No. 07-77

**IN THE**
**Supreme Court of the United States**

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HONORABLE BOB RILEY, AS GOVERNOR OF THE STATE OF ALABAMA,

*Appellant,*

v.

YVONNE KENNEDY, JAMES BUSKEY AND WILLIAM CLARK,

*Appellees.*

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

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# BRIEF FOR ABIGAIL THERNSTROM AND STEPHAN THERNSTROM AS AMICI CURIAE SUPPORTING APPELLANT

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## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page(s)

### CASES

**STATUTES**



**REGULATIONS**

**MISCELLANEOUS**

## INTEREST OF THE *AMICI CURIAE*

Abigail and Stephan Thernstrom are well-recognized scholars in the areas of race, voting rights, and related civil rights issues in America.[1]

Abigail Thernstrom is a Senior Fellow at the Manhattan Institute in New York and Vice Chair of the United States Commission on Civil Rights. Recently, she served as a witness in the hearings before the Senate Judiciary Committee regarding the 2006 reauthorization of the Voting Rights Act. Stephan Thernstrom is the Winthrop Professor of History at Harvard University, a Senior Fellow at the Manhattan Institute, and a member of the National Council for the Humanities. He has served as an expert witness in more than two dozen federal cases involving claims of racial discrimination.

The Thernstroms' extensive scholarship includes *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Harvard University Press 1987), *America in Black and White: One Nation, Indivisible* (Simon & Schuster 1997), *Beyond the*

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[1] The parties have consented to the filing of this brief, and their consent forms have been filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

*Color Line: New Perspectives on Race and Ethnicity* (Hoover Institution Press 2002), *No Excuses: Closing the Racial Gap in Learning* (Simon & Schuster 2003), and the forthcoming works *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections* and *Don't Call it Segregation: The Myth of American Apartheid.*

Numerous organizations have recognized the Thernstroms' contributions, including the Bradley Foundation, which awarded them one of its four 2007 prizes for "outstanding intellectual achievement." Members of this Court have likewise cited the Thernstroms' scholarship. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1***,** 127 S. Ct. 2738, 2776-77 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, J., joined by Scalia, J., concurring); *Lopez v. Monterey County*, 525 U.S. 266, 297 (1999) (Thomas, J., dissenting); *Johnson v. De Grandy*, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring); *Bush v. Vera*, 517 U.S. 952, 1075 n.9 (1996) (Souter, J., joined by Ginsburg, J., and Breyer, J., dissenting); *Holder v. Hall*, 512 U.S. 874, 894-95 (1994) (Thomas, J., joined by Scalia, J., concurring); *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

Abigail and Stephan Thernstrom would like once again to offer their views to this Court. As scholars long concerned with race and voting in America, the Thernstroms have an interest in highlighting the confusion that has developed in the application of the Voting Rights Act and in ensuring that the Voting Rights Act provides a consistent, predictable framework for the States, federal government, and courts. The Thernstroms

accordingly are filing this brief to aid the Court in its resolution of this case.

## INTRODUCTION

Appellant's brief thoroughly sets forth the arguments that the preclearance requirements of the Voting Rights Act do not apply to purely judicial decisions of state supreme courts. Instead of repeating those arguments here, this brief offers an additional ground for reversing the district court's decision.

In 2004, the Department of Justice precleared Act No. 2004-455, which provides that when a vacancy arises on a county commission, the default rule is gubernatorial appointment. In 2005, a vacancy arose on the Mobile County Commission. The Alabama State Supreme Court, interpreting Act No. 2004-455, held that the vacancy must be filled pursuant to the precleared default rule of gubernatorial appointment. Amici submit that the Alabama Supreme Court's 2005 decision did not constitute a change from the most recent precleared statute in force or effect, *i.e.*, Act No. 2004-455. Accordingly, the district court's decision should be reversed.

## SUMMARY OF RELEVANT FACTS

The parties detail a series of state statutes, court rulings, appeals, county special elections, gubernatorial appointments, and Department of Justice preclearance decisions extending from the 1980s to the present. Amici, however, believe that

this Court need only consider those events occurring since 2004 to resolve this appeal.

On May 14, 2004, Alabama enacted Act No. 2004-455, a general law governing vacancies on county commissions in Alabama. Joint Appendix ("J.A.") 115-17. The Act's preamble explains that the Act's purpose is "to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of county commission." *Id*. at 116. The Act amended Alabama law to state, "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor." *Id*.

Alabama submitted Act. No. 2004-455 to the Department of Justice for preclearance, with a letter explaining that Act 2004-455 "will allow local law to provide for special elections to fill vacancies in the office of county commissioner." Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Aug. 8, 2004). The Department of Justice's preclearance letter, dated September 28, 2004, included only one sentence describing Act No. 2004-455: It stated that Act No. 2004-455 is a statute "which permits the filling of county commissioner vacancies by special election, for the State of Alabama." Letter from Joseph D. Rich, Chief, Voting Rights Section, Civil Rights Division, to Charles B. Campbell, Esq., Assistant Attorney General of Alabama (Sept. 28, 2004).

During 2004 and 2005, there was confusion over the application of Act No. 2004-455. On September 7, 2004, Alabama Attorney General Troy

King issued an opinion letter stating that Act No. 2004-455 allowed Houston County to hold a special election pursuant to a local law enacted before 2004. Letter from Troy King, Attorney General of Alabama, to Rep. Steve Clouse, House of Representatives of Alabama (Sept. 7, 2004); *see also* J.A. 49. On April 26, 2005, Etowah County filled a county commission vacancy by special election, pursuant to a local law enacted before 2004. J.A. 49 (citing website of Secretary of State of Alabama).

Controversy arose in September 2005, when a vacancy arose on the Mobile County Commission. On September 19, 2005, Appellees Yvonne Kennedy, James Buskey, and William Clark filed suit against Governor Bob Riley in the Circuit Court of Montgomery County, Alabama. J.A. 21. They requested a declaratory judgment that the vacancy on the Mobile County Commission be filled by special election pursuant to a state statute enacted in 1985, *i.e.*, Act No. 85-237. *Id.* Governor Riley argued that the 1985 state statute could not provide a basis for a special election, because it had been held unconstitutional by the Alabama Supreme Court's 1988 decision in *Stokes v. Noonan*. *See* Jurisdictional Statement Appendix ("J.S. App.") 26a.

The Alabama Circuit Court ruled for the plaintiffs on September 29, 2005, and ordered the vacancy to be filled by special election. J.A. 21. On October 11, Governor Riley appealed the decision to the Alabama Supreme Court. *See* J.S. App. 26a. In the meantime, the Mobile County probate judge (who is the chief election official for the county) approved a special-election plan designed to implement the

circuit court's decision and, on October 13, submitted it to the Department of Justice for preclearance. J.A. 22; Letter from J. Michael Druhan, Jr., to Chief, Voting Rights Section, Civil Rights Division (Oct. 13, 2005). On October 25, Alabama Attorney General Troy King asked the Department of Justice to "withhold action on the merits of [the] Probate Judge['s] submission pending action by the Alabama Supreme Court." Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Oct. 25, 2005). The letter noted that Department of Justice regulations provide that the Attorney General will not consider a submission concerning a change "'prior to final enactment or administrative decision,'" and the circuit court's order for a special election was not final because it was still "subject to . . . reversal by the Alabama Supreme Court." *Id.* (quoting 28 C.F.R. § 51.22). The Department of Justice declined to wait for the Alabama Supreme Court's ruling, and on October 26, it precleared the special-election plan submitted by the probate judge. J.A. 22.

On November 9, 2005, the Alabama Supreme Court reversed the circuit court's decision and held that the vacancy on the Mobile County Commission must be filled by gubernatorial appointment. J.S. App. 25a. The court adopted neither Appellees' nor the Governor's reading of Act No. 2004-455. Instead, it held "that Act No. 2004-455 applies prospectively only," and authorizes special elections only pursuant to laws enacted after Act No. 2004-455 took effect. *Id.* at 30a-31a. Because the statute providing for special elections in Mobile County, Act No. 85-237, was enacted in 1985, it did not constitute

"a local law [that] authorizes a special election" under the 2004 statute. J.A. 115-17; J.S. App. 30a-31a. The Alabama Supreme Court explained that for decades, it "has consistently held that statutes are to be prospective only, unless clearly indicated by the legislature." J.S. App.39a-30a (internal quotation marks and citations omitted). Moreover, the court reasoned that the Act's preamble, which declares that the Act's purpose is "'*to authorize* the Legislature by local law to provide for the manner of filling vacancies,'" "further indicates an intention by the legislature that the Act is to be prospectively applied." *Id*. at 30a (quoting Act No. 2004-455). The court held that under Act No. 2004-455, the vacancy on the Mobile County Commission should be filled by gubernatorial appointment. *Id*. at 31a.

Under Alabama law, the Alabama Supreme Court is the "final arbiter" of the meaning of a state statute. *Ex parte James*, 863 So. 2d 813, 834 (Ala. 2002). Accordingly, Governor Riley adopted the Alabama Supreme Court's interpretation of Act No. 2004-455. On November 15, 2005, pursuant to the most recent precleared statute, Act No. 2004-455, Governor Riley appointed Juan Chastang, an African-American, to fill the vacancy on the Mobile County Commission. J.A. 23.

The state legislature also recognized that the Alabama Supreme Court's interpretation of Act No. 2004-455 was binding. It responded by passing Act No. 2006-342, which Governor Riley approved on April 16, 2006. 2006 Ala. Acts No. 2006-342. Act No. 2006-342 declares that its purpose "is to reenact Act 85-237" and provides that if a vacancy arises on the

Mobile County Commission "with 12 months or more remaining on the term of the vacant seat," the vacancy will be filled by special election. *Id.* The Justice Department has precleared Act No. 2006-342. Letter from Assistant Attorney General Wan Kim, Civil Rights Division, to Troy King, Attorney General of Alabama (July 2, 2007). Accordingly, henceforth, any vacancy on the Mobile County Commission which occurs at least twelve months before the end of the term will be filled by special election.

In the meantime, Appellees Yvonne Kennedy, James Buskey, and William Clark filed the instant lawsuit on November 16, 2005, in the United States District Court for the Middle District of Alabama. J.A. 9-14. They argued that the Alabama Supreme Court's 2005 decision in *Riley v. Kennedy* constituted a change requiring preclearance under section 5 of the Voting Rights Act. Plaintiffs' Trial Brief at 3, 8-9, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.); *see also* J.A. 10-11. Appellees also asserted that the Alabama Supreme Court's 1988 decision in *Stokes v. Noonan* should have been submitted for preclearance. Plaintiffs' Trial Brief at 8, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.); *see also* J.S. App. 5a. Appellees sought only prospective relief: a declaratory judgment that both decisions of the Alabama Supreme Court required preclearance, and an injunction forbidding the Governor to fill the vacancy on the Mobile County Commission unless and until the decisions were precleared. Plaintiffs' Trial Brief at 8-9, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.); *see also* J.A. 11. The State of Alabama argued that neither decision of the Alabama Supreme Court

required preclearance, and the Governor's appointment of Juan Chastang to the Mobile County Commission was proper because it was made pursuant to a precleared statute—Act No. 2004-455. Trial Brief of Governor Riley at 4-6, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.).

On August 18, 2006, the district court held that both decisions of the Alabama Supreme Court require preclearance. J.S. App. 3a-8a. The court explained that to determine whether the Alabama Supreme Court's decision in *Riley v. Kennedy* constituted a change under section 5, it would "compar[e] the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a-7a. The district court acknowledged that in 2004, Alabama enacted, and the Department of Justice precleared, a statute governing vacancies on County Commissions—Act No. 2004-455. *Id.* at 4a-5a. And the district court acknowledged that the *Riley v. Kennedy* decision interpreted only Act No. 2004-455. *Id.* at 5a. The district court did not, however, address whether Act No. 2004-455 was the "baseline." Instead, it held that the 1985 statute providing for special elections to fill vacancies on the Mobile County Commission (Act No. 85-237) constituted the "baseline," and the Alabama Supreme Court's decision in *Riley v. Kennedy* that the 1985 Act "was not rendered enforceable by Act No. 2004-455" constituted a change requiring section 5 preclearance. *Id.* at 7a-8a.

On November 9, 2006, in compliance with the district court's order, the Alabama Attorney General

submitted the state supreme court's decisions to the Department of Justice. Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Nov. 9, 2006). The Department of Justice denied preclearance on January 8, 2007, and on May 1, 2007, the district court vacated Governor Riley's appointment of Juan Chastang to the Mobile County Commission. Appellees' Motion to Dismiss Appendix 2a-8a; J.S. App. 1a-2a. The State of Alabama appealed to this Court on May 18, 2007. J.S. App. 11a-13a.

## SUMMARY OF ARGUMENT

In holding that the Alabama Supreme Court's decision in *Riley v. Kennedy* constituted a change under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the district court not only misapplied the law, it also created the potential for confusion and unpredictability in the preclearance process.

The district court set forth the correct legal standard: "Changes are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a-7a (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997) and *Gresham v. Harris*, 695 F. Supp. 11791, 1183 (N.D. Ga. 1988)); *see also Reno v. Bossier Parish*, 528 U.S. 320, 327 (2000). But it misapplied that standard and designated a 1985 statute as the "baseline" or "benchmark," instead of the most recent precleared statute, *i.e.* Act No. 2004-455. Additional confusion was created by the preclearance of the Alabama Circuit Court's 2005 order for a special

election, despite the fact that the order never had any force or effect. And, in their trial court brief, appellees offered a third proposal for the benchmark—the Alabama Attorney General's 2004 opinion letter. The Court should eliminate this confusion, which too often characterizes the preclearance process, by confirming that the section 5 benchmark is the most recent precleared statute or practice that the State put into force or effect—Act No. 2004-455.

The district court next erred by holding that the Alabama Supreme Court's decision in *Riley v. Kennedy* constituted a change under section 5. This Court should clarify that preclearance is not required when a state supreme court enforces a precleared statute consistent with the statute's plain language, the state's section 5 submission letter, and longstanding state precedent.

If this Court concludes that Alabama may implement the holding in *Riley v. Kennedy* without obtaining preclearance, it need go no further. Such a ruling would be sufficient to uphold Juan Chastang's appointment to the Mobile County Commission, which was made pursuant to Act No. 2004-455 and the order in *Riley v. Kennedy*. It is undisputed that all future vacancies will be filled pursuant to Act No. 2006-342 and Act. No. 2004-455. Accordingly, in such circumstances, this Court need not decide whether an earlier Alabama Supreme Court decision, *Stokes v. Noonan*, required preclearance.

## ARGUMENT

### I. The Correct Section 5 Baseline Is The Most Recent Precleared Statute, Act No. 2004-455.

The district court correctly defined its inquiry as whether the Alabama Supreme Court's decisions constituted changes requiring preclearance under section 5. J.S. App. 6a. The district court also set forth the correct legal standard: "Changes are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." *Id.* at 6a-7a. And the district court acknowledged that the most recent precleared statute was Alabama's 2004 law, Act No. 2004-455. *Id.* at 4a-5a. Yet, the district court erroneously held that the baseline was a 1985 statute, Act No. 85-237, instead of Act No. 2004-455. *Id.* at 7a.

Given that Act No. 2004-455 was "the most recent practice that is both precleared and in force or effect," the district court's own test required that Act No. 2004-455 be designated as the baseline. *Id.* at 7a (citing *Abrams*, 521 U.S. at 96-97 and *Gresham*, 695 F. Supp. at 1183). Precedents from this Court and lower federal courts, as well as the Department of Justice's own regulations, confirm that Act No. 2004-455 is the proper baseline—not the 1985 statute, the Alabama Circuit Court's 2005 decision, or the State Attorney General's opinion letter of September 7, 2004.

### A. The District Court Erred in Holding That The 1985 Statute Is the Baseline.

The district court did not cite any authority supporting its decision to choose a 1985 statute as the baseline instead of the most recent precleared 2004 statute. Nor could it. As this Court has explained, where two precleared laws cover the same disputed practice, the more recent law will serve as the benchmark. *See Bossier Parish*, 528 U.S. at 327 (holding that if a 1992 redistricting plan were precleared, it would replace the 1982 precleared plan as the benchmark); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 172-73 (1985) (holding that the "effect of the Attorney General's preclearance of Act No. 549 was to render [the previously precleared] Act No. 547 . . . null and void" and establish Act No. 549 as the baseline). It is undisputed that Act No. 2004-455 was precleared after Act No. 85-237, and that both acts govern the practice at issue in this case—vacancies on the Mobile County Commission.

The district court's decision to treat the earlier statute as the baseline borders on arbitrary. Alabama had no reason to imagine that the district court would select the 1985 statute as the baseline for evaluating *Riley v. Kennedy*. The decision in *Riley v. Kennedy* did not interpret the 1985 statute. Indeed, the 1985 statute was not in force at the time. If district courts or the Department of Justice are free to designate any statute as the baseline, they can engineer any result that they wish. They need only select a sufficiently different baseline to ensure

that the voting practice is denied preclearance—or a sufficiently similar baseline to ensure that the change is precleared. The Court should not allow such confusion to prevail in the preclearance process.

This Court should confirm that under section 5, the baseline is the most recent precleared statute that addresses the voting practice at issue, and hold that the district court erred in designating Act No. 85-237 as the baseline.

### B. The Baseline Is Not The Alabama Circuit Court's 2005 Order And Probate Judge's Plan For A Special Election.

The Alabama Circuit Court's 2005 order for a special election in Mobile County and the probate judge's plan to implement that order cannot serve as the section 5 benchmark, despite the fact that the Department of Justice precleared them.

As this Court has explained, because the circuit court order and probate judge's plan were never put into "'force or effect,'" they cannot constitute a section 5 benchmark. *Young v. Fordice*, 520 U.S. 273, 282 (1997) (quoting 42 U.S.C. § 1973c). In *Young v. Fordice*, Mississippi proposed a "Provisional Plan" for voter registration. The Justice Department precleared the plan, but the state legislature never enacted it. *Id.* at 279. This Court held that even though the Provisional Plan had been precleared, it could not serve as the section 5 baseline because it was never "in force or effect." *Id.* at 283. The Court explained that Mississippi

"abandoned the Provisional Plan as soon as its unlawfulness became apparent," and "[t]he plan was used to register voters for only 41 days, and only about a third of the State's voter registration officials had begun to use it." *Id.* Likewise, the State of Alabama abandoned the circuit court's order and the probate judge's special-election plan as soon as the Alabama Supreme Court declared their unlawfulness, and the State *never* put them into force or effect. Accordingly, under the rule of *Young*, the circuit court's order and probate judge's plan cannot serve as the baseline under section 5. *Id.*; *see also Abrams*, 521 U.S. at 96-97 ("There are sound reasons for requiring benchmarks to be plans that have been in effect.").

The Justice Department's regulations are consistent with this conclusion. Those regulations provide that a plan must have been "used by the jurisdiction" and have been "legally enforceable" to serve as a benchmark under section 5. 28 C.F.R. § 51.54(b) (defining the section 5 "benchmark" as "the voting practice or procedure in effect at the time of the submission . . . the last legally enforceable practice or procedure used by the jurisdiction"). The State of Alabama, however, never "used" the probate judge's special-election plan, and the Alabama Supreme Court confirmed that neither the circuit court's order nor the probate judge's plan were "legally enforceable."

The federal government should not be empowered to force a non-final, erroneous court decision onto a state by first preclearing it, and then designating it as the new section 5 benchmark. This

Court should confirm that a non-final court order that was never put into "force or effect" cannot serve as the baseline under section 5, regardless of whether it was precleared.

### C. The Baseline Is Not The Alabama Attorney General's 2004 Opinion Letter.

In their trial court brief, appellees pointed to the Alabama Attorney General's 2004 opinion letter and the special election in Etowah County for the proposition that, for the two elections following preclearance of Act No. 2004-455, Alabama's practice was to treat Act 2004-455 as retroactive. This "practice," they argued, should serve as the baseline, not Act No. 2004-455. Plaintiffs' Trial Brief In Reply 3-4, *Riley v. Kennedy*, No. 205-cv-01100-MHT-DRB (M.D. Ala.).

But this contention lacks merit. The Court has consistently held that where a precleared statute governs the disputed voting practice, that precleared statute constitutes the baseline, even if the jurisdiction violated it in the most recent elections. *See Bossier Parish*, 528 U.S. at 327 (holding that if 1992 redistricting plan was denied preclearance, benchmark for future section 5 inquiries would be the last precleared redistricting plan, not the parish's implementation of the invalid 1992 plan in the previous two elections); *City of Monroe v. United States*, 522 U.S. 34, 35-37 (1997) (per curiam) (holding that benchmark was the most recent precleared statute, as opposed to the city's implementation of invalid local laws for the three

previous decades); *Hampton County Election Comm'n*, 470 U.S. at 172 (declaring baseline to be precleared statute, Act. No. 549, as opposed to county's recent practice of holding an election in violation of that precleared statute); *see also Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986) (defining the section 5 benchmark as the Democratic Party's precleared rule, not the Democratic Party's failure to enforce against violations of that rule in the two most recent elections).

The Justice Department's regulations confirm that the correct benchmark is Act No. 2004-455, not the Alabama Attorney General's opinion letter. The regulations state that under section 5, the "benchmark" shall be "the last *legally enforceable* practice or procedure used by the jurisdiction," 28 C.F.R. § 51.54(b) (emphasis added), not the last practice used by the jurisdiction. Given that opinion letters of the Alabama Attorney General are not legally enforceable, *Henderson*, 641 F. Supp. at 1199 (citing *Hill Grocery Co. v. State*, 159 So. 269 (1935)), whereas precleared state statutes are, *City of Monroe*, 522 U.S. at 37, under the Department's regulations, the correct benchmark is Act No. 2004-455.

Only where there is no precleared statute that can serve as the baseline has this Court looked to the jurisdiction's actual practice. *See Foreman v. Dallas County*, 521 U.S. 979 981 (1997) (defining the baseline as "the procedure used by Dallas County for appointing election judges as of . . . the date on which Texas became a covered jurisdiction," only after

determining that the relevant precleared statute provided no guidance on the standards for appointing judges); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 195 (1996) (defining the baseline as the Republican Party's past practice of not charging a delegate fee, only after determining that the relevant precleared statute was silent on the issue and delegated the issue to "the two parties to determine . . . for themselves.").[2] Accordingly, this Court should confirm that under section 5, the baseline is the most recent precleared statute, not a

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[2] This Court's decisions in *Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), are consistent with this principle. Both *Perkins* and *Lockhart* involved section 5 inquiries brought shortly after the jurisdictions became covered by section 5, when *no precleared statute existed* to serve as a baseline. Accordingly, neither decision stands for the proposition that a jurisdiction's unprecleared practice can replace a precleared statute as the baseline.

Moreover, in *Perkins* this Court confirmed that even in such a situation, the Court will typically designate the state's statute as the baseline. In *Perkins*, the Court had two choices for a baseline: the state's actual practice in 1961 and 1965, or the requirement of a 1962 state statute that the state had never followed. The Court explained that ordinarily, it would use the state statute as the baseline, but the evidence was conclusive that the City did not embrace that statute. *Perkins*, 400 U.S. at 440 n.12. Similarly, in *Lockhart*, this Court could have defined the baseline either as the city's consistent practice (from 1917 to 1973), or as a state law that had never been enforced. Citing *Perkins*, the Court chose the former. *Lockhart*, 460 U.S. at 132-33 & n.7. In the instant case, there is a precleared statute to serve as the baseline. Moreover, unlike the jurisdictions in *Perkins* and *Lockhart*, Alabama has enforced Act No. 2004-455.

practice that fails to comply with the terms of that statute.

A contrary rule would be unworkable for several reasons. *First*, such a rule would reward state officials who implement practices in contravention of precleared statutes by freezing those practices as the section 5 benchmark.

*Second*, the proposed rule would be subject to manipulation by the Justice Department or courts. There would often be multiple, plausible ways to characterize the State's "practice," and "a myriad of benchmarks would be proposed in every case." *Abrams*, 521 U.S. at 97. For example, the Alabama Attorney General's practice in 2004 could be characterized as allowing special elections, or as enforcing those special-election laws that had not been invalidated by a court. Both characterizations are plausible, and it is uncertain which of them the Justice Department or a court would choose—or whether it would choose another characterization entirely.

*Finally*, such a rule would invite manipulation by local officials. Section 5 inquiries would turn on which local official was first to implement a practice and establish his or her view as the section 5 baseline. The Voting Rights Act should not devolve into a race among local officials to be the first to freeze his or her view as the baseline.

## II. The Alabama Supreme Court's Decision In *Riley v. Kennedy* Was A Reasonable Interpretation Of The Most Recent Precleared Statute And Thus Not A Change Under Section 5.

The preclearance provisions of the Voting Rights Act do not apply to *every* voting "standard, practice, or procedure" that a State administers, but "only to proposed changes." *Beer v. United States*, 425 U.S. 130, 138-39 (1976). The facts establish that *Riley v. Kennedy* created no "change" from the most recent precleared statute. The Alabama Supreme Court merely enforced the precleared statute consistent with the statute's plain language, the state's description of the statute in its preclearance submission, and longstanding Alabama precedent.

This Court has established that section 5 does not apply when a state implements a practice consistent with a precleared election law. *City of Monroe* involved a state law that "defers where [local laws] are specific and provides a default rule where they are not." *City of Monroe*, 522 U.S. at 37. In 1968, Georgia enacted, and the Department of Justice precleared, a general law providing that municipal elections would be decided by majority vote unless a municipality had a local law explicitly providing for plurality vote. *Id*. at 35-36. This Court held that a 1990 local law by Monroe County, explicitly providing for majority vote, did not constitute a change under section 5. *Id*. at 37. The Court explained that the practice required by the 1990 law was identical to the practice required by the 1968 precleared statute: majority vote. As the

Court stated, "Since the Attorney General precleared the default rule, Monroe may implement it." *Id.* The Court also emphasized that the state's preclearance submission gave the Attorney General "an adequate opportunity to determine the purpose [and effects] of . . . the default rule." *Id.* at 39.

Similarly, Act No. 2004-455 defers where a local law is specific, but otherwise provides a default rule. The Alabama Supreme Court's decision in *Riley v. Kennedy* merely enforced the default rule of gubernatorial appointment, consistent with decades of Alabama precedent and the statute's plain language. J.S. App. 29a-30a (explaining that the Alabama Supreme Court "has consistently held that statutes are to be prospective only," and this conclusion is confirmed by the Act's preamble). Moreover, the court's ruling is consistent with Alabama's preclearance submission letter to the Department of Justice, which explains that Act No. 2004-455 "*will allow* local law to provide for special elections to fill vacancies in the office of county commissioner." Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Aug. 8, 2004) (emphasis added). Accordingly, this Court should hold that under *Monroe*, the Alabama Supreme Court's decision in *Kennedy v. Riley* does not constitute a change requiring preclearance. *See also Lake v. State Bd. of Elections of North Carolina*, 798 F. Supp. 1199, 1204-05 (M.D.N.C. 1992) (holding that a state court order, pursuant to precleared statute, to keep polls open for an additional hour did not constitute a change requiring preclearance

because "[t]he order effected no change, but merely mirrored a previously precleared statute").

The court in *Ritter v. Bennett*, 23 F. Supp. 2d 1334 (M.D. Ala. 1998), set forth a workable test for evaluating whether a state's implementation of a precleared statute constitutes a change: Courts will defer to the interpretation of a precleared statute offered by the state authority with responsibility for interpreting that statute, so long as it is reasonable and does not change the statute's plain meaning. *Id.* at 1343. In *Ritter*, the plaintiffs argued that the Alabama Secretary of State violated section 5 of the Voting Rights Act by "implementing a definition of [a] candidate distinct from the one prescribed by [the precleared statute.]" *Id.* at 1341. In finding no change, the district court reasoned that "courts accord significant weight to the interpretation of a statute by the agency that is charged with the responsibility of implementing it. The same presumption of validity that attaches to the agency action applies to a state agency as to a federal agency." *Id.* at 1343 (citations omitted). The court explained that because "the Secretary of State's interpretation of the statute appears reasonable," "the court will defer to [it]." *Id.*

Under Alabama law, final authority for interpreting state statutes lies with the Alabama Supreme Court. *Ex parte James*, 863 So. 2d at 834. Under *Ritter*, this Court should defer to the Alabama Supreme Court's interpretation of Act No. 2004-455, so long as that interpretation is reasonable. The holding in *Riley v. Kennedy* clearly satisfies this standard. The decision is supported by the plain

language of Act No. 2004-455 and decades of Alabama precedent requiring that statutes be construed as purely prospective. *See* J.S. App. 29a-309. Accordingly, this Court should hold that the interpretation in *Riley v. Kennedy*, like the interpretation in *Ritter*, is not a change requiring preclearance under section 5.

## III. The Court Need Not Decide Whether The Alabama Supreme Court's 1988 Decision In *Stokes v. Noonan* Required Preclearance.

If this Court concludes that Alabama may implement the holding in *Riley v. Kennedy* without obtaining preclearance, it need go no further.

The Appellees have requested only prospective relief—vacatur of Juan Chastang's appointment, an injunction against enforcement of *Riley v. Kennedy*, and an injunction against enforcement of *Stokes v. Noonan*. A ruling that Alabama may implement *Riley v. Kennedy* will be sufficient to uphold Juan Chastang's appointment to the Mobile County Commission, which was made pursuant to Act No. 2004-455 and the order in *Riley v. Kennedy*. It will also dispose of Appellees' second request for relief.

Appellees' third request for relief would no longer be an issue in this case. There is no likelihood that Alabama will seek to enforce *Stokes v. Noonan*. No other seats on the Mobile County Commission are in dispute, and it is undisputed that future vacancies will be filled pursuant to Act No. 2006-342 and Act No. 2004-455, not the decision in *Stokes v. Noonan*. Even if Appellees were to prevail on their claims

regarding *Stokes v. Noonan*, they would not be entitled to any relief. Accordingly, the Court need not address the question. *See City of Dallas v. United States*, 482 F. Supp. 183 (D.D.C. 1979) (holding that declaratory judgment action brought by city seeking approval of voting plan was moot in light of city's subsequent approval of new plan and preclearance by Attorney General ); *cf. Texas v. United States*, 523 U.S. 296 (1998) (holding that Texas's request for preclearance of legislatively authorized sanctions was not ripe, because it was questionable that the sanctions would ever be triggered or imposed).

## CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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