No. __-____

In the
Supreme Court of the United States

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

v.

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,
Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This Section 5 litigation involves two decisions of the Supreme Court of Alabama, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Those decisions concern the manner of filling vacancies on the Mobile County Commission and are based on valid, race-neutral, generally-applicable principles of law. The three-judge district court held that both decisions required preclearance to be enforceable. The State submitted the decisions for preclearance, and the Attorney General of the United States interposed an objection. The district court then entered a remedy order vacating a gubernatorial appointment that had relied on these State court decisions to fill a vacancy that had arisen. This appeal presents the following questions:

1. Whether the decision of a covered jurisdiction's highest court that a precleared State law is unconstitutional and, thereby, invalid as a matter of State law is a change that affects voting that must be precleared before it can be enforced.

2. Whether the preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal establishes a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced.

PARTIES TO THE PROCEEDINGS

A. Parties To This Proceeding.

BOB RILEY, in his official capacity as Governor of the State of Alabama, is the appellant in this case and was the defendant below.

YVONNE KENNEDY, JAMES BUSKEY, and WILLIAM CLARK are the appellees in this case and were the plaintiffs below.

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Bob Riley, in his official capacity as Governor of the State of Alabama, appeals from the Order of the three-judge federal district court vacating the appointment of Mr. Juan Chastang, an African-American, to fill a vacancy on the Mobile County Commission, as well as from the rulings that form the predicate for that Order.

OPINIONS BELOW

The district court's Order vacating Governor Riley's appointment of Mr. Juan Chastang to fill a vacancy on the Mobile County Commission has not been published, but appears as *Kennedy v. Riley*, ___ F. Supp. 2d ___, 2007 WL 1284912 (M.D. Ala. May 1, 2007) (three-judge court). The Order is reprinted in the Appendix at 1a. That Order followed an earlier Opinion and Judgment that the two decisions which led to the appointment, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), required preclearance before they could be enforced. That decision of the three-judge court is published at *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006). The three-judge court's Opinion is reprinted at Appendix 3a, and the Judgment is reprinted at 9a.

JURISDICTION

This case arises under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Jurisdiction in the three-judge district court and in this Court is proper pursuant to 42 U.S.C. § 1973c, which states, in pertinent part, "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

In this litigation, the three-judge court acted exclusively as a *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), court. Hence, the court considered the following inquiries to be relevant: "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *Id.*

The second inquiry, whether preclearance of the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* had been obtained, was not an issue in this case; all agreed it had not been. As to the first inquiry, on August 18, 2006, the three-judge court determined that preclearance was required before those decisions could be implemented and allowed the State time to seek preclearance. On May 1, 2007, after the State's efforts at administrative preclearance were frustrated, the three-judge court completed its *City of Lockhart* function and entered a remedy order, vacating Governor Riley's appointment of Mr. Juan Chastang.

On May 18, 2007, Governor Riley filed notice of appeal from the district court's May 1, 2007 Order, as well as from the rulings that form the predicate for that Order, specifically the August 18, 2006 Opinion and Judgment. See 11a. The notice of appeal was timely filed after the May 1, 2007 Order, which represents the conclusion of the core proceedings in the case. After Governor Riley appealed, the Kennedy Appellees requested additional relief, and that request was denied without prejudice.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the application of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. While the application of Section 5 in this case raises constitutional questions, those concerns were not considered by the three-judge court. Rather, that court applied the test set out in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), and did not address the

constitutional and workability concerns raised by Governor Riley.

STATEMENT OF THE CASE

A. Legal Proceedings.

This Section 5 litigation involves two decisions of the Supreme Court of Alabama, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), and their effect on the method of filling vacancies on the Mobile County Commission. These decisions are reprinted in the Appendix at 17a and 25a, respectively.

From the mid to late 1800s until 2004, Alabama's general law provided that vacancies on the county commissions of the 67 counties were to be filled by gubernatorial appointment. A handful of counties had contrary local laws. A 1985 local law applicable to Mobile County provided for the filling of vacancies on the Mobile County Commission by special election. The 1985 local law was precleared.

When a vacancy arose on the Mobile County Commission and it was the first time for the local law to be put in action for the first time, litigation ensued. Applying valid, race-neutral, generally applicable principles of law, the Supreme Court of Alabama determined that the 1985 local law violated a provision of the Constitution of Alabama (1901) that forbids, with one exception not applicable here, local laws that conflict with general laws. *Stokes v. Noonan*.

In 2004, the Alabama Legislature amended the general law to allow for local laws concerning the filling of vacancies on county commissions. The 2004 Act was precleared.

In 2005, a vacancy arose on the Mobile County Commission. Yvonne Kennedy, James Buskey, and William Clark, all African-Americans and then members of the Alabama House of Representatives (the "Kennedy Appellees," unless otherwise stated), filed suit in the Circuit

Court of Montgomery County, a trial court of general jurisdiction in Alabama. They sought a declaration that the vacancy was to be filled by special election (pursuant to the 1985 local law) and injunctive relief directing that such a special election be conducted. The Circuit Court entered judgment in favor of the plaintiffs, holding that the vacancy was to be filled by special election. Governor Riley appealed.

On November 9, 2005, following an expedited appeal, the Supreme Court of Alabama reversed the judgment of the Circuit Court. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Alabama's highest court held that the change to the general law on which the Circuit Court had relied—the 2004 Act—operated prospectively only and did not revive the unconstitutional 1985 local law. Accordingly, there was no State law basis for a special election, and the vacancy was to be filled by gubernatorial appointment.

On November 16, 2005, the Kennedy Appellees filed suit in the United States District Court for the Middle District of Alabama alleging that the Alabama Supreme Court's decision in *Riley v. Kennedy* was a change to a voting standard, practice, or procedure that had to be precleared before it could be enforced. As the case proceeded, the Kennedy Appellees also alleged that the 1988 decision of the Supreme Court of Alabama in *Stokes v. Noonan* was a change that had to be precleared before it could be enforced.

Governor Riley contended that neither decision represented a change because both affected the underlying validity of the State's laws, which is an entirely distinct consideration from their enforceability under Section 5. Preclearance is an action by federal authorities that makes a valid State statute enforceable. Without a valid State law, though, a preclearance letter is of no effect.

Acting as a *City of Lockhart* court, the three-judge federal court held that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* were changes that could not be enforced unless

precleared. The court refrained from moving immediately to the relief stage and allowed the State 90 days to seek preclearance.

By letter dated November 9, 2006, the Attorney General of Alabama submitted the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* to the Attorney General of the United States for review pursuant to Section 5. By letter dated January 8, 2007, the Attorney General of the United States, through Wan J. Kim, Assistant Attorney General for Civil Rights, objected to the State's enforcement of those decisions, notwithstanding that they were based on valid, race-neutral, generally-applicable principles of law. By letter dated January 30, 2007, the State asked the Attorney General of the United States to reconsider his decision. By letter dated March 12, 2007, Assistant Attorney General Kim "decline[d] to withdraw the January 8 objection."

In an Order of May 1, 2007, the district court vacated Governor Riley's appointment of Mr. Chastang to fill the vacancy. See 1a. The court denied Governor Riley's motion for a stay pending appeal. On May 18, 2007, Governor Riley appealed from that May 1, 2007 Order and from the prior orders on which that relief order was based. See 11a.

The day before Governor Riley filed his notice of appeal, the Judge of Probate for Mobile County, the county's chief election official, moved to intervene in the federal litigation to seek guidance as to how to proceed. One of the complicating factors, in his view, was that a 2006 local law had not been precleared. That 2006 local law essentially re-enacted the 1985 local law; because the 2006 local law would operate prospectively and because the Alabama Legislature changed the general law in 2004 to allow for local laws like it, the 2006 local law was not unconstitutional for the reason set out in *Stokes v. Noonan*.

When the Kennedy Appellees sued the probate judge in State court, he filed a withdrawal of his motion to intervene. The three-judge federal court treated the notice of withdrawal

as a motion to withdraw and granted it. Thereafter, representing that they had dismissed their State court action, the Kennedy Appellees sought to join the probate judge as a party in the federal court litigation and to have the federal court schedule a special election to fill the vacancy.

A hearing was held and the federal court strongly suggested that the Kennedy Appellees should re-file their action in State court and that the 2006 local law should be submitted for preclearance. The Kennedy Appellees re-filed that day in the Mobile County Circuit Court, and, within a matter of days, the State court entered an order setting an election schedule. The court's order, including an election schedule which does not comply with the 1985 local law or with the 2006 local law, was submitted for Section 5 review and immediately precleared. The State submitted the 2006 local law for Section 5 review, and preclearance was granted the next week. Accordingly, the process for conducting a special election is underway in Mobile County.

In addition to pursuing this appeal, the State of Alabama will file suit seeking, among other things, judicial preclearance.

B. Statement of Facts.

Before November 1, 1964, the effective date of the Voting Rights Act in Alabama, general law provided that vacancies on the 67 county commissions of Alabama, including the Mobile County Commission, would be filled by gubernatorial appointment. That general law was codified at § 11-3-6, Code of Alabama (1989).

In 1985, the Legislature passed a local law, Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by special election, under certain conditions not relevant here. That special election was to be held no sooner than 60 days after the vacancy arose and before 90 days had passed. The State of Alabama

submitted Act No. 85-237 for preclearance in accordance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and, by letter dated June 17, 1985, the State was advised that the Attorney General of the United States had no objection to the proposed change.

In 1987, a vacancy on the Mobile County Commission occurred. In April of that year, Willie Stokes filed suit in the Circuit Court of Mobile County, attacking the constitutionality of Act No. 85-237. Stokes contended that Act No. 85-237 violated §§ 104(29) and 105 of the Constitution of Alabama (1901), in that, respectively, it was a local law on a prohibited subject and on a subject controlled by a general law.[1] The effect of declaring Act No. 85-237 unconstitutional would be to revert to the pre-1964 general law of gubernatorial appointment.

The Circuit Court denied relief, and, even though Stokes appealed, the vacancy was filled by special election. On appeal, in a decision issued on September 30, 1988, the Supreme Court of Alabama reversed the judgment of the Circuit Court. In *Stokes v. Noonan*, the Supreme Court of Alabama declared Act No. 85-237 unconstitutional because it violated § 105 of the Constitution of Alabama, in that the general law codified at § 11-3-6 of the Alabama Code was primary, Act No. 85-237 was a local law on the same subject, and Act No. 85-237 could not be enacted consistently with § 105.[2]

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[1] Article IV, § 104(29), Constitution of Alabama (1901), provides, in pertinent part, "The legislature shall not pass a special, private, or local law . . . [p]roviding for the conduct of elections . . . ." *Id*.

Article IV § 105 of the Constitution of Alabama (1901), provides, in part, "No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law . . . ." *Id*.

[2] The Supreme Court of Alabama did not address Stokes's contention that Act No. 85-237 violated § 104(29) of the Constitution of Alabama.

The decision of the Supreme Court of Alabama created a vexing issue of State law. Without any State law authority to conduct a special election, Mr. Sam Jones, who had been elected, had no right to hold the office and was vulnerable to an action in *quo warranto*. Then-Governor Guy Hunt, a Republican elected on a statewide basis, solved the problem by appointing Mr. Sam Jones, who is African-American, to fill the vacancy.

In 2004, the Alabama Legislature amended the general law, § 11-3-6, by passing Act No. 2004-455. As amended, § 11-3-6 provided that vacancies on county commissions would be filled by gubernatorial appointment "[u]nless local law authorizes a special election." Ala. Code § 11-3-6 (Supp. 2004).

Act No. 2004-455 was submitted for preclearance. By letter dated September 28, 2004, the State was advised that the Attorney General of the United States had no objection to the proposed change.

The next time that a vacancy on the Mobile County Commission occurred was in September 2005, when Mr. Sam Jones, then the incumbent Commissioner for District 1, was elected Mayor of Mobile. With the vacancy, the method of filling it became a bone of contention. Some contended that the vacancy had to be filled by special election, pointing to Act No. 85-237 and arguing that it had been revived by Act No. 2004-455. Others contended that, with the declaration that Act No. 85-237 was unconstitutional in *Stokes v. Noonan*, the vacancy had to be filled by gubernatorial appointment pursuant to the general law.

Yvonne Kennedy, James Buskey, and William Clark, all African-Americans and then members of the Alabama House of Representatives, filed suit in the Circuit Court of

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That issue, whether a local law providing for the filling of vacancies on county commissions by special election complies with § 104(29), remains unresolved.

Montgomery County seeking declaratory and injunctive relief. They sought a declaration that the vacancy was to be filled by a special election and an injunction directing the local probate judge to conduct one.[3] Governor Riley, who was named as a defendant, responded by contending that, with the declaration that Act No. 85-237 was unconstitutional in *Stokes v. Noonan*, he was empowered to fill the vacancy by appointment. The Circuit Court of Montgomery County ruled in favor of the plaintiffs, and Governor Riley appealed.

After the Circuit Court ruled, and notwithstanding the fact that the ruling was on appeal, the local probate judge asked the Attorney General of the United States to preclear a special election calendar. The probate judge needed to get the machinery started if an election was going to occur within 60 to 90 days, and he had to prepare for the possibility of a primary election, a primary runoff, and a general election. The preclearance submission included a copy of the Circuit Court's Order and necessarily relied on that Order to provide a State law basis for holding the special election.

By letter dated October 25, 2005, the Attorney General of Alabama suggested that the Attorney General of the United States withhold action on the probate judge's submission pending the outcome of the litigation in State court. The Attorney General of Alabama pointed out that the proceedings on appeal had been expedited and that withholding action was consistent with 28 C.F.R. § 51.22 (2004). That regulatory provision states:

> [W]ith respect to a change for which approval by . . . a State . . . court . . . is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final

[3] Under Alabama law, the probate judge is the chief election official for each county.

> approving action and if all other action necessary for approval has taken place.

Id.

Even though the office of the Attorney General of the United States knew that the Circuit Court's decision was not final and the proceedings on appeal were expedited, the Voting Section declined to withhold action and interposed no objection to the proposed special election calendar.

As the Attorney General of Alabama suggested might happen, the Supreme Court of Alabama reversed the judgment of the Circuit Court. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). The court held that Act No. 2004-455 did not act retroactively so as to revive Act No. 85-237. Rather, the change to the general law operated prospectively to open the door to future local laws. Without Act No. 85-237, there was no basis in State law for a special election.[4] In reaching this result, the Supreme Court of Alabama applied valid, race-neutral, generally-applicable principles of law.

After the Supreme Court of Alabama issued its decision in *Riley v. Kennedy*, Governor Riley appointed Mr. Juan Chastang, who is African-American, to fill the vacancy on the Mobile County Commission. Under State law, Mr. Chastang would serve the remainder of Sam Jones' term and stand for election in 2008.

District 1 of the Mobile County Commission is a majority-black district. The other two districts on the Mobile County Commission are, however, majority-white, and so is Mobile County as a whole. As a result, Act No. 85-237, which covers the entirety of Mobile County, applies to more white voters than it does to black voters.

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[4] The Attorney General of Alabama wrote to the Chief of the Voting Section to inform him of the Supreme Court of Alabama's decision in *Riley v. Kennedy*, and to let him know that the previously precleared special election would not be taking place.

One week after the Supreme Court of Alabama issued its decision in *Riley v. Kennedy*, the Kennedy Appellees filed suit in the United States District Court for the Middle District of Alabama alleging that the Alabama Supreme Court's decision in *Riley v. Kennedy* was a change to a voting standard, practice, or procedure that had to be precleared before it could be enforced. As the case proceeded, the Kennedy Appellees also alleged that the 1988 decision of the Supreme Court of Alabama in *Stokes v. Noonan* was a change that had to be precleared before it could be enforced.

Acting as a *City of Lockhart* court, the three-judge federal court held that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* were changes that could not be enforced unless precleared. The court refrained from moving immediately to the relief stage and allowed the State 90 days to seek preclearance. When administrative preclearance was denied, the three-judge federal court vacated Governor Riley's appointment of Juan Chastang. The process for conducting a special election is now underway in Mobile County.

ARGUMENT

By its terms, Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, precludes a covered jurisdiction from enforcing a change to a standard, practice, or procedure that affects voting unless the Attorney General of the United States declines to object to the change or a three-judge federal district court sitting in the United States District Court for the District of Columbia declares that the change has neither the purpose nor the effect of discriminating on the basis of race. Inherent in the process is the presumption that the change made by the covered jurisdiction is valid as a matter of State law. This case presents the question whether two decisions of the Supreme Court of Alabama that deprived State statutes of operative effect represent changes that must be precleared.

This case also presents an important question concerning the intersection of Federal and State law that highlights the constitutional tensions inherent in the preclearance scheme of Section 5. Before a State statute that affects voting can be enforced, it must be both valid as a matter of State law and precleared. If that is not the case, the covered jurisdiction will be told to do something for which there is no basis in State law. As a result of the interpretation of Section 5 by the three-judge district court in this case, the State has been compelled to conduct a special election pursuant to a State statute that is unconstitutional.[5]

I. A decision by a covered jurisdiction's highest court that a precleared State law is unconstitutional and, thereby, invalid as a matter of State law is not a change that requires preclearance before it can be enforced.

In concluding that *Stokes v. Noonan* required preclearance, the three judge court essentially held that the validity of a State law is irrelevant. That conclusion, which is offensive to federalism and the State's sovereignty interest, is inconsistent with this Court's decision in *Abrams v.*

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[5] When this case was filed, the only conceivable basis for conducting a special election was pursuant to Act No. 85-237, which had been declared unconstitutional in *Stokes v. Noonan*. While this litigation was pending, Representatives Yvonne Kennedy, James Buskey, William Clark and Joseph Mitchell sponsored the legislation that became Act No. 2006-342. Act No. 2006-342 readopts Act No. 85-237, providing that vacancies on the Mobile County Commission are to be filled by special election to be held between 60 and 90 days after the vacancy occurs. While the Mobile County Circuit Court has entered an order setting out an election schedule that does not comply with either Act and that, further, required preclearance of the 2006 Act, that 2006 Act did not yet exist when the vacancy arose or when Kennedy, Buskey, and Clark initiated this litigation. The probate judge for Mobile County, who was the defendant in the Mobile County Circuit Court litigation, prefers to travel under the 2006 Act, and the Governor certainly understands why State officials would be uncomfortable conducting their official duties pursuant to a local law that the Supreme Court of Alabama has declared unconstitutional.

Johnson, 521 U.S. 74 (1997). *Abrams* demonstrates that both validity and enforeceability are required.

In the post-1990 redistricting cycle, the Georgia Legislature passed two redistricting plans that were not precleared and a third that was held to be the product of an unconstitutional racial gerrymander in *Miller v. Johnson*, 515 U.S. 900 (1995). Ultimately, the federal courts drew a plan, and this Court considered a variety of challenges to that remedial plan, including a Section 5 challenge, in *Abrams*. With respect to that Section 5 challenge, this Court pointed out that a plan that was not precleared could not serve as a benchmark. 521 U.S. at 96. Neither could the plan that was declared unconstitutional. As this Court explained, that plan, "constitutional defects and all," could not be the benchmark because "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." 521 U.S. at 97. Indeed, the unconstitutional plan could not be used as the benchmark even though elections had been conducted under it.

The Alabama Supreme Court's declaration in *Stokes v. Noonan*, that Act No. 85-237 is unconstitutional operates just like this Court's decision in *Miller v. Johnson* did on the Georgia redistricting plan at issue. Under Alabama law, acts that have been declared unconstitutional are void *ab initio*. *Ex parte Southern Railway*, 556 So. 2d 1082, 1089-90 (Ala. 1989). Allowing the preclearance of Act No 85-237 to freeze it in place forces the State to follow an unconstitutional law. And, the fact that an election was conducted under it should have no more effect than the legislative elections in Georgia conducted under the unconstitutional plan.

This Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997), is also instructive in analyzing whether *Stokes v. Noonan* effected a change requiring preclearance. *Young* arose from the State of Mississippi's attempt to conform its voter registration system to the National Voter Registration Act of 1993. State officials devised a Provisional Plan and

began to implement it, anticipating that the Mississippi Legislature would adopt it. The Provisional Plan was also submitted for preclearance and precleared before the Legislature decided not to adopt the Provisional Plan and came up with a New Plan, which was not precleared.

This Court held that, while the New Plan had to be precleared before it could be implemented because it differed from the pre-NVRA system, the intervening Provisional Plan was not the baseline even though it had been precleared. This Court concluded that the Provisional Plan was never in "force or effect" as Section 5 requires. While "[a] State might, after all, maintain in effect for many years a plan that technically, or in one respect or another, violate[s] state law," 520 U.S. at 283, the Provisional Plan was not such a plan. Instead, it was used for only a short period of time with the anticipation that the Legislature would adopt it, and its use was abandoned "as soon as its unlawfulness became apparent." *Id.* at 283.

In the same way, the special election scheme in Act No. 85-237 was short-lived and was abandoned after its unlawfulness became apparent. While a special election had been held, that election was the result of the vagaries of the litigation process; if the Circuit Court had enjoined the election as Plaintiff Stokes wanted, and as the Alabama Supreme Court's decision held it should have, there would have been no election to which to point. In any event, Act 85-237 was abandoned as soon as its unlawfulness became apparent and then-Governor Hunt exercised his power of appointment under the general law. Governor Hunt, a Republican elected on a statewide basis, appointed Mr. Sam Jones, the candidate who had won the special election, to fill the vacancy. In doing so, he resolved a vexing issue of State law, as Mr. Jones was subject to a *quo warranto* action seeking to oust him from office after the decision in *Stokes v. Noonan*. Hence, just as in *Fordice*, Act 85-237 was never truly "in force or effect."

II. Preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal does not establish a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced.

With respect to *Riley v. Kennedy*, the three-judge federal court's conclusion that there has been a change is even more intrusive. The special election schedule that was precleared by the Attorney General of the United States relied upon a Circuit Court ruling that was not final. Moreover, when he acted, the Attorney General of the United States knew not only this, but also that the proceedings in the Supreme Court of Alabama were expedited. At best, preclearance allowed the election machinery to get started on a provisional basis. Preclearance should not, however, have the effect of preserving in amber a State action that was not final and immunizing it from reversal before finality. Otherwise, an unelected federal bureaucrat will not only determine State law but also preempt the State's legal or administrative processes.

This Court's decision in *Perkins v Matthews*, 400 U.S. 379 (1971), is not to the contrary. In *Perkins*, the City of Canton, Mississippi, did not follow a 1962 State law in its 1965 municipal elections. When it sought to follow the 1962 law in 1969, this Court held that the change was one that required preclearance even though it had the effect of bringing Canton into compliance with State law. No court order, federal or State, mandated or prohibited Canton's compliance with the 1962 law in 1965. Rather, Canton had deviated from State law on its own.

In this case, it is the final rulings of the State's highest court that deprive local Act No. 85-237 of effect. While Act No. 85-237 was not challenged until 1987 after having been precleared in 1985, the challenge came when the first

vacancy arose.[6] *Stokes v. Noonan* represents the first and final word of the Alabama judicial system on the use of Act No. 85-237. Likewise, when the Supreme Court of Alabama held that the change to the general law in 2004 operated prospectively, that was the first time anyone had tried to use it to revive Act No. 85-237.

Perkins is distinguishable for another reason as well. *Perkins* concerned the practice in effect on Mississippi's coverage date. That is, Section 5 states that a covered jurisdiction must receive preclearance before it can change a standard, practice or procedure that was in effect on the applicable coverage date, which is November 1, 1964 for Mississippi and for Alabama. 42 U.S.C. § 1973c(a) ("Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . ."). In *Perkins*, the City of Canton had not followed State law on the coverage date, and allowing the City to make a change to follow State law without preclearance would have required peeking behind the coverage date.

Here, on Alabama's coverage date, vacancies in the Mobile County Commission were filled by gubernatorial appointment. The decision in *Stokes v. Noonan* that Act No. 85-237 was unconstitutional returned the State to its practice on its coverage date; it did not make a change from the practice in force or effect on the coverage date. In Mobile County, the decision in *Riley v. Kennedy* continued the status quo established by *Stokes v. Noonan*.

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[6] A challenge to the constitutionality of Act No. 85-237 would not have been ripe before it came time to use the Act to call a special election to fill a vacancy.

III. The district court's conclusion that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* require preclearance raises grave constitutional and workability concerns.

As noted above, the three-judge federal district court applied the test in *City of Lockhart*, and did not address the constitutional and workability problems its ruling creates. With its refusal to preclear *Stokes v. Noonan* and *Riley v. Kennedy*, United States Department of Justice has made State law and effectively commandeered State officials in violation of the Tenth Amendment. As this Court has held, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc*., 452 U.S. 264, 288 (1981); see also *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress lacks power to condition statehood on specific location of state capital). If Congress cannot tell a State what its law is, neither can the United States Department of Justice.

As to workability, in the ordinary course of the State's business, it reviews and submits legislation affecting voting for preclearance as soon as it can after the Legislature concludes its session. That submission and preclearance 60 days later can be complete well before litigation challenging the constitutionality of the statute in question can be concluded, or even initiated. That is exactly what happened with Act No. 85-237, which was precleared before it was ripe to challenge its constitutionality.[7] The same scenario played out again as this litigation progressed with respect to an Act of the 2006 Legislature which was precleared and then attacked on constitutional grounds in State court.

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[7] While this litigation was ongoing, another local Act of the Legislature that affected an additional judgeship in one of Alabama's 67 counties and had been precleared was attacked on constitutional grounds in State court. That litigation is on-going.

Finally, the State notes that it has done nothing wrong. When the Supreme Court of Alabama declared local Act No. 85-237 unconstitutional in 1988, then-Governor Guy Hunt, a white Republican, appointed Mr. Sam Jones, the African-American who had won the special election, to fill the vacancy. When the Supreme Court of Alabama held that general Act No. 2004-455 did not revive local Act No. 85-237, Governor Riley appointed Mr. Juan Chastang, an African-American, to fill the vacancy. Mr. Chastang may not be the choice of the Kennedy Appellees, but he would have had to run for a full term in 2008. Moreover, the Alabama Legislature used general Act No. 2004-455 prospectively to pass a new local law providing for the filling of vacancies on the Mobile County Commission by special election, namely Act No. 2006-342. Thus, change has come about through the ordinary political process.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's Order vacating the appointment of Mr. Juan Chastang and remand the case with instructions to declare that neither *Stokes v. Noonan* nor *Riley v. Kennedy* represents a change affecting voting that must be precleared to be enforceable.

Respectfully submitted,

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