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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Riley, Governor of Alabama, versus Kennedy.

Mr. Newsom.

ORAL ARGUMENT OF KEVIN C. NEWSOM

ON BEHALF OF THE APPELLANT

MR. NEWSOM: Mr. Chief Justice, and may it please the Court:

This appeal presents two issues, both a threshold jurisdictional question and a substantive question concerning the scope of section 5. We have explained in some detail in our briefs why Governor Riley's appeal in this case was timely and why this Court has jurisdiction to resolve the merits. The Solicitor General has agreed with us on the jurisdictional question.

I certainly want to answer any questions that the Court may have concerning the jurisdictional issue, but with the Court's permission I would like to proceed in my affirmative presentation directly to the merits and, specifically, the second of two independent bases that we have urged for reversal here. Our argument under this Court's decision in Young versus

1 Fordice is perhaps the simplest and most straightforward
2 way to resolve this case.

3 In Young, this Court held that a State voter-
4 registration plan, despite its promulgation,
5 preclearance and active implementation to register 4,000
6 voters, was nonetheless not "in force or effect" within
7 the meaning of section 5 and thus was not a valid
8 section 5 baseline for purposes of measuring future
9 changes, because the Court said it resulted only from a
10 temporary misapplication of State law, and it was
11 immediately corrected upon acknowledgment that it was
12 unlawful in fact.

13 CHIEF JUSTICE ROBERTS: It's pretty hard to
14 argue something wasn't in force and effect when they
15 have an election under it, isn't it?

16 MR. NEWSOM: Your Honor, I don't think --
17 Your Honor is correct that the only possible distinction
18 between Young and this case is the holding of the 1987
19 election, but I don't think the election can make the
20 difference here for this reason: It proceeded solely by
21 virtue of the vagaries of the State litigation process.
22 The challenge preceded the election by two months. That
23 election was conducted under a cloud of litigation that
24 everyone certainly knew about and it went forward only
25 because, in the words of Young, the trial court

1 temporarily misapplied State law.

2 If the trial court had gotten State law
3 right to begin with, Your Honor, and had enjoined the
4 election, as we now all know it should have, then there
5 never would have been the election to point to as
6 evidence that 85-237 ever went into force or effect.
7 And it seems to me inconceivable, consistent with any
8 meaningful notion of federalism, that section 5 can
9 require a world in which a State trial court, as we say
10 in the reply brief, which exists at the bottom of the
11 state judicial hierarchy, can by getting State law wrong
12 in the first place lock into State law as a section 5
13 baseline an unconstitutional statute.

14 I don't take anybody, on this side of the
15 podium anyway, to be denying that 85-237 was -- is now
16 and was at its inception unconstitutional and thereby
17 strip the Alabama Supreme Court of its sovereign
18 prerogative to correct the errors of lower courts.

19 JUSTICE STEVENS: What if there had been no
20 challenge to that election, but two or three years later
21 somebody challenged the election, and then the supreme
22 court said it was invalid?

23 MR. NEWSOM: Well, Justice Stevens --

24 JUSTICE STEVENS: Then there never would
25 have been a State statute.

1 MR. NEWSOM: I'm sorry?

2 JUSTICE STEVENS: Then there never would
3 have been a State statute, a valid State statute.

4 MR. NEWSOM: Right. There are -- we have
5 pitched two different arguments in this case, Your
6 Honor. And under the -- I think it's fair to say -- the
7 broader of the two arguments contained in II of our
8 brief, that, the later action, nonetheless would not be
9 a change under section 5. But under the argument that I
10 was talking about specifically under Young versus
11 Fordice, I think it does make a difference that the
12 Alabama Supreme Court stepped in at the earliest
13 possible opportunity to invalidate this statute, again
14 as part of litigation that preceded the first and only
15 implementation, attempted implementation, of the
16 statute.

17 And I think that the question at bottom here
18 in this case is whether section 5 provides State courts
19 with any breathing space whatsoever in which to conduct
20 this exercise of judicial review, and our submission is
21 that at the very least that it ought to extend so far as
22 to allow State courts to step in, as they did here, at
23 the earliest possible opportunity.

24 JUSTICE KENNEDY: If the Respondent prevails
25 in this case and you have a case similar to this one

1 that begins in the trial court, how do you think it
2 would work: That the plaintiffs in the trial-court
3 action have to get preclearance either way? They have
4 to get preclearance in the event that they prevail, and
5 then the other side has to get preclearance in the event
6 that it doesn't? I mean, is that the way it would work
7 in your view?

8 MR. NEWSOM: I'm not -- frankly, Justice
9 Kennedy --

10 JUSTICE KENNEDY: If I'm a State trial
11 court, how can I make a ruling if -- assuming the
12 Respondents win in this case -- if I know there has to
13 be preclearance?

14 MR. NEWSOM: Well, I think, Your Honor,
15 that's certainly part of the point that we've emphasized
16 here as one of the key federalism issues in this case,
17 is that this case really does in a very functional way
18 strip State courts of their jurisdiction to exercise
19 judicial review, whether at the trial-court stage or at
20 the supreme-court stage. Because on Appellee's theory,
21 once the statute is precleared, it is effectively locked
22 in place, and that the trial court or the supreme court
23 needs permission from the executive branch in Washington
24 to exercise the authority to invalidate --

25 JUSTICE KENNEDY: Well, I suppose States get

1 -- State courts get preclearance all the time with
2 district changes, don't they? Or how does it work?
3 They just hold the judgment in abeyance until there is
4 preclearance, and couldn't -- and if so, couldn't you do
5 that here?

6 MR. NEWSOM: Well, to be sure, the Appellees
7 are correct that it is the administration of the change
8 itself that requires preclearance. So I don't want the
9 Court to think that our position here is that courts are
10 having to -- to render sort of provisional judgments
11 that are then subject to preclearance in Washington.
12 The point is that -- so I think in the redistricting
13 example, Your Honor, it would be the implementation of
14 the districting that would require preclearance.

15 JUSTICE SCALIA: Are there any other
16 district cases that require preclearance except those
17 that redistrict the -- the State?

18 MR. NEWSOM: No, Your Honor, and the point
19 is that no one here denies -- certainly the State does
20 not deny -- that a State-court order redistricting,
21 redrawing a map, in essence, and giving rise or
22 exercising what is functionally, this Court has said, a
23 legislative power, requires redistricting. No one
24 doubts that.

25 But the question here is quite different:

1 Whether if there is a spectrum of State-court decisions
2 with redistricting at one end, my case has to be at the
3 other end of the spectrum.

4 JUSTICE SOUTER: Are there district court --
5 there must be -- district-court cases in which the State
6 trial court has invalidated on some State constitutional
7 ground legislation redistricting that has been passed by
8 the legislature? When that happens, have those opinions
9 been precleared?

10 MR. NEWSOM: Not to my knowledge, Your
11 Honor. And I will confess that I'm not aware of any
12 right off the top of my mind that fit that paradigm.
13 But not to my knowledge. The only --

14 JUSTICE SOUTER: But isn't the reason that
15 there would be no reason to preclear them? I mean, if
16 the State court invalidates legislative redistricting,
17 and does so before there has been a preclearance
18 request, in other words, if it gets into State court
19 right off the bat, then there's no State law
20 subsequently to ask the feds to preclear.

21 MR. NEWSOM: That might be right, Justice
22 Souter, but I'm not sure that I understand the
23 implications for this case. If you could --

24 JUSTICE SOUTER: Well, I guess what I'm
25 saying is your "No" answer does not prove much. In

1 other words, you're trying to make the case here that
2 there is something extremely unusual about this. And I
3 thought your answer to Justice Scalia, in effect, was
4 one reason that it's unusual is that we don't have any
5 of these cases in -- in which a State court has knocked
6 out a State law that is then subject to some kind of
7 preclearance review.

8 And my only point was, if I understand the
9 situation, as long as the preclearance review had not
10 preceded the State constitutionality judgment, following
11 the State constitutionality judgment there would be no
12 law to take to Washington, whether it be to -- to the
13 Justice Department or to -- or to the court, and ask to
14 have precleared. So the fact that there are no such
15 cases doesn't prove anything.

16 MR. NEWSOM: Well, I think the point that I
17 was trying to make, Your Honor, is that this Court has
18 said in construing section 5 that it will not construe
19 it so as to exacerbate federalism costs. And one of the
20 reasons that the federalism costs are exacerbated here
21 is that this is -- this scenario is simply unlike any,
22 as we say in the brief, that this Court has --

23 JUSTICE SOUTER: Well, that may be, but --

24 JUSTICE KENNEDY: But you said in answer to
25 Justice Souter that this is your case. There is no law

1 that's precleared.

2 MR. NEWSOM: Well, it's certainly true, Your
3 Honor, that when a State court, as any court -- as this
4 Court made clear only last month in Danforth -- when a
5 court exercises judicial review to invalidate a practice
6 that's unconstitutional, it is not changing or making
7 new law as it goes along, but declaring what the law has
8 always been.

9 JUSTICE SCALIA: There is a law to be
10 cleared if you -- if you assume that the existence of a
11 law to be cleared occurs before that law has been tested
12 in the courts. In the hypothetical we've been
13 discussing, just as in this case, there was a State law;
14 and if you assume the State law is valid before it's
15 gone through the judicial clearance process, there is a
16 State-law change when the clearance process results in
17 striking down the law. I don't -- it seems to me that
18 the two situations are pretty parallel.

19 MR. NEWSOM: Well, with respect, Justice
20 Scalia, my case is the latter situation where there was
21 technically a law in place. 85-257, to be sure, was in
22 place. Now, whether it was "in force or effect" within
23 the meaning of this Court's decision in Young is
24 different, but it was in place.

25 JUSTICE GINSBURG: And it was precleared at

1 what point? The 1985 law was precleared before the
2 litigation?

3 MR. NEWSOM: Yes, Your Honor, it was
4 precleared virtually immediately, so let's say in '85.
5 I don't remember the month specifically, but it was
6 precleared in '85.

7 JUSTICE GINSBURG: And it was submitted by?

8 MR. NEWSOM: Submitted by the State of
9 Alabama.

10 JUSTICE GINSBURG: Yes. And then the
11 litigation came.

12 MR. NEWSOM: Right. The litigation was
13 commenced in April of 1987.

14 JUSTICE GINSBURG: And so your point is that
15 if the circuit court -- there are only two levels of
16 court in this, the circuit court and the supreme court?

17 MR. NEWSOM: For purposes of this
18 litigation.

19 CHIEF JUSTICE ROBERTS: So if the circuit
20 court had gotten the State law right, then there never
21 would have been an election?

22 MR. NEWSOM: Well, that's right.

23 JUSTICE SOUTER: There never would have been
24 perhaps preclearance if it got it right soon enough.

25 MR. NEWSOM: Well, that's true, but, of

1 course, courts don't get to reach out and grab the
2 disputes and bring them into court.

3 JUSTICE SOUTER: Well, but if the -- if the
4 challenging parties go into court at the first
5 opportunity and you don't have an election sort of
6 coming up next week, I would suppose that in cases like
7 that, the State would at least allow the State
8 litigation to proceed to some level. And if in point of
9 fact that State litigation resulted in a declaration
10 that the new statute was unconstitutional in some
11 fashion, one would not expect the State then to bull
12 ahead and ask for preclearance, as opposed to trying
13 either to appeal at the State level or to correct the
14 statute.

15 MR. NEWSOM: That's right, Your Honor, but
16 it -- but the challenge here would not have been ripe
17 until 1987. There was no vacancy on the horizon. And
18 so the challenge here was brought at the earliest
19 conceivable opportunity when the vacancy became a
20 reality.

21 JUSTICE SOUTER: I will assume that.

22 JUSTICE KENNEDY: Even in the hypothetical
23 Justice Souter proposes, I don't know the rules in
24 Alabama, but I can see a Federal court saying: Well,
25 this is premature; it hasn't been precleared; why should

1 I pass on the validity of something that might not be
2 precleared?

3 MR. NEWSOM: Well, I think that's entirely
4 possible, Your Honor, and --

5 JUSTICE SCALIA: On the other hand, I can
6 also see the attorney general saying: Why should I
7 preclear it? It hasn't even been determined to be law
8 in Alabama yet.

9 Does the Justice Department preclear stuff
10 that is -- that is in the midst of litigation?

11 MR. NEWSOM: The Justice Department's
12 regulations at 51.22, Your Honor, say that they will not
13 preclear things that are not final and that are subject,
14 it says, to revision by court -- by court judgments.
15 But that regulation is specific, the Federal Register
16 says, to --

17 JUSTICE KENNEDY: How does that apply to a
18 State statute which is fully enacted and then there is
19 going to be a challenge?

20 MR. NEWSOM: The truth is the regulations
21 don't speak specifically to that question, and the
22 reason is that the regulations are quite clear in the
23 Federal Register at 46 Federal Register 872 that they
24 don't deal with changes, so-called, brought about as a
25 result of court judgments. The regulation that I was

1 referring to, 51.22, refers specifically to State courts
2 having an administrative role to play in --

3 JUSTICE SCALIA: Where they are doing the
4 districting or --

5 MR. NEWSOM: That's right, redistricting,
6 reannexation.

7 JUSTICE SCALIA: Do you know of any cases
8 where -- where a piece of State legislation has been in
9 the middle of litigation where the Justice Department
10 has precleared it?

11 MR. NEWSOM: No, Your Honor, not right off
12 -- not as I'm standing here, I don't.

13 JUSTICE SCALIA: It seems like an exercise
14 in futility.

15 MR. NEWSOM: But the point, Justice
16 Ginsburg, getting back to your point so you'll
17 appreciate the timeline, is that in April of 1987 the
18 challenge is brought. In June of 1987 the election goes
19 forward. So the challenge here preceded the election by
20 two months.

21 And the point that I've been trying to make is
22 that the -- had the trial court gotten State law right
23 to begin with and enjoined the election, as we now know
24 it should have, there never would have been an election
25 to point to, to show within the meaning of Young that

1 the -- that the statute was ever put into force and
2 effect.

3 JUSTICE BREYER: What happened -- I have a
4 factual question.

5 MR. NEWSOM: Sure.

6 JUSTICE BREYER: In around July, Mr. Sam
7 Jones is sworn in, and now he is in office until
8 sometime after, I guess, September 1988, a little over a
9 year, and then the Governor appointed him. Well, he
10 must have gotten paid during that year.

11 MR. NEWSOM: Yes.

12 JUSTICE BREYER: And then when the Governor
13 appointed him, what does the appointment look like?
14 Does it say it's retroactive? No. I would be
15 surprised. I mean, you're not going to tell me it is.
16 So my guess is he's appointed as of -- let's say he's
17 appointed by the Governor. It must have said as of
18 when, and it probably said as of September '88.

19 MR. NEWSOM: The truth is, Your Honor, I do
20 not know what --

21 JUSTICE BREYER: Well, I think it's
22 important to me because -- for this reason: I would
23 guess they don't make it retroactive or you'd know it,
24 and, therefore, we -- we have more. We have the facts,
25 the following facts, as to whether -- and this is what

1 Fordice says; it says this is a practical question.
2 It's not some theory about whether it's unconstitutional
3 or not unconstitutional.

4 The question is: As a practical matter, was
5 it in force and effect? And, as a practical matter,
6 one, there was an election under it; two, somebody was
7 elected; three, he took office; four, he held that
8 office for a year and was paid for it. All right? Why,
9 as a practical fact, as a practical matter, we do not
10 say that special-election law was in force and effect
11 for about a year and two months?

12 MR. NEWSOM: Your Honor, the difference --
13 or what makes this case just like Young versus Fordice
14 is that the relevant -- the relevant implementation in
15 Young was not election. The relevant implementation in
16 Young was registration. And this Court's opinion makes
17 clear that 4,000 real, live flesh-and-blood voters were
18 registered.

19 JUSTICE BREYER: Yes, but registering is a
20 precondition of voting. Not one person had ever voted.
21 Moreover, they all had to register again. So the net
22 practical effect of the election -- of plan two in Young
23 v. Fordice was null, zero, zilch. And the practical
24 effect here is that somebody is elected under the law,
25 holds office for a year and two months, and is paid. It

1 seems to me quite a big difference.

2 MR. NEWSOM: With respect, Your Honor --

3 JUSTICE BREYER: I mean, that's what I
4 wanted to know. I mean, maybe it's different if this
5 was a retroactive something or other, but I -- you're
6 not aware of that.

7 MR. NEWSOM: No, I can't --

8 JUSTICE BREYER: So I assume it wasn't.

9 MR. NEWSOM: -- tell you as I'm standing
10 here that the --

11 JUSTICE BREYER: Yes.

12 MR. NEWSOM: -- that the appointment was
13 retroactive. But I do think that, given the nature of
14 the implementation, the relevant implementation in Young
15 being registration, the fact that 4,000 people were
16 registered does bring this case pretty close to Young.
17 And the fact that --

18 JUSTICE BREYER: All right. Suppose I
19 reject that on the ground of what I said. I'm not
20 saying I would, but suppose I did. Isn't that the end
21 of this case? Because then, if I reject that, there is
22 a plan. The plan is called "the special-election plan."
23 It is in effect for a year and two months. People hold
24 office in election, and they're paid. And then a new
25 plan comes along, the governor's plan. Now that seems

1 to me a change, and the statute says that if you have a
2 change, which this would be, you've got to preclear it.
3 End of matter.

4 Now, what's your argument about that?

5 MR. NEWSOM: With respect to that, Your
6 Honor, it's that I don't think it is accurate to say
7 that this was the Governor's plan. The Governor was not
8 --

9 JUSTICE BREYER: No, I'm just using that as
10 shorthand, the shorthand for a system under which the
11 officeholder is appointed by the government -- by the
12 governor.

13 MR. NEWSOM: Right. And --

14 JUSTICE BREYER: And I'm saying if we start
15 from the base that the plan is special election which
16 was in force and effect for a year and two months, then
17 for whatever set of reasons there is a change, and the
18 State has to preclear the change. Now, what's the
19 answer to that?

20 MR. NEWSOM: The answer to that, Your Honor,
21 is that the shorthand misses the fact here that what
22 we're talking about is that the change results here from
23 a State court exercising judicial review. And this is
24 -- that is different in kind from any sort of decision
25 that this Court has ever rendered about --

1 JUSTICE BREYER: All right. So you're
2 saying that if the cause of a change is a court
3 decision, then you do not have to preclear. So that if
4 in Mississippi in 1975 there had been a ruling of a
5 court which said segregationist plan number one here is
6 no good, so we're going to go back to the even worse
7 plan that was before, that that wouldn't have had to
8 have been precleared?

9 MR. NEWSOM: The point, Your Honor, is that
10 that --

11 JUSTICE BREYER: Well, you see where I'm
12 going, and I'm not phrasing it correctly, but you can
13 answer it anyway.

14 MR. NEWSOM: So the point, Your Honor, is
15 that the result of that court decision would have been
16 immediately enjoined under the Fourteenth Amendment, the
17 Fifteenth Amendment, or section 2. The point about
18 section 5 --

19 JUSTICE SCALIA: It would have been able to
20 be brought up here if it was based on a discriminatory
21 intent, certainly.

22 MR. NEWSOM: Absolutely. This Court would
23 have cert jurisdiction if there were -- if you have the
24 --

25 JUSTICE BREYER: But what my question is:

1 Is there any authority for the proposition that between
2 1964 and today it mattered whether the cause of a change
3 in a State plan was a decision of let's say five members
4 of a court -- of a State court -- or whether it was a
5 legislative decision. Because that's what I think
6 you're arguing, and is there any authority that supports
7 you on that?

8 MR. NEWSOM: If I -- if I may, Justice
9 Breyer, as a preface it's important that I emphasize
10 simply as sort of a superstructure point here that as --
11 not only as the Plaintiff in this case, but as the party
12 asking the Court to exacerbate federalism costs within
13 the meaning of Bossier Parish over what they have been
14 to this point, I think it's my opponents' burden to show
15 you that Congress clearly intended to include these
16 provisions, as opposed to my burden to show you that
17 Congress intended to exclude them. That's essentially
18 what this Court said in Gregory versus Ashcroft.

19 JUSTICE ALITO: Well, they argue in their
20 brief that there were instances in which State supreme
21 courts participated prior to the enactment of the Voting
22 Rights Act in changes in election requirements for the
23 purpose of disenfranchising African-Americans. Are they
24 wrong on that? And if they're right on that, what
25 reason is there to think that -- without any text in

1 section 5 to making an exception for changes that are
2 made by State courts, what would be the reason for
3 reading that in?

4 MR. NEWSOM: Well, I think there are -- if I
5 can answer in two parts. First, with respect to the
6 legislative history, to be sure the Appellees and their
7 amici have brought forward a number of examples of
8 State-court judges, principally southern State-court
9 judges, doing some pretty despicable stuff, and I'm not
10 here to defend that. But with respect to the specific
11 question at issue here, whether Congress was in -- in
12 enacting section 5, was clued into this question and it
13 had reason to think that State-court exercises of
14 judicial review would -- had -- would give rise to the
15 sorts of problems that section 5 was designed to
16 inhibit, there simply is nothing to support that
17 suggestion.

18 Section 5, of course, was intended to do
19 something very specific. It was designed to prevent or
20 to catch government conduct that the more traditional
21 remedies in place at the time under the '57, '60 and '64
22 Civil Rights Acts, what we would today, I think, call a
23 section 2 suit, couldn't get. And the point here, in
24 addition to the Danforth point that at some deep,
25 jurisprudential level courts don't change law, the more

1 important practical point is that courts exercising
2 judicial review are institutionally incapable of
3 changing the law specifically in the way that Congress
4 was concerned about when it enacted Section 5.
5 Congress was --

6 CHIEF JUSTICE ROBERTS: Now, counsel, since
7 you mentioned section 5, perhaps you ought to look at
8 it. It says that you have to preclear standards,
9 practices, whatever, different from that in force or
10 effect on November 1st, 1964.

11 Now, the Respondents in their brief accused
12 you of making the argument that since this isn't
13 different from what was in effect in 1964, you don't
14 have to preclear it. And you said, no, that's not what
15 we're saying; we take no position on that.

16 Why in the world did you say that?

17 MR. NEWSOM: Well --

18 CHIEF JUSTICE ROBERTS: It says quite
19 clearly the standard has to be different from that in
20 force or effect on November 1st, '64. At that point
21 these people were appointed.

22 MR. NEWSOM: That's right, Your Honor. And
23 there are two sort of different things going on here.
24 One, as a matter again of the Appellees' burden to show
25 you that these decisions are clearly included within the

1 text, quite clearly they are not, because November 1,
2 1964, as Your Honor quite correctly points out --

3 CHIEF JUSTICE ROBERTS: Well, in your reply
4 brief on page 8 you say you take no position on that
5 question.

6 MR. NEWSOM: With respect, what I say at
7 page 8 of the reply is that there is no need for this
8 Court to determine specifically how the November 1,
9 1964, language ought to operate in the legislative- and
10 administrative-change scenario. This Court in Presley
11 and then again in Young versus Fordice has suggested in
12 dicta that perhaps the baseline might float,
13 notwithstanding the November 1, 1964 --

14 CHIEF JUSTICE ROBERTS: Well, there wouldn't
15 be a different baseline for judicial changes than there
16 would be for legislative or executive changes; would
17 there?

18 MR. NEWSOM: No. You're right. I think
19 you're right, Your Honor, perhaps not. And this again
20 goes to the burden point that I was trying to make
21 earlier. My -- the sole purpose in citing the November
22 1, 1964, language is to show that at the very least, to
23 the extent you're looking for some clear indication that
24 Congress intended to get these decisions, the text
25 cannot provide that clear indication.

1 JUSTICE KENNEDY: Well, I take it it's your
2 position -- and I noticed this in the question put to
3 you by Justice Breyer -- tell me if this is wrong, but
4 it is not just the fact that the court makes a decision,
5 because the court may have discretion to choose plan
6 one, plan two, plan three; but it is if the court makes
7 a decision to show that the prior practice was invalid,
8 was void under State law.

9 MR. NEWSOM: That's right, Your Honor.

10 JUSTICE KENNEDY: That's the distinction, I
11 take it.

12 MR. NEWSOM: That's right, Your Honor.

13 JUSTICE KENNEDY: It is not the fact that
14 it's just the court, but the kind of decision the court
15 makes.

16 MR. NEWSOM: That's right. There are
17 different lines the court might choose to draw. This
18 case at most presents a question where a court is
19 exercising the power of judicial review to invalidate a
20 previously precleared statute. It might decide the case
21 more narrowly, as I have said, under *Young versus*
22 *Fordice* on a more fact-specific basis. But at the very
23 most the Court would need to decide in this case is that
24 the State court exercises of judicial review to
25 invalidate previously precleared practices as compliant

1 with section 5 do not give rise to section 5 changes.

2 And, Chief Justice Roberts, just to get back
3 to the textual piece of this, we have pointed, in
4 addition to the "in force or effect" language, which we
5 think -- which we think requires judgment for the
6 Governor on Young versus Fordice grounds and the
7 November 1, 1964, language, we have also pointed to the
8 provision in the -- in section 5 that we have referred
9 to as the "savings clause," which I think provides good
10 reason at the very least to think that Congress was
11 thinking about court decisions enjoining existing
12 baselines differently from the way it was thinking about
13 the typical legislative and administrative changes that
14 have been the grist of this Court's section 5
15 jurisprudence.

16 JUSTICE GINSBURG: Mr. Newsom, before you
17 finish I would like to ask you a question about what
18 action Governor Riley would take if you're right on the
19 law. That is, a mistake by the Alabama Circuit Court
20 can't invalidate a law that the Supreme Court says on
21 judicial review of -- on review of the circuit court
22 that the circuit court got it wrong.

23 The first time around when Jones was elected
24 and then the Governor mooted any controversy by just
25 appointing him. Now we have a similar situation.

1 We have somebody who has won an election overwhelmingly
2 against the person that the Governor appointed. There
3 are, what, five months left in the term?

4 If your position on the law is correct, would
5 the Governor, in fact, oust the person who was a
6 four-to-one winner in a popular election and install the
7 person who was a loser in -- would that happen? Could
8 we project, based on what happened the first time
9 around, that the Governor would not so thwart the will
10 of the people?

11 MR. NEWSOM: It would be the Governor's
12 option, Your Honor, whether to -- to do what was done in
13 1987 or '8, I suppose, and to install the winner of the
14 election or to reinstate Juan Chastang to his position.
15 I have not discussed with the Governor what his specific
16 intention would be with respect to that. But it would
17 be his option to take one of those two courses under the
18 law.

19 I'd like to reserve the balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Newsom.

22 Ms. Karlan.

23 ORAL ARGUMENT OF PAMELA S. KARLAN

24 ON BEHALF OF THE APPELLEES

25 MS. KARLAN: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 I want to turn initially to two cases that
3 weren't mentioned yet by the Court that I think dispose
4 of the question of whether the law was in force or
5 effect. And I would like to direct the Court's
6 attention to page 101 of the joint appendix, because the
7 language I'm going to be talking about appears there in
8 the course of the Governor's request for reconsideration
9 of DOJ's objection.

10 This is the language from this Court's opinion
11 in Young against Fordice. And it starts midway down the
12 page, where the Court says that: "The simple fact that
13 a voting practice is unlawful under State law does not
14 show entirely by itself that the practice was never in
15 force or effect." We agree.

16 And then the Court goes on to say: "A
17 State, after all, might maintain in effect for many
18 years a plan that technically or in one respect or
19 another violates some provision of State law," citing
20 Perkins against Matthews and City of Lockhart against
21 United States.

22 All that Young against Fordice does is
23 explain that that case is a sport that deviates from the
24 general rule that this Court has had that when a law is
25 in force or effect, its constitutionality under State

1 law doesn't matter.

2 I'd also like to direct the Court's
3 attention to page 114 of the joint appendix, where Act
4 85-237's text appears, and direct you to the bottom of
5 the page in section 4, which says: "This Act shall
6 become effective immediately upon its passage and
7 approval by the Governor upon its otherwise becoming a
8 law," which it did in June of '85 when the State
9 obtained preclearance.

10 JUSTICE SCALIA: Do you agree that the
11 lawsuit to invalidate it was filed as soon as was
12 feasible?

13 MS. KARLAN: I don't honestly know the
14 answer to that question, Justice Scalia, because Alabama
15 law has different views, for example, on ripeness and
16 the like than Article III does. And this also goes to
17 the question that Justice Ginsburg asked at the very end
18 of the argument about the remedy in this case, because
19 Alabama law here is quite peculiar. And since we filed
20 our brief, there have been two opinions by the Alabama
21 Supreme Court, in a case called Roper against Rhodes and
22 a case called Wood against Booth, that reiterated under
23 Alabama law once an election has been held, if no
24 contest litigation was timely brought, the fact that the
25 person is unentitled to remain in office does not allow

1 the contest after the fact.

2 So we have a peculiar problem in this case,
3 which is even if this Court were to reverse, there was
4 an election held here pursuant to Alabama Act 2006-342
5 that was conceivably valid under Alabama law. And the
6 question whether to replace Merceria Ludgood, who won
7 that election, as you noted, by a four-to-one margin,
8 with either Juan Chastang or somebody else is quite up
9 in the air.

10 JUSTICE SCALIA: Why didn't the Alabama
11 Supreme Court say that in this very case?

12 MS. KARLAN: Well, in this case, the
13 election hadn't been held yet, Justice Scalia. That is,
14 the Alabama Supreme Court in the Riley decision here
15 ruled in the Governor's favor before we brought our
16 preclearance action, so there was no election on the
17 table.

18 JUSTICE GINSBURG: Then it was the district
19 judge that made Alabama go to the preclearance after the
20 second election.

21 MS. KARLAN: Yes, that's correct.

22 JUSTICE GINSBURG: But still, if you take
23 this case at its essence, a circuit court got Alabama
24 law wrong, and that's what you say counts as to make the
25 law operative.

1 The law becomes operative because an Alabama
2 intermediate court or trial court made a wrong decision
3 about Alabama law; and then when the supreme court
4 corrects it, that doesn't count. That's essentially
5 your position. That --

6 MS. KARLAN: No.

7 JUSTICE GINSBURG: -- that they're locked --
8 Alabama is locked into a mistake that was made about
9 Alabama law by that circuit court.

10 MS. KARLAN: No, Your Honor. We're not
11 saying that Alabama is locked in by the mistake of the
12 circuit court. What we're claiming here is that in
13 April of 1985, Alabama passed Act 85-237. As a matter
14 of Alabama law, it went into effect. In 1985, Alabama
15 received preclearance. That law was on the books; an
16 election was held; a man served for three years. But
17 it's not just that, Justice Ginsburg, that is at issue.

18 JUSTICE SCALIA: Excuse me. I don't think
19 -- I don't think I follow you that, as a matter of
20 Alabama law, it went into effect. Just because the
21 statute said it went into effect does not prove that it
22 went into effect. I think the Alabama --

23 MS. KARLAN: Well, Your Honor --

24 JUSTICE SCALIA: -- the Alabama Supreme
25 Court would say it never went into effect because it was

1 unconstitutional.

2 MS. KARLAN: No. No, Your Honor. If you
3 look at page 5 of the Defendant's trial brief, which is
4 -- I think it's Docket No. 16 -- you'll see that there
5 in footnote 5 the State says: We asked for the Alabama
6 Supreme Court to hold Act 85-237 void ab initio. They
7 did not do that, but we think they ought to have.

8 And so even as a matter of Alabama law, I
9 don't think this is 100 percent clear. But if I can
10 turn to the 2004 Act, because we think one of the --

11 JUSTICE KENNEDY: But suppose they didn't
12 have that footnote. Suppose they said: We hold it void
13 ab initio. Then what's your answer to Justice Scalia's
14 question?

15 MS. KARLAN: My answer to his question is
16 Perkins against Matthews and City of Lockhart against
17 United States still compel the result of finding that
18 this law went into effect as a matter of Federal law,
19 because the question of whether a law is in force or
20 effect is a question of construing section 5 of the
21 Voting Rights Act, which is Federal law.

22 JUSTICE ALITO: Well, you're saying that if
23 a State passes a statute that's -- a State legislature
24 passes a statute that's flagrantly in violation of the
25 State constitution, it immediately is precleared; it's

1 locked into place?

2 MS. KARLAN: Yes, I am.

3 JUSTICE SCALIA: That rule of law renders
4 constitutional under State law an act that would
5 otherwise not be constitutional.

6 MS. KARLAN: No, it does not render it
7 constitutional.

8 JUSTICE SCALIA: Well, that's what you are
9 saying.

10 MS. KARLAN: No.

11 JUSTICE SCALIA: You are saying that's the
12 effect: It locks it in.

13 MS. KARLAN: It locks it in until the State
14 comes up with a constitutional cure, in the same way --

15 JUSTICE SCALIA: Oh, but it can't go back.

16 MS. KARLAN: No, it cannot go back.

17 JUSTICE SCOUTER: It locks it in.

18 MS. KARLAN: Well, it doesn't -- it doesn't
19 require that they stay with that law. It simply says
20 they cannot make a change without obtaining
21 preclearance, because that's what section 5 does. It's
22 a clear, bright-line rule.

23 JUSTICE SOUTER: May I ask: You're not --
24 and correct me if I'm wrong. I didn't think you were
25 arguing that because of the preclearance followed by the

1 State determination of unconstitutionality, that the
2 State was required to follow that unconstitution law.

3 I thought your argument simply was that, in
4 effect, there was a stalemate at that point, and the
5 State was going to have to come up with some new law
6 that would be precleared. Am I correct?

7 MS. KARLAN: It's a little trickier than
8 that, Justice Souter, for the following reason. Let me
9 give you a hypothetical that will --

10 JUSTICE SCALIA: For the reason that, absent
11 their coming up with a new law, what law would be in
12 effect?

13 MS. KARLAN: That's what I was about to
14 explain.

15 JUSTICE SOUTER: And isn't the answer that
16 no law would be in effect? I mean, you're in the same
17 situation then that you would be in if there had been no
18 judicial litigation going on; the law had been brought
19 to the Justice Department or the D.C. court, had --
20 preclearance had been refused. The State at that point
21 didn't have the old law because it had been repealed.
22 It couldn't apply the new law because it wasn't
23 precleared, and somebody in Alabama would have to do
24 something.

25 Aren't we in essentially the same position

1 here?

2 MS. KARLAN: Well, we are; but, as I
3 suggested, it's a little trickier than that. Because,
4 of course, the existing practice is for purposes of
5 section 5 the law that's in force or effect. So, for
6 example, suppose you had a State that --

7 JUSTICE SOUTER: Well, it was in force and
8 effect.

9 MS. KARLAN: Excuse me?

10 JUSTICE SOUTER: Does the theory require
11 that we assume it remains in force and effect by virtue
12 of the preclearance even when there is a subsequent
13 determination of unconstitutionality?

14 MS. KARLAN: I think the answer to that
15 question, candidly, is yes, and the State can cure that
16 quite quickly. But let me explain it with a
17 hypothetical that might make this clearer, which is:
18 Suppose you had a State in which people were voting in
19 an election, and then the State supreme court held that
20 that part of the county had never been properly annexed.
21 The State would be required to continue letting those
22 people vote in the election unless and until it received
23 preclearance from the Department of Justice. That's
24 what Perkins against Matthews and City of Lockhart
25 require.

1 So the State has to, once it adopts a
2 practice, continue using that practice unless and until
3 it receives preclearance for a new practice or -- and
4 this is somewhat --

5 JUSTICE KENNEDY: Well, I'm not sure that in
6 those cases you had what you had here, which was a
7 declaration, let's assume, of invalidity ab initio.

8 Let me give you this hypothetical.

9 MS. KARLAN: Sure.

10 JUSTICE KENNEDY: A county council goes to
11 the board of commissioners or the board of supervisors
12 of the local county or legislative branch and says: The
13 legislature has just adjourned; it passed a lot of laws;
14 and one of the laws it passed is that you now have to
15 set the qualifications locally for certain officials.
16 So we have to act on this right away.

17 They pass the legislation. Three weeks go
18 by. The county council says: You know, I made a
19 mistake; that law was never passed; it was never signed
20 by the governor. What rule -- what result?

21 MS. KARLAN: Well, in your hypothetical
22 there would be no problem at all, and this goes back to
23 Justice Souter's hypothetical that he asked Mr. Newsom,
24 which is: That law hasn't been precleared. Therefore,
25 it's never in force or effect as a baseline.

1 JUSTICE KENNEDY: Well, suppose it had been
2 precleared?

3 MS. KARLAN: Then it would be Perkins
4 against Matthews.

5 JUSTICE BREYER: Well, is it? Because -- I
6 mean, what they're saying is let's use a little common
7 sense here. And you look at Fordice, and, you know --
8 and there it was an instance where it just didn't take
9 effect at all as a practical matter.

10 And then we cited those two cases you're
11 talking about, but I can't tell from the Fordice opinion
12 -- there was a ward system that was in fact in force or
13 effect. But I don't know how long that ward system was
14 in effect. It might have been for a long time, and
15 people might have taken action under it.

16 And the same thing is true in City of
17 Lockhart. I can't tell. You may know. But my point is
18 they are saying: Here we have a middle case, and what
19 we want is to use enough sense to say, look, it wasn't
20 really in effect. People challenged it the minute they
21 could. They -- everybody knew it was unconstitutional,
22 or a lot of people believed it. And the governor then
23 did something to make up for it.

24 If you are going to say that that little bit
25 counts as putting it in force and effect, do you know

1 what we're going to have? We're going to have every
2 municipality all over the country that doesn't always
3 know what the rules are, and they pass something, and
4 people challenge it immediately. It's obviously wrong,
5 and they're stuck with it as a matter of Federal law.
6 That's going to be a mess.

7 They are saying something like that, so I'd
8 like to hear your response.

9 MS. KARLAN: Well, there are two factual
10 points in response to your question, Justice Breyer.
11 The first is, with respect to Perkins against Matthews,
12 the Mississippi statute that required the use of
13 at-large rather than district elections was passed in
14 1962 and used precisely once before the preclearance, so
15 it is on all fours with this case. It was a three-year
16 lag between the unconstitutionality of the City of
17 Canton's practice and the preclearance. So if we were
18 to ask what does our case look most like that this Court
19 has already decided, it would be Perkins.

20 The second point which I want to direct the
21 Court to is we are not actually talking in this case --
22 and this goes as well to the Court's judicial function
23 -- about just Act 85-237. We are also talking in this
24 case about Act 2004-215, which was the attempt by the
25 Alabama Legislature to revise the constitutionality of

1 Act 85-237. Because the central problem in this case
2 was a provision of the Alabama Constitution, Section
3 105, that said you couldn't pass local legislation
4 unless the act -- unless the general act made that very
5 clear.

6 So in 2004 the Alabama legislature thought
7 it had solved the entire problem here by amending the
8 section of chapter 11 of the Alabama election law to say
9 unless a local law provides otherwise you can use
10 gubernatorial appointment. That law was intended to
11 revive Act 85-237. We know this because, among other
12 things, our clients were the sponsors of the act -- yes,
13 among the sponsors of the act.

14 Now, the Alabama legislature then enacted --

15 JUSTICE ALITO: If I could just ask you, in
16 making that argument, aren't you asking us to say that
17 the purpose of this act -- that the intent of the
18 Alabama legislature in passing that act is different
19 from the intent as determined by the Alabama Supreme
20 Court?

21 MS. KARLAN: Yes, but if I can explain why I
22 think this is important in a sense. It's because the
23 claim of the State is that this is a case about
24 fundamental, constitutional provisions of Alabama law;
25 but in fact in its current guise, which is whether the

1 2004 Act revived the 1985 Act, this is purely a matter
2 of statutory construction. And what the Alabama Supreme
3 Court said is: We don't think the legislature meant to
4 make this law retroactive; we think they meant to make
5 it only prospective. But that's not the same thing as
6 talking about fundamental Marbury against Madison
7 judicial review of the kind that the --

8 JUSTICE GINSBURG: It's a review of a lower
9 court by a higher court. That's what higher courts do.
10 They review for correctness, and the Alabama Supreme
11 Court said the circuit court got it wrong. It
12 misconstrued the law, and we are correcting that. And
13 that's --

14 MS. KARLAN: That is correct, Justice
15 Ginsburg, which leads to the second pair of cases that
16 we think this Court has already decided that provide you
17 absolutely clear guidance as to why preclearance was
18 required here. And that's this Court's decision in
19 Hathorn against Lovorn and this Court's decision in
20 Branch against Smith.

21 In both of those cases as well, you had the
22 question, quite acutely in Hathorn against Lovorn, of
23 whether or not the chancery court in Mississippi, which
24 is a trial-level court, got the law right or wrong on
25 whether elections should be conducted in a particular

1 way in Warren County. The Mississippi Supreme Court
2 said they got it wrong.

3 But this Court said that decision and the
4 implementation require preclearance because the presence
5 of a court decree doesn't exempt a contested change from
6 section 5.

7 So in this case, had Governor Riley decided
8 completely by himself that he, having taken an oath to
9 support the Alabama constitution, could not in good
10 conscience let a special election go forward here, it
11 would be no different from having the Alabama Supreme
12 Court decide that.

13 JUSTICE SCALIA: What does the Alabama
14 Supreme Court preclear? Where it was redistricting and
15 it had a redistricting plan, I can see that it would
16 send over to the attorney general the new redistricting
17 plan. What -- what do the justices of the Alabama
18 Supreme Court have to come before the attorney general
19 to get his benediction upon?

20 MS. KARLAN: They have to --

21 JUSTICE SCALIA: Do they submit their
22 opinion and say, "Mr. Attorney General, please approve
23 our opinion"?

24 MS. KARLAN: No. No, Justice Scalia.

25 JUSTICE SCALIA: What?

1 MS. KARLAN: They do not have to come before
2 this court at all. The chief election administrators of
3 Alabama or in this case the governor must come before
4 the court before he issues a certificate of office.

5 JUSTICE SCALIA: Before the attorney
6 general, you're talking about?

7 MS. KARLAN: He doesn't even have to come
8 before the attorney general. If you look at the
9 statute, he could have come to the United States
10 District Court for the District of Columbia and gotten a
11 --

12 JUSTICE SCALIA: Well -- but, first of all,
13 you're trying to get -- the quick way is to get it from
14 the attorney general.

15 MS. KARLAN: Well -- and the attorney
16 general here found that this was a retrogressive change.

17 JUSTICE SCALIA: I understand. What was
18 supposed -- what should have been submitted to the
19 attorney general? What is the Alabama Supreme Court's
20 --

21 MS. KARLAN: Exactly what was submitted
22 after the Federal court did, which is the -- the
23 decision to appoint rather than to elect someone to
24 District 1 of the Mobile County Commission. The Alabama
25 Supreme Court didn't have to submit anything, and the

1 Federal court could not have been clearer in this case.

2 JUSTICE GINSBURG: The Federal court told
3 the Alabama --

4 MS. KARLAN: No, it told --

5 JUSTICE GINSBURG: It told Alabama. I
6 thought -- I thought that one of the reasons was
7 adjudication wasn't complete when the district court
8 made its first ruling, so the district court said, now,
9 go off and get those two Alabama Supreme Court decisions
10 precleared.

11 MS. KARLAN: No, Your Honor. That's not
12 what they said.

13 JUSTICE GINSBURG: What did they say?

14 MS. KARLAN: If you turn to the August 18th
15 final judgment, which is on page 9a over to page 10a of
16 the jurisdictional statement, they said judgment is
17 entered in our favor -- that was the declaratory
18 judgment -- and then said the State of Alabama has 90
19 days to obtain preclearance.

20 The State was free to come to the DDC and
21 seek judicial preclearance if they wanted. The State
22 was free, as Justice Scalia suggested, to try and use
23 the quick way.

24 JUSTICE GINSBURG: But the State's position
25 was it shouldn't have to preclear a decision of the

1 State's highest court --

2 MS. KARLAN: But it -- it --

3 JUSTICE GINSBURG: -- saying that the State
4 lower court got it wrong.

5 MS. KARLAN: Justice Ginsburg, this does not
6 say the State has to preclear the decision of the
7 Alabama Supreme Court. It simply says -- and if you
8 look at page 8a, which is the end of the district
9 court's opinion -- you know, it's enjoining enforcement
10 of those decisions; it's not enjoining those decisions.
11 You don't have to spin the Alabama Supreme Court here.
12 But they literally sued only the governor in this case.

13 CHIEF JUSTICE ROBERTS: Why did Alabama have
14 to preclear anything? On November 1st, 1964, this was
15 an appointed position. This is not a change from what
16 was, quote, "in force or effect" on November 1st, 1964.

17 MS. KARLAN: Well, for one thing, this Court
18 would have to overrule its decision --

19 CHIEF JUSTICE ROBERTS: Oh, no, no, no.
20 Those decisions are all dicta.

21 MS. KARLAN: Well, let me go then straight
22 to a factual point, which is this is not the same
23 practice as they were using on November 1st of 1964,
24 because that practice was a combination of two things.
25 It was gubernatorial appointment under Alabama Section

1 11-3-6, and it was gubernatorial appointment in the
2 context of at-large elections, but --

3 CHIEF JUSTICE ROBERTS: So something else
4 changed --

5 MS. KARLAN: No, the --

6 CHIEF JUSTICE ROBERTS: -- whether they were
7 membership elections or at-large elections.

8 MS. KARLAN: It's a huge difference, Your
9 Honor.

10 CHIEF JUSTICE ROBERTS: The argument you
11 made in your brief was that this was already decided in
12 Reno versus Bossier Parish. I didn't see the argument
13 --

14 MS. KARLAN: No, we didn't --

15 CHIEF JUSTICE ROBERTS: Is the argument that
16 this was not, in fact, a change in your brief?

17 MS. KARLAN: We didn't see that until their
18 reply brief, and we didn't think we needed to file a
19 surreply brief. This Court doesn't allow them.

20 CHIEF JUSTICE ROBERTS: No. They had the
21 argument -- you at least thought they did --

22 MS. KARLAN: No.

23 CHIEF JUSTICE ROBERTS: You quote in your
24 brief Reno versus Bossier Parish --

25 MS. KARLAN: Yes.

1 CHIEF JUSTICE ROBERTS: -- and one other
2 case. I'm thinking of one other.

3 MS. KARLAN: I think you're probably
4 thinking about Young against Fordice, itself.

5 CHIEF JUSTICE ROBERTS: Yes. And you raised
6 the argument -- you criticized them for raising this
7 argument; that this wasn't any different; but you did
8 not say that it wasn't any different.

9 MS. KARLAN: Well, their claim there was
10 that -- not that this wasn't any different, but part of
11 our explanation is that, in context, we think there is a
12 difference between what was going on in 1964.

13 They actually, I think, want to go back to
14 the 1977 to 1985 practice, which is the post -- the
15 post-election practice in Alabama once Brown against
16 Moore had been decided.

17 Now, the other thing is I will say that the
18 Department of Justice regulations on this, which are
19 quite clear, have been in effect since 1987. And in the
20 2006 -- in the 2006 reenactment of the Voting Rights
21 Act, if you look at the House report, they talk about
22 Young against Fordice there. And they say Mississippi's
23 attempt "to revive and to resuscitate" -- and those are
24 the House's words, "to revive and to resuscitate" -- the
25 --

1 CHIEF JUSTICE ROBERTS: Well, I think you're
2 quite right on the DOJ regulations and the House report,
3 but I just don't see how that squares with the statutory
4 language.

5 MS. KARLAN: Well, Your Honor, if I could
6 just make an observation about section 5 more generally
7 in Allen, and I'll start here. In Allen, itself, this
8 Court recognized that the text of section 5 doesn't
9 provide for private rights of action, and yet it found
10 them.

11 It recognized that the text of section 14 of
12 the Voting Rights Act suggests that the only place that
13 can be -- that the only place that can litigate section
14 5 --

15 CHIEF JUSTICE ROBERTS: So because we've
16 ignored the text in other areas, we should just forget
17 about it here?

18 MS. KARLAN: No, because that -- that --
19 those sets of decisions by this Court have been ratified
20 by Congress and have been the longstanding practice
21 under section 5. You should continue that.

22 CHIEF JUSTICE ROBERTS: I saw that -- so
23 they ratified -- these cases were ratified by Congress,
24 but Congress did not change the language in the statute.

25 MS. KARLAN: Because it thought that the

1 purpose of section 5 -- if I could spend just one
2 sentence on this -- the purpose of section 5's November
3 1st language was to prevent a sort of game of
4 Whac-A-Mole in which the States would keep changing the
5 practice. And the idea of that freeze was to hold it in
6 place so that it could be challenged as a constitutional
7 matter before the State switched again. It wasn't to
8 create a safe harbor against attacks on the November 1st
9 practice.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you, Ms.

12 Karlan.

13 Mr. Shanmugan.

14 ORAL ARGUMENT OF KANNON K. SHANMUGAM

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURIAE,

17 SUPPORTING THE APPELLEES

18 MR. SHANMUGAM: Thank you, Mr. Chief

19 Justice, and may it please the Court:

20 As this Court has repeatedly recognized,
21 section 5 of the Voting Rights Act requires a cover
22 jurisdiction to seek preclearance whenever it seeks to
23 administer any change in its voting practices. And
24 there is no basis in either text or policy for carving
25 out an exception for all or some changes precipitated by

1 State-court decisions. The judgment of the district
2 court should, therefore, be affirmed.

3 JUSTICE SCALIA: Do you have any problem
4 with the republican-form-of-government provision of the
5 Constitution?

6 MR. SHANMUGAM: Absolutely not.

7 JUSTICE SCALIA: As I understand what's
8 going on here, the -- the legislative process of the
9 people of Alabama, whereby something is invalid as a
10 law, suddenly becomes a law because the Federal attorney
11 general has given it preclearance. The people have
12 never voted for that properly under their Constitution.
13 Yet, it becomes law in Alabama. And that's a republican
14 form of government?

15 MR. SHANMUGAM: Well, I don't think, with
16 respect, Justice Scalia, that that's actually happened
17 here. What happened in this case was that the practice
18 of special elections actually went into effect while the
19 litigation was ongoing.

20 The Alabama Supreme Court then held that the
21 statute adopting that practice was invalid as a matter
22 of State law, to be sure, and, therefore, was void ab
23 initio as a matter of State law.

24 As a result of that decision, the remedy in
25 some sense was to revert to the practice of

1 gubernatorial appointments. And what happened then was
2 that it was then incumbent on the attorney general under
3 section 5, the Alabama attorney general, to seek
4 preclearance of that practice. And the Federal attorney
5 general made the determination that it would be
6 retrogressive to go back to that practice.

7 JUSTICE SCALIA: From an Alabama law that
8 had never been adopted by the people of Alabama?

9 MR. SHANMUGAM: It had been adopted by the
10 people of Alabama.

11 JUSTICE SCALIA: Not validated, so --

12 MR. SHANMUGAM: It was invalid, to be sure,
13 as a matter of State law. And then -- and then what
14 happens at that point is that the Alabama attorney
15 general is in very much the same position as he would be
16 if the Federal attorney general had held that some
17 statutory provision that had been enacted by the Alabama
18 legislature was improperly retrogressive. He would be
19 faced with a choice: He could either proceed under a
20 practice that was invalid under State law, or the State
21 could pass a new law providing a new practice for
22 filling vacancies, which would then have to be
23 precleared.

24 JUSTICE GINSBURG: That all depends on there
25 having been a change. What there was was gubernatorial

1 appointment. Then the legislature passes a law.
2 Suppose that the circuit court had said: Sorry,
3 legislature, you got it wrong. The general prevails.
4 You can't do it this way. The law is invalid. Suppose
5 the circuit court had said that. Then there would not
6 have been an election, right?

7 MR. SHANMUGAM: That's exactly right, and
8 under our view there would not have been a change,
9 because it is the fact that there was a special election
10 that is critical.

11 JUSTICE GINSBURG: So there becomes -- there
12 becomes a change only because the circuit court has made
13 a mistake about what the State law is. That's very odd.

14 MR. SHANMUGAM: There becomes a change,
15 Justice Ginsburg, because the practice of special
16 elections actually went into effect by virtue, at a
17 minimum, of the fact that an election was actually held.
18 And, to be sure --

19 CHIEF JUSTICE ROBERTS: What if the district
20 court -- the circuit court, I guess it is, in Alabama.
21 This action is filed before the election, and the
22 circuit court says: You may have a successful claim
23 here, but I'm not going to disrupt the election. There
24 isn't time. So this election can go forward, and during
25 that period I'll be considering the law.

1 We do that all the time, or three-judge
2 district courts do, saying we're going to look at this
3 question, but we don't have time to stop the election,
4 so it's going to go forward. Now, in that case, would
5 that lead to the same result?

6 MR. SHANMUGAM: Well, with respect,
7 Mr. Chief Justice, I think that what a State court might
8 do in that circumstance would be to enter a stay until
9 it could adjudicate the validity of the State's law.

10 CHIEF JUSTICE ROBERTS: Well, sure, but not
11 always. I mean, you know, if it's a week before the
12 election or something, even if they think it's a serious
13 claim, they sometimes say: We're going to allow the
14 election to go forward because we've got to look at
15 this, and perhaps the State supreme court has to look at
16 it, and we don't want to hold up the election.

17 MR. SHANMUGAM: Well, it is certainly the
18 implication of our position that if the law actually
19 goes into effect and an election is held and if
20 preclearance has already been granted for, in some
21 sense, the contrary position, then, yes, if the State
22 supreme court or the State trial court subsequently
23 gives State law a different interpretation, then that
24 change is going to require preclearance.

25 JUSTICE KENNEDY: That's not just an

1 implication. That's your whole theory.

2 MR. SHANMUGAM: Well, it is our theory as to
3 what the "in force or effect" requirement means. And we
4 believe that that follows from this Court's decision in
5 Young versus Fordice, which sets out the parameters for
6 determining --

7 JUSTICE BREYER: Well, Young versus Fordice,
8 that's Young versus -- I mean, if it never went into
9 force and effect, of course, we don't reach questions
10 like republican form of government or 1964 safe harbors
11 and so forth. And so I think it's an important matter.
12 And as I read Fordice, we have over here an instance
13 where nothing happened. You know, some people
14 registered, and then immediately they were told the
15 registration was no good. So it wasn't in force and
16 effect.

17 When I looked at Perkins v. Matthews, that
18 was not a case where the law was challenged immediately.
19 Rather, what Justice Brennan said is that this has been
20 in effect from 1962 to 1965 at least, and in 1965 they
21 had an election under the ward system. So even if it
22 might have been unconstitutional or was, it was still in
23 effect for three years.

24 In the other case, City of Lockhart, Justice
25 Powell says this statute has been in effect, we assume,

1 from 1917 to 1973. That's not exactly, you know, a
2 fleeting matter. So -- so here we have a case where
3 they challenged it instantly, where it was litigated as
4 fast as it possibly could be, where in fact, as Justice
5 Ginsburg just said, a different decision of the circuit
6 court would have led to the opposite if it never would
7 have even had it. So what harm does it do to the
8 enforcement of the civil rights laws of the United
9 States if the holding of this Court were: Well, under
10 these circumstances, where challenged immediately, et
11 cetera, it never took force and effect?

12 MR. SHANMUGAM: Justice Breyer, the harm is
13 that there would be actual retrogression. And I think
14 that there are two critical and distinct legal issues
15 that this Court needs to address. The first is whether
16 this practice was in effect for long enough for it to
17 have been "in force or effect."

18 The governing precedent on that issue is Young
19 versus Fordice. And we believe that there is more here.
20 There is not simply the partial implementation of voter-
21 registration procedures for a very brief period of time,
22 a matter of weeks. An election was actually held, and
23 if that is not sufficient to satisfy the "in force or
24 effect" requirement, it's hard to see what would be.

25 The second question is whether a practice

1 can be said to be in force or effect when it was void ab
2 initio as a matter of State law. And we do respectfully
3 submit that the City of Lockhart and Perkins answer that
4 question because in both of those cases the Court held
5 that the relevant question was whether the practice was
6 actually in effect.

7 CHIEF JUSTICE ROBERTS: Counsel, you talk
8 about "force and effect." Of course, the statute says
9 "force or effect on November 1st, 1964." Do you have
10 anything to add to Ms. Karlan's response on my quaint
11 fixation on the language of the statute?

12 MR. SHANMUGAM: Well, it isn't quaint at
13 all. I would say that, you know, I do think that as a
14 textual matter one could perhaps make the argument that
15 where a covered jurisdiction changes its voting practice
16 after the statutory-coverage date and then enacts
17 basically a new version of the preexisting practice,
18 that the new practice could as a formal matter be said
19 to be a new practice.

20 But I want to make two additional points.
21 The first is that the question of whether the statute
22 covers reversions-to-coverage-date practices is really
23 not properly before the Court. Appellant seemingly did
24 not raise it before the district court, and it is not --

25 CHIEF JUSTICE ROBERTS: Well, that can't tie

1 our hands in properly interpreting the statute.

2 MR. SHANMUGAM: Well, it's not within the
3 scope of the question presented, either. The question
4 presented focuses solely on the question of whether
5 changes precipitated by State court decisions require
6 preclearance. And that's a question that this Court has
7 answered twice in Hathorn and Branch.

8 The only other thing that I would say is
9 that it has been not only the consistent interpretation
10 of the attorney general, but also the consistent
11 interpretation as far as we are aware of the lower
12 courts, that the statute does reach reversions to
13 preexisting practices as well.

14 CHIEF JUSTICE ROBERTS: I don't see how --
15 regardless of how consistent the interpretation is, how
16 can you read "November 1st, 1964," to mean anything
17 other than that date?

18 MR. SHANMUGAM: Well, I do think that a
19 textual argument could be made, Mr. Chief Justice, that
20 the practice that was in effect as of the coverage date
21 in some sense ceases to exist when the jurisdiction
22 adopts an intervening, distinct practice. And certainly
23 there is enough ambiguity, I believe, to get us into the
24 realm of deference, and this Court has repeatedly
25 recognized that the attorney general's interpretations

1 of section 5 are entitled to substantial deference.

2 JUSTICE SCALIA: Mr. Shanmugan, what does
3 the attorney general do when he gets -- I mean, does he
4 just preclear any old thing that somebody shoves under
5 his nose? Does he look to see whether there is
6 litigation pending on it? Was this litigation pending
7 when it was --

8 MR. SHANMUGAM: I think this bears --

9 JUSTICE SCALIA: -- when the plan was
10 submitted for --

11 MR. SHANMUGAM: This bears on a critical
12 point, Justice Scalia. And this Court has a line of
13 cases in the section 5 area that says that it is really
14 incumbent on covered jurisdictions, when they seek
15 preclearance, clearly to identify the relevant change in
16 their voting practices when they come to the attorney
17 general for preclearance. And when the 1985 act was
18 submitted for preclearance, there was nary a word in the
19 Alabama attorney general's submission that there was any
20 potential difficulty with the statute under State law.

21 And so the attorney general precluded on the
22 understandable understanding that the statute simply
23 affected a shift to special elections. And I do think
24 that the great price of Appellant's interpretation is
25 that if the court were to adopt it, it would suddenly

1 shift the burden to the Federal attorney general or to
2 the D.C. District Court to, when they receive a
3 preclearance submission, essentially assess the meaning
4 and validity of any State statute, lest the State
5 statute be construed differently by a State court and,
6 thus, lock in the preclearance court or attorney
7 general. And we believe that that problem, along with
8 this Court's decisions in Branch and Hawthorne, support
9 our interpretation.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Newsom, four minutes.

13 JUSTICE STEVENS: Mr. Newsom, I hate to
14 intrude on your rebuttal time, but I would like to ask
15 you this question. Supposing a State after 1964 and
16 before 2000 made 35 different changes that all improved
17 voting rights. Could they always go back to the
18 practice in effect in 1964 and not have to preclear?

19 REBUTTAL ARGUMENT OF KEVIN C. NEWSOM

20 ON BEHALF OF THE APPELLANT

21 MR. NEWSOM: Your Honor, if we are talking
22 about a legislative or administrative change, the answer
23 may well be no under this Court's dicta.

24 JUSTICE STEVENS: It could be any kind of
25 change, legislative, administrative, judicial. Could

1 they always go back to 1964 and have a safe harbor?

2 MR. NEWSOM: I think that, Your Honor, if
3 you're going to treat all forms of changes together,
4 then they may well be able to, although I would say
5 this: That that will very rarely, if ever, be the case.
6 This is sort of the oddball case in which the reversion
7 happens to be --

8 JUSTICE STEVENS: I understand. I'm just
9 trying to understand how much teeth there is in the 1964
10 date. Is it a safe harbor, or isn't it?

11 MR. NEWSOM: Well, I think the explanation
12 for 19 -- for November 1, 1964 is that section 5 was
13 implemented as a five-year stopgap measure. It has now
14 been extended through 2031 with no amendment of the
15 language. So it might have made some sense as a hard
16 requirement in 1964. It makes much less practical
17 sense, I recognize, today. But the language is what the
18 language is. I'm sorry.

19 CHIEF JUSTICE ROBERTS: What about
20 Ms. Karlan's response that this is not the same
21 practice, but it's different because the underlying
22 method of election has been changed.

23 MR. NEWSOM: With respect, Your Honor, I
24 think the practice is gubernatorial appointment. It
25 doesn't strike me that the underlying method of how the

1 election might have operated if the rule were election
2 should matter. The rule was gubernatorial appointment.
3 The rule is by virtue of these decisions gubernatorial
4 appointment.

5 If I may, just a couple of housekeeping
6 items.

7 Justice Ginsburg, the question of what DOJ
8 was asked to preclear here is crystal clear from the
9 district court's opinion. On August 18, 2006, this
10 three-judge court held that two Alabama Supreme Court
11 decisions, Stokes v. Noonan and Riley v. Kennedy, must
12 be precleared before they can be implemented. So the
13 notion that the State was not asked to preclear judicial
14 decisions is simply incorrect.

15 The second thing I'd like to mention just
16 briefly is that the Federalism exacerbation here exists
17 in a very real way for this reason. The entire
18 legislative and litigation history of section 5 has been
19 about legislative and administrative change. Even with
20 respect to those sorts of changes, this Court has said
21 most recently and most forcefully in Presley that that
22 application of section 5 even there works an
23 extraordinary change to the traditional course of
24 relations between the States and the Federal Government.
25 So that to this point, to be sure, the Court has been

1 willing to accept that extraordinary departure. The
2 question in this case, however, is whether this
3 extraordinary departure ought to become this
4 extraordinary departure to account for this new
5 category, this new universe of changes.

6 JUSTICE SOUTER: Why as a matter of
7 Federalism is it more extraordinary to review a court
8 determination than the determination of a popularly
9 elected legislature?

10 MR. NEWSOM: Well, Your Honor, there are two
11 pieces of this, really. It's more extraordinary simply
12 in a quantitative sense. We are talking about a lot
13 more changes, so in sheer numbers we have got an
14 exacerbation.

15 But it's also in a qualitative sense, the
16 sense that we are living in a post Marbury, post Cooper
17 versus Aaron, post Bernie world in which State courts
18 just like Federal courts are tasked with finally
19 deciding what State law means. And so there is a very
20 real difference, I think, in upsetting the considered
21 judgment of a State court with respect to what State
22 court -- with respect to what State law means than there
23 is --

24 JUSTICE SOUTER: But they are not saying
25 that State law is different from what it means. They

1 are saying that you cannot put a change in effect until
2 you get it precleared.

3 MR. NEWSOM: Right, Your Honor. But with
4 respect, I think that that doesn't do justice to the
5 functional reality of what's going on here. In 1988 the
6 Alabama Supreme Court says -- may I -- says in Stokes
7 versus Noonan that 85-237 is, and always was,
8 unconstitutional.

9 We have a void-ab-initio doctrine that's
10 simply part of Alabama law. And, again, I don't think
11 anybody here seriously disputes that 85-237 was
12 unconstitutional.

13 And 20 years later DOJ steps in and refuses
14 to bless that determination; and, to be sure, it is not
15 meddling around in the intricacies of State law but the
16 functional equivalent is the same. They set that
17 judgment aside; and, notwithstanding the Stokes court
18 invalidation of that, DOJ says very clearly in its
19 objection letters that 85-237, despite its invalidation,
20 remains in full force and effect.

21 CHIEF JUSTICE ROBERTS: Thank you counsel.

22 MR. NEWSOM: Thank you.

23 CHIEF JUSTICE ROBERTS: The case is
24 submitted.

25 (Whereupon, at 2:02 p.m., the case in the

1 above-entitled matter was submitted.)

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