

No. 07-77

IN THE
Supreme Court of the United States

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

—v.—

YVONNE KENNEDY, JAMES BUSKEY &
WILLIAM CLARK,
Appellees.

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

**BRIEF *AMICUS CURIAE* OF
THE AMERICAN CIVIL LIBERTIES UNION AND
ACLU OF ALABAMA IN SUPPORT OF APPELLEES**

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STATEMENT OF INTEREST¹

The American Civil Liberties Union (ACLU) is a, nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of that goal, the ACLU has long been active in defending the equal right of racial and other minorities to participate in the electoral process. The ACLU has appeared before this Court in numerous voting cases over the years, including those seeking to enforce the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, *e.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985), *Holder v. Hall*, 512 U.S. 874 (1994), and *Abrams v. Johnson*, 521 U.S. 74 (1997), both as direct counsel and as *amicus curiae*. The ACLU of Alabama is a statewide affiliate of the national ACLU.

INTRODUCTION

This case presents the question whether the decision of the Governor of Alabama to fill a vacancy on the Mobile County Commission by appointment rather than by special election is a voting change

¹ No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief was granted by the parties who have filed blanket letters of consent with the Court.

requiring preclearance under Section 5 of the Voting Rights Act. Although the filling of the vacancy by special election had been authorized by a local law passed by the state legislature and precleared under Section 5, Appellant contends the appointment was not a covered change because it was based upon decisions of the state supreme court that filing a vacancy by special election was in violation of the Alabama Constitution. The district court disagreed and held the appointment was a covered change and enjoined its implementation absent compliance with Section 5. J.S.App. 3a.

Amici will address primarily the administration of Section 5 by the Department of Justice, the legislative history of Section 5, and the state's various federalism arguments, including its advocacy of "conditional preclearance."

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act requires preclearance of all changes in voting, including those implemented pursuant to state court orders interpreting state law. The distinction Appellant seeks to draw between a state court's exercise of a "political function," which it concedes is subject to Section 5, and a "core judicial duty," which it argues is not, is unwarranted based on the facts of this case and has been rejected by the decisions of this Court and lower federal courts. Any change in voting that affects "[t]he power of a citizen's vote" is subject to Section 5, whether it is implemented pursuant to an act of the legislature or a decision of a state court. *Allen v. State Board of Elections*, 393 U.S. 544, 569

(1969). The distinction urged by Appellant should be rejected for the further reason that it is “inherently standardless” and incapable of meaningful application. *Holder v. Hall*, 512 U.S.at 885.

The administration of Section 5 by the Department of Justice and the legislative history of Section 5 also show that preclearance is required for changes in voting implemented pursuant to state court orders. The Attorney General has interposed numerous objections to voting changes implemented as a result of court orders invalidating state election procedures or pursuant to consent decrees. These objections letters were made part of the congressional record when Congress amended and extended the Voting Rights Act in 2006, and Congress based its finding of the continued need for Section 5 on, *inter alia*, the “hundreds of objections interposed . . . by the Department of Justice since 1982.” Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Sec. 2(b)(4)(A). Congress similarly approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975, Public Law 94-73, 89 Stat. 400, and recognized that state court litigation can lead to court ordered changes that require preclearance when it extended Section 5 in 1982. See p.17, *supra*.

Based on this legislative, judicial, and administrative history, this Court should reject Appellant’s proposed, and totally unprecedented, “contingent preclearance” rule. It is fundamentally inconsistent with Section 5 and would allow covered

jurisdictions essentially to take a state court appeal from a precleared voting change.

Section 5, which has repeatedly been held constitutional by this Court, was designed to halt retrogression in minority voting strength without regard for the legality under state law of a practice in force or effect. State law cannot be the ultimate arbiter of Section 5 or federal law in general. And given the action of the Alabama legislature restoring the authority to fill vacancies to the voters for future elections, there is no merit to Appellant's argument that Section 5 requires the state to maintain a practice that violates state law.

Appellant's "Pandora's Box" and undue burden arguments are equally without merit. Since voting changes implemented pursuant to state court orders have always been held subject to Section 5, there is no Pandora's Box to open. Defenses based upon undue burden, or laches, have been consistently rejected by the courts, which have correctly understood that allowing such defenses would reward a jurisdiction's long failure to comply with Section 5, and would do what Section 5 was designed to forbid, *i.e.*, allow the burden of litigation and delay to operate in favor of the perpetrators and against the victims of possibly discriminatory practices. Finally, there is no evidence of existing unprecleared state court decisions in Alabama affecting voting or that complying with Section 5 would in fact be burdensome.

ARGUMENT

I. VOTING CHANGES IMPLEMENTED PURSUANT TO STATE COURT ORDER HAVE CONSISTENTLY BEEN HELD SUBJECT TO SECTION 5

One of Appellant's principal arguments is that the district court's application of Section 5 to voting changes implemented pursuant to a state court order interpreting state law "works an unprecedented expansion of that statute's already-broad scope." Brief for Appellant, p. 2.² The contention is patently incorrect.

As Appellees have pointed out in their brief, a unanimous Court in *Branch v. Smith*, 538 U.S. 254, 262 (2003), held 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." (Citations omitted.) The voting change requiring Section 5 preclearance in *Branch* was a redistricting plan drawn by a Mississippi chancery court reapportioning the state's congressional districts. 538 U.S. at 260. Appellant seeks to distinguish *Branch* by arguing that while a state court's exercise of a "political function" is subject to Section 5, "an exercise of the core judicial duty" is not. Brief for Appellant, p. 44. The distinction is not only unwarranted based on the facts of this case, but is incapable of meaningful application.

It is difficult to see how the drawing of a

² See also Brief for Appellant, p. 27 ("this case arises . . . far outside the ordinary course of §5 business").

congressional reapportionment plan by a state court, which Appellant concedes is subject to Section 5, is not a “core judicial duty.” Courts routinely draw interim redistricting plans when a state legislature, for whatever reasons, fails to do so. And in enforcing the one-person, one-vote protection of the Fourteenth Amendment, the courts are plainly exercising a “core judicial duty.” As *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964), expressly holds, a court ordered reapportionment to comply with the constitution is “an appropriate and well-considered exercise of judicial power.” This Court has often noted, therefore, that “state courts have a significant role in redistricting,” *Grove v. Emison*, 507 U.S. 25, 33 (1993), and that “the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the State in such cases has been specifically encouraged.” *Scott v. Germano*, 381 U.S. 407, 409 (1965).³

It is equally difficult to see how a state court’s invalidation of an election to fill a vacancy on a county commission is not a “political function,” which

³ The constitution of South Dakota, for example, imposes upon the state supreme court the judicial duty to make an apportionment should the state legislature fail to do so “by December first of the year in which apportionment is required.” Article III, Section 5 of the South Dakota Constitution. See also *In re Certification of a Question of Law from U.S. Dist. Court, Dist. of South Dakota*, 615 N.W.2d 590, 595 (S.D. 2000) (noting that “[i]n 1982, the voters of this State transferred the duty of apportionment, if not performed by the Legislature, to this Court”). As is apparent, when the state supreme court performs apportionment, it is exercising a judicial duty imposed upon it by the voters of the state.

Appellant concedes would be covered by Section 5. Indeed, in *Allen v. State Board of Elections*, 393 U.S. at 544, the Court held that an amendment to state law changing an office from elected to appointed was covered by Section 5 because “[t]he power of a citizen’s vote is affected by this amendment.” A similar change implemented pursuant to a state court order would have no less affect upon the power of a citizen’s vote, nor should it be exempted from Section 5 on the pretext that it was based upon a court’s exercise of a “core judicial duty.”

Courts routinely exercise their judicial duties in ways that have political consequences. In *Gray v. Sanders*, 372 U.S. 368, 380-81 (1963), for example, the Court invalidated Georgia’s county unit system, which gave a disproportionate political advantage in redistricting to rural counties. And in *Smith v. Allwright*, 321 U.S. 649, 666 (1944), the Court struck down the exclusion of blacks from voting in Democratic primaries in Texas, which had a direct impact on the political participation of both blacks and whites. There is no rational or principled basis upon which Appellant can characterize a court drawn reapportionment as a “political function” covered by Section 5, but a court order changing an office from elected to appointed as a “core judicial duty” exempt from preclearance. The impact upon political participation and the power of a citizen’s vote is apparent and direct in both instances.

This Court has also rejected the use of statutory constructions that are “inherently standardless.” See *Holder v. Hall*, 512 U.S. at 885 (rejecting a Section 2 challenge to a sole commissioner form of county government because the

“wide range of [replacement] possibilities makes the choice ‘inherently standardless’”). The political function/core judicial duty construction of Section 5 urged by Appellant here is equally standardless and should be rejected as well. What is relevant and dispositive under Section 5 is whether state action has an impact on voting and participation in the political process. Because the implementation of the state court orders in this case has such an impact, it is covered by Section 5.

Branch v. Smith, as Appellees make clear in their brief, is consistent with prior decisions of this Court, as well as decisions of lower federal courts. In *LULAC v. Texas*, 995 F.Supp. 719 (W.D. Tex. 1998), a case virtually identical to this one, the court enjoined the State of Texas from implementing a voting change resulting from a decision of the state supreme court until the change received preclearance under Section 5. See *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 491 (Texas 1996). The state court decision altered the practice and procedure for filling the vacancy left by a judge who prospectively resigned prior to the expiration of his elected term. The preexisting procedure required an interim election to fill the vacancy. The decision of the state supreme court, based upon its interpretation of the state constitution, changed that by providing for gubernatorial appointment followed by an election at the time of the next regularly scheduled general election. In arguing that the change from an elected to an appointed office was not covered by Section 5, the state made the same argument that Appellant makes here, that “§ 5 is inapplicable because the contested change resulted

from a court decision rather than from a legislative or administrative act.” *LULAC v. Texas*, 995 F.Supp. at 724. The court rejected the argument, *id.* at 724-25, relying upon *Hathorn v. Lovorn*, 457 U.S. 255, 266 n.16 (1982) (“the presence of a court decree does not exempt the contested change from § 5”).

As *LULAC* further points out, the change in the method of filing vacancies, if enacted by the legislature, would require § 5 preclearance. Accordingly, “[w]e see no reason why such a change . . . should not also require preclearance if it resulted from a state court opinion.” 995 F.Supp. at 725. As this Court has likewise held, “the form of a change in voting procedures cannot determine whether it is within the scope of § 5.” *NAACP v. Hampton County Election Comm’n*, 470 U.S. 166, 170 (1985).

The only exception recognized by the Court to the requirement that voting changes embodied in court orders are subject to Section 5 are redistricting plans “wholly court-developed” by a federal court, and “voting changes embodied in federal-court orders.” *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999). *Accord*, *Abrams v. Johnson*, 521 U.S. at 95 “[t]he exception applies to judicial plans, devised by the court itself, not to plans submitted to the court by the legislature of a covered jurisdiction in response to a determination of unconstitutionality”).

Voting changes implemented pursuant to state court orders, including those interpreting state law, are subject to Section 5.

II. THE ADMINISTRATION OF SECTION 5 AND ITS LEGISLATIVE HISTORY BOTH SHOW THAT PRECLEARANCE IS REQUIRED FOR CHANGES IN VOTING IMPLEMENTED PURSUANT TO STATE COURT ORDERS

Appellant further asserts that “[a]ll relevant sources . . . refute the district court’s novel interpretation [of Section 5].” Brief for Appellant, p. 24. Again, the assertion is incorrect. The administration of Section 5 by the Department of Justice and the legislative history of the Voting Rights Act both show that preclearance is required for changes in voting implemented pursuant to state court orders relying upon or interpreting state constitutional law.

For example, following the decision in *LULAC v. Texas* discussed above, the state sought preclearance in 1998 of the change in filling prospective vacancies in judicial office from election to gubernatorial appointment “as a result of the state supreme court’s interpretation of Texas’ constitution in *State of Texas ex rel. Angelini v. Hardberger*, 932 S.W.2d 489 (Texas 1996).” See Letter from Bill Lann Lee, Acting Assistant Attorney General, to Alberto R. Gonzales, Secretary of State, September 29, 1998, p. 1. Under the new procedure sought to be precleared, “an interim appointment will be made by the governor, and the appointed judge will serve until the next succeeding general election.” *Id.*

The Attorney General objected to the change on the ground that it would have a discriminatory effect. He concluded that because voting was often

polarized along racial lines, voters in districts with significant Hispanic populations “will not have an opportunity to participate in the selection of judges under the new system similar to the opportunity they have under the current system.” *Id.* at 2. He also concluded that in making a recent judicial appointment the governor had not sought input from Hispanic voters about potential judicial appointees. That failure was “illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters.” *Id.*

Notably, however, the Attorney General held that since the purpose of Section 5 was to avoid retrogression in “minority participation opportunities,” nothing “precludes the state from adopting a procedure for filling prospective judicial vacancies by gubernatorial appointment,” so long as “any appointment procedure that is used . . . provide[s] minority participation opportunities.” *Id.* Thus, under Section 5 a jurisdiction may adopt whatever election procedures it wishes, even a procedure that the Attorney General has previously declined to preclear, as long as it does not cause a retrogression in minority voting strength.⁴

Another instance of a covered jurisdiction seeking to implement a change in voting pursuant to a state court order articulating state law involved the Town of Kilmichael, Mississippi. The town, which

⁴ The Attorney General did in fact subsequently preclear the change involved in *LULAC v. Texas* “based on the additional information” submitted by the state. Letter from Bill Lann Lee, Acting Assistant Attorney General, to Alberto R. Gonzales, Secretary of State, October 21, 1998.

was historically majority white, elected its mayor and five member board of aldermen at-large. The 2000 census, however, showed that the black population had increased and was now 52.4% of the population. For the first time in its history, blacks were a majority of the town's registered voters and a significant number of black candidates qualified for the 2001 general election. At the request of the town a state circuit court cancelled the election, ostensibly so that the town could develop a new system of single member districts. See Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to J. Lane Greenlee, Esq., December 11, 2001, p. 2, citing *In the Matter of the General Election for Mayor and Aldermen of the Town of Kilmichael of June 2001*, Case No. 2001-0073CV-L (Cir. Ct. Montgomery Cty. Miss. May 21, 2001). In its decision, the state court relied in part upon the constitution, *i.e.*, "that there is a substantial risk of the violation of constitutional rights of the voters of the Town of Kilmichael, Mississippi should the scheduled elections go forward." *Id.*, slip op. at 2.

The town submitted the court ordered cancellation of the election for preclearance under Section 5 but the Attorney General objected. He concluded "the town has not established that its decision was motivated by reasons other than an intent to cause retrogression in minority voting strength." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to J. Lane Greenlee, Esq., December 11, 2001, p. 2. The board "did not focus on changing the method of election until it became clear that the minority community potentially could win the mayoral seat as well as four of the five aldermanic seats." *Id.*, at 3. The Attorney General

also concluded the change had a discriminatory effect because it denied blacks “the opportunity to attempt to elect candidates of their choice.” *Id.*

In administering Section 5, the Attorney General has interposed numerous objections to voting changes implemented as a result of court orders invalidating state election procedures or pursuant to consent decrees. *See, e.g.* Letter from John R. Dunne, Assistant Attorney General, to Jimmy Evans, Attorney General, March 27, 1992 (objecting to Alabama’s congressional redistricting plan proposed pursuant to a court order).⁵ Carving

⁵ For other similar objection letters, *see* Drew S. Days III, Assistant Attorney General, to George E. Glaze, City Attorney, December 9, 1977 (objecting to a redistricting plan submitted by College Park, Georgia, as the result of a court order); Wm. Bradford Reynolds, Assistant Attorney General, to R. Bruce Warren, July 23, 1984 (objecting to a redistricting plan submitted by Thomas County, Georgia, as the result of a court order); James P. Turner, Acting Assistant Attorney General, to Ken W. Smith, November 13, 1989 (objecting to majority vote, numbered posts, and staggered terms submitted by Lumber City, Georgia, pursuant to a consent decree); John R. Dunne, Assistant Attorney General, to Michael E. Hobbs, Senior Assistant Attorney General, March 11, 1991 (objecting to a change in the method of selecting a school board submitted by Georgia pursuant to a consent decree); James P. Turner, Acting Assistant Attorney General to Alex Davis, June 25, 1993 (objecting to a majority vote requirement for mayor submitted by Butler, Georgia, pursuant to a consent decree); J. Stanley Pottinger, Assistant Attorney General, to John Ward, December 24, 1975 (objecting to reapportionment plans submitted by Rapides Parish, Louisiana, pursuant to a court order); Wm. Bradford Reynolds, Assistant Attorney General, to Wayne Hatcher, December 20, 1982 (objecting to reapportionment plans submitted by LaSalle Parish, Louisiana, one of which had been approved by the court); James P. Turner, Acting Assistant Attorney General, to Harry A. Rosenberg, November 17, 1989

out an exception to preclearance for changes implemented pursuant to state court orders, including those interpreting state constitutional law, would be contrary to the established administration of Section 5 by the Department of Justice. It would also be contrary to the legislative history and the intent of Congress, which has approved the Department's administration of the statute.

When it amended and extended the Voting Rights Act in 2006, Congress had before it evidence that retrogressive changes in voting implemented pursuant to state court orders, including those

(objecting to a redistricting plan submitted by Jefferson Parish, Louisiana, pursuant to a court order); Deval L. Patrick, Assistant Attorney General, to E. Kay Kirkpatrick, August 12, 1996 (objecting to a congressional redistricting plan submitted by Louisiana as the result of a court order); J. Stanley Pottinger, Assistant Attorney General, to William O. Semmes, March 30, 1976 (objecting to a redistricting plan submitted by Grenada County, Mississippi, pursuant to a court order); Wm. Bradford Reynolds, Assistant Attorney General, to Donald B. Patterson, July 5, 1983 (objecting to a redistricting plan submitted by Lincoln County, Mississippi, which had been approved by the court); Wm. Bradford Reynolds, Assistant Attorney General, to Francis Vining, January 3, 1984 (objecting to a redistricting plan submitted by Lawrence County, Mississippi, pursuant to a court order); James P. Turner, Acting Assistant Attorney General, to John P. Fox, February 27, 1990 (objecting to a redistricting plan submitted by Chickasaw County, Mississippi, pursuant to a court order); John R. Dunne, Assistant Attorney General, to Jack N. Thomas, April 26, 1991 (objecting to a redistricting plan submitted by Monroe County, Mississippi, pursuant to a court order); James P. Turner, Acting Assistant Attorney General, to Roy D. Bates, February 2, 1990 (objecting to a proposed election schedule submitted by Bennettsville, South Carolina, pursuant to a consent judgment and decree).

interpreting state constitutional and statutory law, had drawn Section 5 objections. Bradley J. Schlozman, Acting Assistant Attorney General, testified before the House of Representatives, and introduced copies of Section 5 objection letters issued by the Department of Justice from 1980 through October 17, 2005. *See Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong., 1st Sess., October 25, 2005, Testimony of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, pp. 8, 225 (Appendix to the Statement of Bradley J. Schlozman: Copies of Objection Letters, by State, in which the Attorney General interposed an objection under Section 5 from 1980 through the present (October 17, 2005), including some letters responding to requests to reconsider an objection and some letters withdrawing objections).*

Included in the letters submitted to Congress were: the 1998 objection to the voting change implemented pursuant to an order of the state supreme court involving the filling of vacancies in judicial office in Texas; the 2001 objection to the cancellation of an election in Kilmichael, Mississippi, pursuant to a state court order; and the objections from 1980 through October 17, 2005, cited at p. 13 n.5 of this Amicus Brief. *See Hearings Vol. I, pp. 1616-19 (2001 Kilmichael objection letter); Hearings Vol. II, pp. 2496-99 (1998 Texas objection letter); Hearings Vol. I, pp. 385, 607, 670, 678, 735, 867, 907, 1119, 1227, 1268, 1388, 1402, and Vol. II, p. 1957*

(objections from 1980 through October 17, 2005).

Congress was thus aware that objections had been entered to voting changes implemented pursuant to state court orders interpreting state law, and necessarily endorsed that application of Section 5 when it extended the statute for an additional 25 years. As the Act provides, evidence of the continuing need for Section 5 included, *inter alia*, “the hundreds of objections interposed . . . by the Department of Justice since 1982.” Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Sec. 2(b)(4)(A). This Court has held that “[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.” *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 134 (1978). *Accord*, *Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 576-77 (1977) (the “administrative construction [of a reenacted statute] may be said to have received congressional approval”). This Court has further held that any doubt that voting “changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference.” *NAACP v. Hampton County Election Comm’n*, 470 U.S. at 178-79.

Congress also approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975. As the Senate report specifically explains in an illustrative example, when a court holds an apportionment plan

unconstitutional,

the court will either direct the governmental body to adopt a new plan and present it to the court for consideration or else choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of - or selection among - any plans presented to it until such times as these plans have been submitted for Section 5 review.

S.Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 784.

The 1981 House Report likewise recognized that state court litigation can lead to court-ordered changes that require preclearance by noting that “although the Department lacks an independent mechanism to monitor voting changes, the Attorney General has attempted to use several methods to identify unsubmitted changes including the existing preclearance process, unsolicited notification of changes from aggrieved persons, and review of voting rights litigation by private parties.” H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 13 (1981).

III. APPELLANT’S PROPOSAL FOR “CONTINGENT PRECLEARANCE” SHOULD BE REJECTED BY THIS COURT

Appellant has asked this Court to adopt a new and totally unprecedented “contingent preclearance”

rule for Section 5. Under Appellant's proposal, the state "would recognize 'contingent preclearance' such that enactment and preclearance are sufficient to render a State law enforceable, unless and until the State law is held unconstitutional. At that point, the law would be void, and the preclearance letter would be of no effect." Brief In Opposition to Motion to Dismiss or Affirm, p. 8. "Contingent preclearance" would allow covered jurisdictions essentially to take a state court appeal from a precleared voting change.

For example, a state court could hold a precleared single member district plan adopted by a city to provide minority voters an equal opportunity to elect candidates of their choice to be in violation of state constitutional law prohibiting the splitting of any precincts in redistricting. If the preclearance were merely contingent, the city could return to its prior at-large, and discriminatory, system of elections which did not split precincts. Such a result would seriously impair Section 5, which was enacted to insure that no changes in voting are made that would lead to a retrogression in minority voting strength.

To give another example, a city, prior to its coverage by Section 5, could have required racial segregation at the polls. After its coverage, it could have adopted an ordinance prohibiting segregated polling places and gotten the change precleared. A law suit could later be brought that the ordinance violated general state law prohibiting municipal election ordinances regulating polling places. If the state's contingent preclearance rule were in effect, the city would revert to segregated polling places free and clear of Section 5.

Contingent preclearance is fundamentally at odds with Section 5, and would provide covered jurisdictions an end run around the preclearance requirement. The suggestion that this Court should adopt contingent preclearance should be rejected.

IV. APPELLANT’S FEDERALISM ARGUMENTS ARE WITHOUT MERIT

Appellant contends that the “federalism implications” of allowing implementation of a precleared voting change, despite a subsequent finding by a state court that the practice is unconstitutional under state law, “are profound” because it “strips state courts of their authority to decide pure state-law questions.” Brief for Appellant, p. 23. First, whether a change in voting is retrogressive is not a pure state law question but a question of federal law under Section 5.

Second, as this Court has held, “Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practice already in effect.” *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983). *Accord*, *Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971) (retrogression is measured by the actual practice in effect, even if it is in violation of state law); *Young v. Fordice*, 520 U.S. 273, 283 (1997) (the “fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never ‘in force or effect’”). A contrary rule would be inconsistent with the basic purpose of Section 5, which “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 v. United States*, 425 U.S. 130, 141 (1976).

Appellant attempts to carve out an exception to the rule in *Lockhart* and *Perkins* by relying upon *Abrams v. Johnson*. The reliance is misplaced. In *Abrams*, the Court rejected as a benchmark for Section 5 review a Georgia congressional redistricting plan it found violated the federal - not the state - constitution. The Court concluded that “Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional.” 521 U.S. at 97. *Accord, Miller v. Johnson*, 515 U.S. 900, 909, 928 (1995) (invalidating congressional redistricting in Georgia as violating the Fourteenth Amendment despite its having been precleared under Section 5); *Bush v. Vera*, 517 U.S. 952, 957 (1996) (finding unconstitutional congressional redistricting in Texas despite the fact it had been precleared under Section 5). In *Abrams*, the Court used as a benchmark the constitutional, and precleared, plan that had been adopted in 1982. But nothing in *Abrams* or the other decisions of this Court hold or suggest that changes in voting implemented pursuant to orders of state courts are not subject to Section 5. A contrary rule would be in violation of these decisions and undermine the very purpose of Section 5.

The State’s reliance upon *Young v. Fordice* is also misplaced. There, the Court held a Provisional Plan to implement the NVRA could not serve as the Section 5 benchmark because the plan “was not ‘in force or effect’; hence it did not become part of the baseline against which we are to judge whether

future change occurred.” *Id.* at 283. The Court concluded that even though the plan had been precleared, it

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. Further, the State held no elections prior to its abandonment of the Provisional Plan, nor were any elections imminent. These circumstances taken together lead us to conclude that the Provisional Plan was not ‘in force or effect.’

Id.

Here, by contrast, Act No. 85-237 was enacted in 1985, was fully implemented, and an election was held under the act two years later in 1987. Moreover, the state supreme court denied a request for a stay pending appeal in *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988), which allowed the election to go forward. Brief for Appellant, p. 8. Unlike the Provisional Plan in *Young*, Act No. 85-237 was in “force or effect.” The subsequent state court orders were thus changes in voting practices or procedures within the meaning of *Young* and Section 5.

State law, moreover, cannot be the ultimate arbiter of Section 5 or federal law in general. Many states, for example, required racially segregated schools as a matter of state constitutional law. *Brown v. Board of Education*, 347 U.S. 483, 486 n.1 (1954) (noting that South Carolina, Virginia, and Delaware required racial segregation in public schools as a matter of state constitutional and

statutory law). It would hardly be constitutionally suspect for a court to enjoin the practice of segregated schools as a violation of federal law, despite the fact that integrated schools were unconstitutional under state law. Similarly, as of 1967, Virginia and 15 other states outlawed interracial marriage as a matter of state legislative or constitutional law. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). It was not constitutionally suspect for the Court to invalidate Virginia's anti-miscegenation laws, which not only voided interracial marriage but made it a felony, as a violation of the Fourteenth Amendment.

It is no more constitutionally suspect for a voting change to be precleared under Section 5 and implemented, despite the fact that the change might subsequently be found unconstitutional under state law. State law does not override Section 5 or other federal laws. As the Court held in *Hillsborough County, Fla. v. Auto. Med. Labs*, 471 U.S. 707, 712 (1985), “[i]t is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art VI, cl. 2, invalidates state laws that ‘interfere with, or are contrary to,’ federal law. *Gibbons v. Ogden*, 9 Wheat 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.)”

Appellant's argument that Section 5 requires a state “to keep in place . . . practice[s] held invalid under state law,” Brief for Appellant, p. 16, is also contradicted by the evidence in this case. There is in fact no inconsistency now between the state's practice of filing vacancies on the Mobile County Commission and the Section 5 objection. As Appellant concedes, “[i]n 2006, the Alabama

Legislature adopted Act No. 2006-342, which provides that on a going-forward basis, vacancies on the Mobile County Commission will be filled through special election.” Brief for Appellant, p. 9 n.5. The Act was signed by the governor on April 12, 2006, legislatively reversing the decisions in this case and *Stokes v. Noonan, supra*, and restoring the authority to fill vacancies to the voters themselves for future elections. Act No. 2006-342 was submitted for preclearance, but the Attorney General said it was not a change in voting for which preclearance was required. See Letter from Wan J. Kim, Assistant Attorney General, to Mr. Troy King, Attorney General, January 8, 2007, p. 3.

Given the recent action by the Alabama legislature, Appellant’s argument that Section 5 requires Alabama to maintain practices that violate state law is obviously erroneous.

V. APPELLANT’S “PANDORA’S BOX” AND UNDUE BURDEN ARGUMENTS ARE WITHOUT MERIT

Appellant argues that requiring preclearance of state court decisions affecting voting “would open up a Pandora’s box of possible challenges and would risk destabilizing the decisional law of all sixteen §5 jurisdictions.” Brief for Appellant, p. 49. The argument ignores the fact that such changes have always been subject to Section 5. There is no Pandora’s box to open.

More important, no jurisdiction is entitled to continue to violate Section 5 based on the theory that it would be harmed or burdened by compliance.

Indeed, the very purpose of Section 5, which has been repeatedly held constitutional by this Court, was “to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims.” *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Appellant’s further suggestion that litigation under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, is an adequate substitute for Section 5 is flatly contradicted by both the decisions of this Court and the legislative history. *Id.* (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits”).

In *Dotson v. City of Indianola*, 514 F.Supp. 397, 400 (N.D. Miss. 1981), *aff’d*, 456 U.S. 1002 (1982), an action to enforce Section 5, the defendant raised a laches defense essentially identical to the one raised by Appellant here, *i.e.*, the city would be unduly prejudiced or harmed by having to comply with preclearance. In rejecting the contention, the three-judge court held a laches defense: “would frustrate the remedial purposes of the Act;” “would transform [the city’s] own long failure to comply with the duty imposed by Section 5 into a defense;” and “would be to do precisely what § 5 was designed to forbid: allow the burden of litigation delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices. *Berry v. Doles*, 438 U.S. 190, 194 (1978) (Brennan, J., concurring).” *Dotson*, 514 F.Supp. at 401. The court also held that the duty to seek preclearance “arises

anew each time the defendant enacts or seeks to administer an uncleared voting regulation.” *Id.* Decisions of other courts in voting rights cases are to the same effect. *See, e.g., United States v. Louisiana*, 952 F.Supp. 1151, 1177 (W.D. La. 1997) (rejecting laches as a defense in an action to enforce Section 5 because “its application would frustrate Congress’s purpose in enacting federal legislation”), *aff’d*, 521 U.S. 1101 (1997); *Shuford v. Alabama State Bd. of Educ.*, 920 F.Supp. 1233, 1240 (M.D. Ala. 1996) (same); *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (rejecting a laches defense in a Section 2 challenge to at-large elections “[b]ecause of the ongoing nature of the violation”); *Smith v. Clinton*, 687 F.Supp. 1310, 1313 (E.D. Ark. 1988) (“the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the multimember structure”), *aff’d*, 488 U.S. 988 (1988); *Blackmoon v. Charles Mix County*, 386 F.Supp.2d 1108, 1114 (D. S.D. 2005) (rejecting a laches defense where plaintiffs alleged that “each new election held under the existing districts violates their constitutional rights and Section 2 of the Voting Rights Act”).

Although Appellant cites no evidence of existing unprecleared Alabama state court decisions affecting voting, compliance with Section 5 would not in fact impose a “staggering” burden, nor risk “destabilizing the decisional law” of covered jurisdictions. Brief for Appellant, pp. 49-50. The recent experience in South Dakota illustrates that even where there are hundreds of unsubmitted voting changes, the preclearance process is entirely manageable.

Two counties in South Dakota, Todd and Shannon, were covered by Section 5 as a result of the 1975 amendments of the Voting Rights Act. Despite that, the state enacted more than 600 changes in voting affecting the two counties, but failed to submit them for preclearance. The state was sued for its failure to comply, and entered into a consent decree in December 2002, in which it agreed to develop a comprehensive plan “that will promptly bring the state into full compliance with its obligations under Section 5.” *Quick Bear Quiver v. Hazeltine*, No. 02-5069 (D. S.D. Dec. 27, 2002) (three-judge court), slip op. at 3. The state made its first submission in April 2003, and began a process that was completed three years later. As with South Dakota, if there are any unprecleared voting changes in Alabama that are being implemented pursuant to state court orders, they should be submitted for preclearance. And as in South Dakota, with its 600 plus voting changes, the burden of complying with Section 5 would neither be “staggering” nor “destabilizing.”

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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