elections prior to its abandonment of the [plan], nor were any elections imminent." *Id.* at 283.

Act No. 85-237 is entirely different. Unlike the plan at issue in *Young*, it actually became law before it was precleared—and it undeniably went into effect. Crucially, the Act was implemented in June 1987, when a special election was held to fill a vacancy on the Mobile County Commission. See J.A. 20-21, 27. It was not until September 30, 1988—more than 15 months after the special election—that the Alabama Supreme Court declared Act No. 85-237 invalid. Although appellant describes the Act as "void *ab initio*" (Br. 25), the Alabama court's decision cannot alter the historical reality that the Act was actually in effect for the 1987 election. Even if the law never had "force" at some theoretical level, it seems impossible to deny that it was "in effect." Indeed, under appellant's position, the law never would have been in effect even if scores of elections had been conducted under the law for decades before it was invalidated. Nothing in this Court's Section 5 jurisprudence requires such a counter-intuitive result.

Although *Young* does not govern here, it does recognize an important limiting principle. There would be considerable artificiality with using a procedure as a relevant baseline for measuring retrogression if that procedure were so obviously unconstitutional that it was

immediately enjoined and never went into effect. Accordingly, Section 5 requires a procedure to have been "in force or effect." A proposal that never has the force of law or takes effect does not constitute a baseline under *Young*. By contrast, a law like Act No. 85-237, that was not only enacted but approved by a trial court and put into effect by an election, provides a relevant baseline, and treating it as such responds to the reality that judicial interpretations, no less than legislative or gubernatorial acts, can have a retrogressive effect.

C. Appellant's "State Sovereignty" Arguments Do Not Compel A Different Result

Appellant suggests (Br. 45-49) that the district court's decision impermissibly intrudes upon state sovereignty. That argument lacks merit.[2]

Appellant repeatedly complains (Br. 23-26) that the application of Section 5 in this case "strips state courts of their authority to decide pure-state law questions." That is incorrect. The district court made clear that, in requiring preclearance of the change from special elections to gubernatorial appointment, it was "in no way disputing the rulings of the Supreme Court of Alabama * * * or that the governors acted in accordance with state law in making the appointments" to the Mobile

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[2] To the extent that appellant and his *amici* attempt to cast doubt on the constitutionality of Section 5, those arguments are not properly presented. The arguments were not pressed or passed upon below, and for good reason. The District Court for the District of Columbia has exclusive jurisdiction over challenges to the constitutionality of Section 5. See 42 U.S.C. 1973*l*(b); *Allen*, 393 U.S. at 557-558. That court is currently considering a constitutional challenge to the reauthorization of Section 5. See *Northwest Austin Mun. Util. Dist. No. 1* v. *Mukasey*, No. 1:06-cv-1384. But this case presents no occasion to consider such a challenge.

County Commission. J.S. App. 8a. The district court was not called upon to determine whether the practices in place under Act No. 85-237 were legal under state law. It was required only to determine whether the election practices implemented by appellant were different from those previously in place. See *LULAC*, 995 F. Supp. at 726. That is a question of federal law and, as explained above, the district court correctly answered it.

Appellant therefore errs in suggesting that Section 5 subjects state supreme courts to the "insult" of having their "authoritative determinations of state law" reviewed by employees of the federal executive branch. Br. 40 (quoting *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting)). To the contrary, by focusing federal officials on the baseline in "effect," as opposed to the baseline validly in effect, Section 5 avoids such second-guessing. As the Attorney General's letters denying preclearance with respect to the voting change in this case illustrate, see MDA App. 2a-8a, 9a-19a, in reviewing a voting change mandated by a state supreme court in a covered jurisdiction, the Attorney General (or the District Court for the District of Columbia in an appropriate case) does not review the court's interpretation of state law for correctness, but rather takes that motivation for a change as a given. The Attorney General determines only whether the change would discriminate against minority voters in violation of Section 5. See *id.* at 5a-6a, 15a-17a. If the Attorney General concludes that preclearance should be denied, he does not "overrule" the state court's interpretation of its own law in any respect. Rather, he simply determines that the requirements of a state law conflict with the requirements of Section 5. By virtue of the Supremacy Clause, Section 5 and its non-retrogression

requirement trump contrary provisions of a state law or a state constitution. See U.S. Const. Art. VI, Cl. 2. That effect was obvious and unproblematic when the VRA overrode state constitutional provisions and judicial decisions allowing practices like literacy tests, and it is no less true in a context like this.

In instances such as this, in which a voting practice currently in place is determined to violate state law, Section 5 will not always require the State to keep in place the particular practice found to be unlawful under state law. In many cases, Section 5 will merely restrict the range of remedies available to the State to cure the state-law deficiency, but the state will remain free to chose among the non-retrogressive options available under state law. Here, of course, the choice is binary: a vacancy can be filled either through an election or by an appointment. And the Attorney General concluded that Section 5 prevents state officials from implementing a change in state law from elections to appointment because, the Attorney General found, that change would have an impermissible retrogressive effect.

Appellant complains (Br. 46-47) that the application of Section 5 may force Alabama to hold elections under a statute that is invalid under state law. It is well-established, however, that failure to obtain Section 5 preclearance for a change affecting voting can justify "an injunction prohibiting the State from enforcing its election laws." *Allen*, 393 U.S. at 562-563. And until preclearance is obtained, courts may properly order covered jurisdictions to hold elections using procedures that are no longer authorized or valid as a matter of state law. See, *e.g.*, *Perkins*, 400 U.S. at 394-395; *In re McMillin*, 642 So. 2d 1336, 1337-1339 (Miss. 1994) (requiring elections to proceed under statutes that the state legislature

had repealed) (cited with approval in *Branch*, 538 U.S. at 262). This impact on state law is just a manifestation of preemption principles as applied to voting and the VRA. A covered jurisdiction could not resist application of Section 5 by insisting that elections without literacy tests or elections by ward are simply unauthorized by state law. The result should be no different here.

Appellant contends that the intrusion on state sovereignty inherent in Section 5 becomes intolerable where, as here, the state's highest court—"the 'ultimate expositor[]' of Alabama law"—is the entity that has mandated the voting change. Br. 46 (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)). But as a matter of federalism, there is no logical justification for giving changes affecting voting greater deference if ordered by a state court than if mandated by the legislature (the State's ultimate lawmaking body) or the governor (the State's ultimate executive official). Appellant does not contend that a state legislature's repeal of a previously precleared statute is exempt from scrutiny under Section 5 (even, presumably, if the legislature acts out of a firmly-held, oath-driven view that the previous statute violated state law). But he fails to explain how requiring preclearance of the implementation of a state court decision invalidating a statute intrudes on state sovereignty to any greater degree than requiring preclearance of the decision of the legislature, with the concurrence of the governor, to repeal the same statute. And the discovery of such a new dimension of Our Federalism would directly undermine Section 5, since many of the problems leading to the passage of Section 5 were the product of state court decisions. See Appellees' Br. 4-7.

To be sure, some intrusion on state sovereignty is inherent in the Section 5 preclearance requirement,

which this Court has upheld as constitutional. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335 (1966). As the Court has explained, "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however." *Lopez*, 525 U.S. at 284-285; see *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980). But nothing in the Constitution, this Court's precedents, or Section 5 justifies re-"split[ting] the atom of sovereignty," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), in a way that would require the federal courts—or for that matter the Attorney General—to accord greater respect to the decisions of state courts than they must to the decisions of state legislatures or state officials. And drawing such a distinction ultimately could erode, rather than reinforce, the important federalism principles established by this Court by creating an arbitrary line that lacks foundation in our Constitution's structure and history.[3]

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[3] Appellant also asserts (Br. 47) that the district court's decision allows the Attorney General to "commandeer[]" state officials in violation of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). But prohibiting a State from implementing one of its election laws is by no means "commandeering" within the meaning of *New York* or *Printz*. This Court has explained that "commandeering" involves "requir[ing] the States in their sovereign capacity to regulate their own citizens." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000). No violation of the anti-commandeering principle occurs where, as here, a federal statute regulates state activities "rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" *Id.* at 150 (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988)).

D. The District Court's Application Of Section 5 Does Not Make The Statute Unworkable

Finally, appellant argues (Br. 49) that continuing to interpret Section 5 to apply to changes that are mandated by state courts is "unworkable" and "unnecessary." It is neither. Appellant concedes (Br. 45) that voting changes resulting from state court decisions can be subject to preclearance under Section 5, because federal approval "is necessary to an election practice's enforceability" in order to prevent covered jurisdictions from evading the mandate of Section 5 by "'laundering' unprecleared practices through the courts." And the Attorney General has a longstanding and effective practice of reviewing changes mandated by state court decisions. A number of States charge their courts with responsibility for adopting various voting changes including annexations, de-annexations, redistricting plans, and special election schedules. For example, the Alabama Supreme Court was historically responsible for prescribing the form and content of the State's voter-registration form, see Act No. 2006-570, 2006 Ala. Laws 1331, amending and renumbering Ala. Code § 17-4-122 (LexisNexis 2005) as § 17-3-52 (LexisNexis 2007), and the changes it ordered were subject to preclearance, see, *e.g.*, Letter from Joseph D. Rich, Acting Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Lynda K. Woodall, Assistant Att'y Gen., State of Alabama (Apr. 18, 2000) (declining to interpose objection to revised "Alabama Voter's Update Form" adopted by Alabama Supreme Court). In addition, the Attorney General has reviewed hundreds of changes resulting from state court decisions in Virginia and Mississippi approving annexations. See, *e.g.*, *City of Richmond* v. *United*

States, 422 U.S. 358 (1975); Va. Code Ann. § 15.2-3202 (LexisNexis 2003); Miss. Code Ann. § 21-1-29 (West 1999).

The Attorney General has also reviewed numerous redistricting plans formulated by state courts. See, *e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Knox V. Jenkins, Jr., Senior Resident Judge, Superior Ct. of Johnston County, N.C. (July 12, 2002) (declining to interpose an objection to redistricting plans for state legislature adopted by state court); Letter from James P. Turner, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Jimmy Evans, Attorney Gen., State of Alabama (July 23, 1993) (same); Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Robert A. Butterworth, Attorney Gen., State of Florida (Aug. 12, 1992) (same); Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Daniel E. Lungren, Attorney Gen., State of California (Feb. 28, 1992) (same). And he has reviewed a number of changes in election dates resulting from state court orders. See, *e.g.*, Letter from Bill Lann Lee, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to T.H. Freeland IV, Freeland & Freeland (Aug. 17, 1998) (objecting to cancellation of municipal election in Grenada, Mississippi, ordered by Mississippi Supreme Court); Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Virginia B. Ragle, Assistant Att'y Gen., State of Alaska (July 8, 1992) (declining to interpose an objection to delay of an election ordered by Alaska state courts).

In addition, this is hardly the first time that the Attorney General has reviewed a change affecting voting

resulting from a court decision interpreting state law. For example, the Attorney General reviewed the change resulting from the Mississippi Supreme Court's decision in *Myers* v. *City of McComb*, 943 So. 2d 1 (Miss. 2006), which interpreted the Mississippi Constitution to prohibit a person from simultaneously serving as a city selectman and a state representative. See Letter from John Tanner, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Reese Partridge, Assistant Att'y Gen., State of Mississippi (July 26, 2007). That change was submitted for preclearance in response to a federal court order rejecting the city's argument that the state court's decision did not result in a change affecting voting because it "merely interpreted a constitutional provision in effect long before the VRA become effective." *Myers* v. *City of McComb*, No. 3:05-CV-00481 (S.D. Miss. Nov. 23, 2005), slip op. 5-6 (three-judge court). In another case, the Attorney General reviewed changes in the procedures used by counties in Alabama to count absentee ballots mandated by the Alabama Supreme Court's decision in *Williams* v. *Lide*, 628 So. 2d 531 (Ala. 1993). See Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Mark Givhan, Deputy Att'y Gen., State of Alabama (Nov. 22, 1994).

There is therefore no reason to give credence to appellant's suggestion (Br. 49) that recognizing that Section 5 covers changes affecting voting that result from the decisions of state courts will alter the course of Section 5 enforcement, much less result in a flood of litigation. Section 5 has been interpreted to apply to such changes for more than a quarter of a century—at least since this Court's 1982 decision in *Hathorn*.

Nor is there merit to the suggestion (Br. 50) that Congress would have seen "no overriding *need*" to apply Section 5 to changes resulting from state court decisions. Congress enacted the VRA "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. at 308. Central to that goal is Section 5's requirement that "*all* voting changes * * * includ[ing] voting changes mandated by order of a state court" be submitted for preclearance. *Branch*, 538 U.S. at 262. History demonstrates the wisdom of Congress's decision to create such a broad remedy: Shortly after the enactment of the VRA, a federal district court had to enjoin Alabama circuit courts from interfering with the implementation of the VRA. *Reynolds* v. *Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965) (per curiam) (three-judge court). Moreover, the decisions of state court judges—who in Alabama, as in many other States, are elected by the people—can reflect the "policy choices of the elected representatives of the people" just as much as the decisions of state legislators. *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981). Such choices—Congress explicitly mandated in Section 5 and this Court has held—must be precleared in covered jurisdictions like Alabama. *Ibid.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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