IN THE SUPREME COURT OF THE UNITED STATES

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BOB RILEY, GOVERNOR OF :

ALABAMA, :

Appellant :

v. : No. 07-77

YVONNE KENNEDY, ET AL. :

- x

Washington, D.C.

Monday, March 24, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

KEVIN C. NEWSOM, ESQ., Birmingham, Ala,; on behalf of the Appellant.

PAMELA S. KARLAN, ESQ., Stanford, Cal.; on behalf of the Appellees.

KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Appellees.

C O N T E N T S

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

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

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

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

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

temporarily misapplied State law.

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

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

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

MR. NEWSOM: Well, Justice Stevens --

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

MR. NEWSOM: I'm sorry?

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Well, I suppose States get

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

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

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

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

But the question here is quite different:

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

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

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

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

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

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

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

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

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

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

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

that's precleared.

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

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

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

JUSTICE GINSBURG: And it was precleared at

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

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

JUSTICE GINSBURG: And it was submitted by?

MR. NEWSOM: Submitted by the State of Alabama.

JUSTICE GINSBURG: Yes. And then the litigation came.

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

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

MR. NEWSOM: For purposes of this litigation.

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

MR. NEWSOM: Well, that's right.

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

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

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

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

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

JUSTICE SOUTER: I will assume that.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: It seems like an exercise in futility.

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

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

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

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

MR. NEWSOM: Sure.

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

MR. NEWSOM: Yes.

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

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

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

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

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

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

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

seems to me quite a big difference.

MR. NEWSOM: With respect, Your Honor --

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

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

JUSTICE BREYER: So I assume it wasn't.

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

JUSTICE BREYER: Yes.

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

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

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

Now, what's your argument about that?

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

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

MR. NEWSOM: Right. And --

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

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

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

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

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

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

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

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

JUSTICE BREYER: But what my question is:

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

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

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

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

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

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

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

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

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

Why in the world did you say that?

MR. NEWSOM: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Newsom.

Ms. Karlan.

ORAL ARGUMENT OF PAMELA S. KARLAN

ON BEHALF OF THE APPELLEES

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

and may it please the Court:

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

This is the language from this Court's opinion in Young against Fordice. And it starts midway down the page, where the Court says that: "The simple 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." We agree.

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

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

law doesn't matter.

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

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

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

the contest after the fact.

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

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

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

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

MS. KARLAN: Yes, that's correct.

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

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

MS. KARLAN: No.

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

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

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

MS. KARLAN: Well, Your Honor --

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

unconstitutional.

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

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

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

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

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

locked into place?

MS. KARLAN: Yes, I am.

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

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

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

MS. KARLAN: No.

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

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

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

MS. KARLAN: No, it cannot go back.

JUSTICE SCOUTER: It locks it in.

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

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

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

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

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

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

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

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

Aren't we in essentially the same position

here?

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

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

MS. KARLAN: Excuse me?

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

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

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

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

Let me give you this hypothetical.

MS. KARLAN: Sure.

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

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

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

JUSTICE KENNEDY: Well, suppose it had been precleared?

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

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

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

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

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

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

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

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

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

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

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

Now, the Alabama legislature then enacted --

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

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

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

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

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

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

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

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

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

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

MS. KARLAN: They have to --

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

MS. KARLAN: No. No, Justice Scalia.

JUSTICE SCALIA: What?

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

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

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

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

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

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

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

Federal court could not have been clearer in this case.

JUSTICE GINSBURG: The Federal court told the Alabama --

MS. KARLAN: No, it told --

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

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

JUSTICE GINSBURG: What did they say?

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

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

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

State's highest court --

MS. KARLAN: But it -- it --

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: So something else changed --

MS. KARLAN: No, the --

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

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

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

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

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

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

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

MS. KARLAN: No.

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

MS. KARLAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

MS. KARLAN: Because it thought that the

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

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Karlan.

Mr. Shanmugan.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE APPELLEES

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

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

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

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

MR. SHANMUGAM: Absolutely not.

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

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

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

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

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

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

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

JUSTICE SCALIA: Not validated, so --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: That's not just an

implication. That's your whole theory.

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

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

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

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

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

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

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

The second question is whether a practice

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, that can't tie

our hands in properly interpreting the statute.

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

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

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

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

of section 5 are entitled to substantial deference.

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

MR. SHANMUGAM: I think this bears --

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Newsom, four minutes.

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

REBUTTAL ARGUMENT OF KEVIN C. NEWSOM

ON BEHALF OF THE APPELLANT

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

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

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

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

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

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

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

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

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

If I may, just a couple of housekeeping items.

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you counsel.

MR. NEWSOM: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

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

above-entitled matter was submitted.)

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