11

No. 07-77

IN THE

Supreme Court of the United States

Bob Riley, Governor of Alabama,
Appellant,

v.

Yvonne Kennedy, et al.,
Appellees.

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

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
*DEBO P. ADEGBILE
RYAN P. HAYGOOD
ALEXIS KARTERON
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 HUDSON STREET
SUITE 1600
NEW YORK, NY 10013
(212) 965-2200

KRISTEN CLARKE
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-1300

*Counsel of Record

February 20, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. LDF, widely regarded as the legal arm of the civil rights movement, served as counsel in numerous civil and criminal cases across the South. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF has an extensive history of involvement in efforts to eradicate barriers to the full participation of African Americans in the political process. LDF has represented parties or participated as *amicus curiae* in numerous voting rights cases before this Court and the United States Courts of Appeals. *See, e.g.*, *League of United Latin Am. Citizens v. Clements*, 126 S. Ct. 2594 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). In addition, LDF has particular expertise in jurisprudence concerning Section 5 of the Voting Rights Act of 1965 ("Section 5"), and advocated for its enactment and reauthorization on several occasions, most recently in 2006. *See, e.g., An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 7-8 (2006) (statement of Theodore M. Shaw, Director-Counsel and President, NAACP Legal Defense and Educational Fund).

Of particular relevance to this case, LDF has extensive experience bearing on the role that state courts in jurisdictions covered by Section 5 played in enforcing — or thwarting attempts to enforce — the constitutional rights of African Americans when Congress considered and passed the Voting Rights Act. That experience reveals that some state courts, like other state institutions, used their authority to deny African Americans the right to vote.

SUMMARY OF ARGUMENT

The plain language of Section 5 and this Court's precedents required Alabama to obtain preclearance before filling the Mobile County Commission vacancy by gubernatorial appointment rather than special election. The fact that an Alabama Supreme Court decision was the basis of the change to the voting procedure at issue provides no exemption from Section 5 coverage. After a long experience with persistent disregard of the Constitution, Congress intended to close off all avenues for covered jurisdictions to evade enforcement of the Fifteenth Amendment, including state court orders.

When Congress considered and passed the Voting Rights Act of 1965 ("VRA"), state courts played an integral role in state sanctioned actions that disfranchised African Americans across the South. In particular, the Alabama judiciary demonstrated astonishing activism by authoring a notorious literacy test whose use was later enjoined around the state and stands as an example of the actions that impeded the federal government's efforts to protect the voting rights of African-American Alabamians. Legislative history confirms that Congress was aware of the unfortunate role of state courts when it first attempted to address the disfranchisement of African Americans in 1957, and subsequent events only underscored the need for the prophylactic measures of Section 5 first adopted by Congress in 1965. If Congress had exempted state courts from Section 5 coverage, one of the surest paths to evade the statute's dictates would have led directly to the state courthouse.

ARGUMENT

I. When it Passed the Voting Rights Act of 1965 Congress Was Aware of the Role State Courts Played in Discriminating Against African Americans in Voting.

As Appellees explain, Appellant's proposed exemption of state court orders from Section 5 coverage is contrary to both the statute's plain language and this Court's precedents requiring that state court orders like the Alabama Supreme Court's decisions at issue here be subject to Section 5 coverage. *See Branch v. Smith*, 538 U.S. 254 (2003); *Hathorn v. Lovorn*, 452 U.S. 255 (1982). In addition to consideration of these precedents, Section 5 "must . . . be interpreted in light of its prophylactic purpose and the historical experience which it reflects." *McCain v. Lybrand*, 465 U.S. 236, 246 (1984). As this Court has recognized, "[Section] 5 reflects Congress' firm resolve to end 'the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.'" *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

The breadth of Section 5's language in combination with historical experience and this Court's precedents counsel that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985). "If it were otherwise, States could evade the requirements of § 5 . . . ." *Id.* Given the role that state courts played in denying African Americans access to the

franchise, particularly in Alabama as discussed *infra*, and Congress's recognition that some state courts refused to enforce the mandates of the Fifteenth Amendment, it is inconceivable that Congress intended to create the exemption that Appellant seeks. Indeed, to have done so in 1965 would have "opened a loophole in the statute the size of a mountain," *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring) — a result that Congress clearly did not intend.

Among the VRA's "array of potent weapons," *South Carolina v. Katzenbach*, 383 U.S. at 337, Section 5 has proven remarkably effective because "Congress intended that the Act be given 'the broadest possible scope' to reach '*any* state enactment which altered the election law of a covered State in even a minor way,'" *Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 567 (1969)) (emphasis added). When it passed the VRA, Congress was mindful of the role that state courts in Section 5 covered jurisdictions,[2] particularly in Alabama, routinely played in maintaining or erecting barriers to the franchise for African Americans. As a result, Congress put nothing in the statute that would exclude potentially discriminatory acts by *any* state official or institution that demonstrated blatant disregard for the constitutional rights of African Americans. To read Section 5 to include such a

---

[2] When Section 5 took effect in 1965, the following jurisdictions were covered in whole or in part: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. *See* 30 Fed. Reg. 9897 (Aug. 6, 1965).

loophole would inoculate from review precisely the types of actions Congress sought to bring within the statute's scope.

A. At the time of the VRA's Passage, State Courts in Covered Jurisdictions Embraced White Supremacy and Issued Rulings Designed to Prevent African Americans from Asserting Their Constitutionally Guaranteed Rights.

At the time the VRA was passed, there was significant evidence that state courts in the South were hostile forums for African Americans seeking to vindicate their federal constitutional rights. Whatever the context, whether faced with claims devised as part of a legal strategy to promote desegregation, or in unremarkable criminal proceedings, states often turned to courts to help ensure that African Americans were treated as second-class citizens.[3]

In the years before Congress passed the VRA, states routinely violated the constitutional rights of African Americans and their allies in defense of segregation and other white supremacist policies. When those conflicts reached the judicial system, state courts routinely failed to offer fair forums and

---

[3] Such experiences led an LDF attorney who later succeeded Thurgood Marshall as Director-Counsel to the following observation: "It is a common defense tactic in segregation cases to urge that the cause should first be heard in the state courts, where, with rare exceptions, the difficulties of the plaintiff will be multiplied." Jack Greenberg, *Race Relations and American Law* 61-62 (1959).

enforce the Constitution. When the police illegally arrested civil rights activists who held protests or conducted sit-ins at lunch counters, or when state officials interfered with the NAACP's organizing efforts or maintained segregated public facilities, state courts simply did not enforce the Constitution. In those circumstances, LDF accumulated significant experience before this Court appealing unconstitutional decisions from state court orders in covered jurisdictions. *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Fox v. North Carolina*, 378 U.S. 587 (1964); *Harris v. Virginia*, 378 U.S. 552 (1964); *Mitchell v. City of Charleston*, 378 U.S. 551 (1964) (per curiam); *Green v. Virginia*, 378 U.S. 550 (1964); *Williams v. North Carolina*, 378 U.S. 548 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Avent v. North Carolina*, 373 U.S. 375 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana v. NAACP*, 366 U.S. 293 (1961); *Boynton v. Virginia*, 364 U.S. 454 (1960); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Morgan v. Virginia*, 328 U.S. 373 (1946).

Of course, this Court's jurisdictional review was, as it remains today, limited. *See* 28 U.S.C. § 1257. Therefore, absent a federal interest, adjudication of state law questions — such as interpretations of voter qualifications and any review of decisions regarding those qualifications — was available only in state courts, whose judiciaries were a product of the Jim Crow system in which they existed at the time Congress considered and passed the VRA.

Elected judgeships, in combination with segregated state bars and law schools, and the widespread disfranchisement of African Americans, led to state judiciaries that counted segregationists, but virtually no African Americans, among their ranks in 1965. State courts in covered jurisdictions were expressly politicized bodies, with judges elected to courts of all levels, or appointed by the legislature. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 Tex. L. Rev. 1081, 1087 & nn.29-33 (1966) (reviewing judicial selection methods in every state).[4] At the time of the VRA's passage, these courts included virtually no African Americans, and not a single African American sat on a southern state appellate court. Beverly Blair Cook, *Black Representation in the Third Branch*, 1 Black L.J. 260, 272 (1971).

Alabama's record provided no exception. "In the 1950s, the Alabama State Bar openly supported segregation legislation." *SCLC v. Sessions*, 56 F.3d 1281, 1287 (11th Cir. 1995) (*en banc*). In addition, the only state-supported law school in Alabama did not enroll a Black student until 1964.[5] *White v.*

---

[4] Alabama, Georgia, Louisiana, Mississippi, and North Carolina elected judges. *Id.* at 1087 & n.29. The legislatures of Virginia and South Carolina appointed judges. *Id.* at 1087 & n.32.

[5] The very few African Americans admitted to the Alabama State Bar before 1965 had either attended law schools in other states or studied law privately. *See* U.W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940-1980*, 52 Ala. L. Rev. 1121, 1128-29, 1132-33 (2001). To maintain segregation at the University of Alabama, the State provided limited financial assistance to Black Alabamians who

Alabama, 867 F. Supp. 1519, 1555 (M.D. Ala. 1994), *vacated on other grounds by* 74 F.3d 1058 (11th Cir. 1996). By 1994, there had only ever been five African Americans on Alabama's circuit courts, the state's trial courts of general jurisdiction.[6] *SCLC*, 56 F.3d at 1288. Although Alabama elects its circuit court judges in partisan elections, they had all first gained their judgeships through gubernatorial appointment. *Id.* at 1285, 1288. A similar record existed at the appellate level, where only two African Americans had served as appellate judges in the 125 years before a VRA case challenging the appellate courts' electoral scheme. *White*, 867 F. Supp. at 1527.[7]

---

attended law school elsewhere. But for their race, these students were qualified to attend the University of Alabama School of Law. *Id.* at 1133 n.64.

[6] Other covered jurisdictions have similar records. As this Court observed, by the late 1980s, no Black person had ever been elected to the Louisiana Supreme Court. *Chisom v. Roemer*, 501 U.S. 380, 385-86 (1991). Similarly, African Americans in Georgia and Mississippi were largely excluded from the state bars and judiciaries until the 1960s and 1970s. *See Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1571 (S.D. Ga. 1994) (noting that African Americans "were not admitted to Georgia's law schools until the 1960's and then only in token numbers"); *Martin v. Allain*, 658 F. Supp. 1183, 1193 (S.D. Miss. 1987) (noting that the first Black judge in Mississippi received a gubernatorial appointment to a trial court in 1977, and that only three Blacks had served on Mississippi's courts of general jurisdiction by 1987).

[7] Both of those judges were initially appointed, rather than elected to judicial office, and, as one of them stressed in his statement to a federal court, incumbency was the key to his success in an election to maintain his judgeship: "Incumbency is the best method . . . to overcome the reluctance on the part of many white voters to vote for a black candidate." *White*, 867 F.

These state judiciary demographics, however, were manifestations of the deeper problem. The Alabama Supreme Court demonstrated astonishing activism in upholding official discrimination, akin to that demonstrated by other state elected officials, and displayed blatant disregard for both the federal constitutional rights of African Americans, and specific orders from this Court instructing it to enforce those rights. In one such case, the Alabama Supreme Court, in rejecting a jury discrimination claim, made its view of African Americans clear by explaining that "[t]he evidence shows that a large majority of the Negroes are ignorant, with little or no education and low moral character, and there is much venereal disease among them and a large percentage of illegitimacy." *Fikes v. State*, 81 So.2d 303, 309 (Ala. 1955), *rev'd*, 352 U.S. 191 (1956). Similarly, it found no abuse of discretion and upheld a criminal contempt order against an African-American woman who refused to respond to a prosecutor who addressed her simply as "Mary."[8] *Ex parte Hamilton*, 156 So.2d

---

Supp. at 1534 (ellipsis in original). To date, only three African Americans have ever served on the Alabama Supreme Court, and only two have survived elections. Thomas Spencer et al., *Moore Wins, Credits God*, Birmingham News, Nov. 8, 2000, at 1; Philip Rawls, *Justices for All*, Mobile Register, Sept. 3, 1999, at A1; Michael Sznajderman, *Blacks Still Face Obstacles in Election to Top Offices*, Birmingham News, Aug. 23, 1998, at 14.

[8] The Alabama Supreme Court recounted the exchange between the woman held in contempt and the prosecutor in its opinion:

> Q. What is your name, please?
> A. Miss Mary Hamilton.
> Q. Mary, I believe – you were arrested – who were you arrested by?

926 (Ala. 1963), *rev'd per curiam sub nom. Hamilton v. Alabama*, 376 U.S. 650 (1964). This Court reversed in both cases.

Another example of the Alabama Supreme Court's steadfast refusal to recognize the constitutional rights of African Americans, which occasioned four trips to this Court and four reversals, involves Alabama's attempt to dismantle and bankrupt the NAACP. On the Alabama Attorney General's petition for a temporary restraining order, a circuit court enjoined the NAACP from doing business in Alabama for its failure to register, even though "Alabama had never ousted any other corporation for nonregistration, and the registration statute mentioned only a fine as penalty for failure to comply." Michael Meltsner, *Southern Appellate*

A. My name is Miss Hamilton. Please address me correctly.
Q. Who were you arrested by, Mary?
A. I will not answer a question –
BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.
A. – your question until I am addressed correctly.
THE COURT: Answer the question.
THE WITNESS: I will not answer them unless I am addressed correctly.
THE COURT: You are in contempt of court
ATTORNEY CONLEY: Your Honor – your Honor –
THE COURT: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine.

Ex parte Hamilton, 156 So.2d 926 (Ala. 1963), *rev'd per curiam sub nom. Hamilton v. Alabama*, 376 U.S. 650 (1964).

Courts: A Dead End, in Southern Justice (Leon Friedman, ed. 1965) 142. The same court acceded to the Alabama Attorney General's demand for a contempt order when the NAACP refused to provide its membership lists, and issued a $100,000 fine. *NAACP v. Alabama ex rel. Patterson*, 91 So.2d 221 (Ala. 1956), *rev'd*, 357 U.S. 449 (1958). On appeal, the Alabama Supreme Court refused to hear the merits of the case, holding that the NAACP had not complied with procedural rules. *Id.*

This Court considered the merits of the constitutional claim, over Alabama's objections, because it held that the Alabama Supreme Court's procedural bar to hearing the merits of the NAACP's claim could not be reconciled with Alabama case law. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 457-58 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."). As for the First Amendment claim, this Court unanimously upheld the NAACP's right to keep its membership lists secret because disclosure would likely lead "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. This Court reversed and instructed the Alabama Supreme Court to lift the contempt order and the related $100,000 fine. *Id.*

In a remarkable ruling, the Alabama Supreme Court willfully disregarded this Court's decision on federal constitutional law, and described it as resting on a "mistaken premise." *Ex parte NAACP*, 109 So.2d 138, 139 (Ala.), *rev'd per curiam sub nom. NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959). It

again affirmed the circuit court's contempt judgment and $100,000 fine in contravention to this Court's instructions. *Id.* at 140. This Court was, therefore, again required to intervene, and unanimously provided the Alabama Supreme Court with explicit instructions regarding its earlier order: "In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition." *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 241 (1959) (per curiam).[9]

Again, this Court was called upon to protect the rights of Blacks when Alabama officials doggedly pursued their campaign against the NAACP in the state courts. The NAACP's appeal to the Alabama Supreme Court of an unconstitutional circuit court order proved fruitless. The Alabama Supreme Court did not hear the case on the merits, and instead found that the NAACP's brief did not conform to procedural rules. *NAACP v. Alabama*, 150 So.2d 677, 682 (Ala.) ("It is clear that nothing is presented to this court for review."), *rev'd sub nom. NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1963).

On appeal before this Court, Alabama argued, as it had in the first case, that the Alabama Supreme

---

[9] Although the Alabama Supreme Court this time followed instructions, the circuit court "persisted in its failure to hold a hearing on the issue which had been so pressing in 1956 that the association had been ordered out of business without one." Meltsner at 144. The NAACP then turned to the federal courts for adjudication of its constitutional claims, but they abstained from entering the case until the state courts ruled on the issues. *NAACP v. Gallion*, 190 F. Supp. 583 (M.D. Ala. 1960), *vacated by* 290 F.2d 337 (5th Cir. 1961), *vacated by* 368 U.S. 16 (1961) (per curiam).

Court decided the case on "a nonfederal ground of decision adequate to bar review in this Court of the serious constitutional claims which the Association present[ed]." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1963). Finding that position "wholly unacceptable" because the NAACP had, in fact, complied with Alabama procedural rules, this Court heard the case on its merits and unanimously reversed the Alabama state court's decision, finding that Alabama unconstitutionally infringed on the First Amendment associational rights of the NAACP and its members. *Id.* at 296, 297, 310. In short, the Alabama state courts refused to enforce the constitutional rights of African Americans and their allies, a proclivity the courts displayed repeatedly.[10] Unsurprisingly, the Alabama judiciary's bold disregard for this Court's orders generated enormous attention that did not escape the attention of members of Congress.[11] *See, e.g.*, Anthony Lewis,

---

[10] *See, e.g., Abernathy v. Alabama*, 380 U.S. 447 (1965) (reversing convictions of a mixed-race group who attempted to be served at a segregated lunch counter); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (reversing Alabama Supreme Court holding that state libel laws lacked protections for freedom of speech and press); *Gober v. City of Birmingham*, 373 U.S. 374 (1963) (per curiam) (reversing convictions of civil rights demonstrators); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963) (same); *Anderson v. Alabama*, 366 U.S. 208 (1961) (per curiam) (reversing a manslaughter conviction where a systematic exclusion of African Americans from the jury was shown); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (reversing Alabama Supreme Court's interpretation of federal statute that would have allowed a labor union to discriminate on the basis of race).

[11] An op-ed by sitting Alabama Supreme Court Justice Tom Parker received similar attention in 2006. *See* Tom Parker,

Alabama Ouster of NAACP Upset, N.Y. Times, June 2, 1964, at A1; James E. Clayton, *Patience of Justices Thins In Alabama NAACP Case*, Wash. Post, Mar. 25, 1964, at A8; *NAACP Penalty Again Ruled Void*, N.Y. Times, June 9, 1959, at A31.

B. The Alabama Judiciary Actively Suppressed Attempts by African Americans to Exercise the Right to Vote.

Aside from its legally unsound rulings in the cases detailed above, the Alabama judiciary was a significant actor in the state machinery that disfranchised African Americans. In the 1940s, the Alabama Supreme Court construed the Alabama Constitution — in what Appellant would describe as an exercise of its "core judicial-review function" — to effectively eliminate judicial review of decisions by local voter registrars to enroll voters. As a result, voter registrars throughout Alabama were left with unfettered discretion to deny African Americans the right to register to vote. In addition, Alabama state court judges devised Alabama's notorious literacy test and issued extraordinarily activist decisions in response to Congress's first attempts to enforce the Fifteenth Amendment, the Civil Rights Acts of 1957 and 1960.

Alabama Justices Surrender to Judicial Activism, Birmingham News, Jan. 1, 2006 ("State supreme courts may decline to follow bad U.S. Supreme Court precedents because those decisions bind only the parties to the particular case.").

1. The Alabama Literacy Test.

The Alabama Supreme Court played a leading role in ensuring the effectiveness of Alabama's literacy test, the state's most notorious tool used to disfranchise African Americans. "[P]art of a movement that swept the post-Reconstruction South to disenfranchise blacks," *Hunter v. Underwood* 471 U.S. 222, 229 (1985), Alabama's use of a literacy test to determine voter qualifications originated at its 1901 Constitutional Convention.[12] *See United States v. Alabama*, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court) ("Delegate after delegate took the floor eager to be put on record as favoring 'the absolute disfranchisement of the Negro as a Negro.'" (footnote omitted)); *Davis v. Schnell*, 81 F. Supp. 872, 876-77 (S.D. Ala.) (three-judge court), *aff'd per curiam*, 336 U.S. 933 (1949); Virginia Van der Veer Hamilton, *Alabama: A Bicentennial History* 94-95 (1977); J. Mills Thornton III, *Dividing Lines: Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham and Selma* 435-36, 678 n.94 (2002); C. Vann Woodward, *Origins of the New South, 1817-1913* 229 (1951).

---

[12] Alabama's literacy test was immediately challenged by African Americans under the Fourteenth and Fifteenth Amendments, but their claims failed on jurisdictional grounds. *Giles v. Harris*, 189 U.S. 475 (1903).

Section 186[13] of the Alabama Constitution allowed citizens to seek judicial review of county registrar decisions denying them the right to register to vote.[14] Ala. Const., art. VIII, § 186(6) (repealed 1996). The Alabama Supreme Court struck an initial blow against Section 186's usefulness by requiring lower courts to presume the validity of any Board of Registrars' initial decision to disfranchise an applicant. *Boswell v. Bethea*, 5 So.2d 816, 821 (Ala. 1942). Later, the court adopted stringent pleading requirements for Section 186 cases. *See Hawkins v. Vines*, 30 So.2d 451 (Ala. 1947); *Madison v. Nunnelee*, 20 So.2d 589 (Ala. 1945). In short, the Alabama Supreme Court construed Section 186's judicial review provision so that it became a dead-letter, leaving voter registrars with unfettered authority to administer the literacy test in a discriminatory manner. As detailed below, they achieved remarkable success in this endeavor until the VRA barred the use of literacy tests. *See* 42 U.S.C. § 1973b.

Alabama's literacy test became an even more important tool to disfranchise Blacks when this

---

[13] Section 186 provided: "A person to whom registration is denied shall have the right of appeal by filing a petition to the Circuit Court or Court of like jurisdiction for the County in which he seeks to register to have his qualification as an elector determined." Ala. Const., art. VIII, § 186(6) (repealed 1996).

[14] In the early 1940s, the Jefferson County Board of Registrars initially attempted to avoid judicial review by simply adding to the rolls the African-American plaintiffs who filed suit to contest its decisions, thereby rendering the cases moot. *See* Thornton at 154. However, the Alabama courts eventually heard several cases under Section 186.

Court's decision in *Smith v. Allwright*, 321 U.S. 649 (1944), eliminated the use of the white primary. *See* Donald S. Strong, *Alabama: Transition and Alienation, in The Changing Politics of the South* 427, 443 (William C. Havard ed., 1972). Shortly thereafter, Alabama adopted the Boswell Amendment through referendum, which augmented the Alabama Constitution's literacy qualification for voters by requiring new voters to demonstrate that they could "understand and explain" any article of the United States Constitution. *Id.*

A federal court declared the literacy requirement unconstitutional, citing both proponents' racial appeals in the ratification campaign, and administration of the amendment that resulted in the exclusion of African American citizens from the franchise. *Davis*, 81 F. Supp. at 880 ("It . . . clearly appears that this Amendment was intended to be, and is being used for the purpose of discriminating against applicants for the franchise on the basis of race or color."). "[T]he legislature responded in the summer of 1951 with a new amendment, written by the arch-segregationist Senator Miller Bonner of Wilcox and co-sponsored by all the Black Belt senators," that was ratified by voters in December 1951. Thornton at 437.

Once the 1951 amendment took effect, the Alabama Supreme Court helped implement and execute the Alabama literacy requirement. In doing so, it took affirmative steps to effect a change in voting that constitute precisely the type of official action that Congress specifically sought to cover by Section 5.

In particular, the Alabama Supreme Court authored a uniform questionnaire to be completed by all applicants. *See United States v. Atkins*, 323 F.2d 733, 735 (5th Cir. 1963); Thornton at 437-38. Remarkably, at a time when only 19.4% of African-American Alabamians were registered to vote, the court-written questionnaire asked the applicant whether she "believe[d] in free elections," and whether she "w[ould] support and defend the Constitution of the United States and the Constitution of the State of Alabama." *See United States v. Penton*, 212 F. Supp. 193, 206 (M.D. Ala. 1962) (questionnaire reprinted therein). If the questionnaire itself did not deter Blacks from registering to vote, its administration by Alabama's local voter registrars made registration virtually impossible for them. Thornton at 438.

Litigation under the Civil Rights Acts of 1957 and 1960 led to only a limited and fleeting reduction in Alabama's discriminatory use of its questionnaire. *See, e.g., United States v. Atkins*, 323 F.2d 733 (5th Cir. 1963) (Dallas County); *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962) (Macon County); *United States v. Penton*, 212 F. Supp. at 201 (Montgomery County); *United States v. Alabama*, 7 Race Rel. Rep. 1146 (M.D. Ala. 1962) (Bullock County); *United States v. Mayton*, 7 Race Rel. Rep. 1136 (M.D. Ala. 1962) (Perry County). The Alabama Supreme Court responded by designing 12 new questionnaires, taking square aim at the impact of the new federal civil rights statutes and frustrating civil rights organizers' efforts to teach voters how to pass the

literacy test.[15] *See United States v. Parker*, 236 F. Supp. 511, 519-29 (M.D. Ala. 1964) (reprinting the test).

The impact of the Alabama Supreme Court's new questionnaire was substantial and immediate. In his 1965 congressional testimony concerning the VRA, Attorney General Katzenbach described the test as follows:

> For Negroes to register in Dallas County was . . . extremely difficult. In February 1964, it became virtually impossible. Then, all Alabama county boards of registrars . . . began using a new application form. This form included a complicated literacy and knowledge-of-government test. . . . [T]he great majority of voting-age Negroes, unregistered, now faced still another, higher obstacle in voting.[16]

---

[15] For example, the first new questionnaire asked an applicant whether she had "ever seen a copy of this registration form before receiving this copy today." *See United States v. Parker*, 236 F. Supp. 511, 519-29 (M.D. Ala. 1964) (reprinting the test). Other questions were aimed at testing an applicant's knowledge of nuanced facts pertaining to government that could not possibly have any bearing on the applicant's ability to read, *e.g.*, "Are post offices operated by the state or federal government?" *id.* at 524; "How many stars are there in the United States Flag?" *id.* at 523; "In what town or city is the court-house located in this county?" *id.* at 527. As one political scientist has remarked, "[t]o refer to the form as a 'literacy test' is absurd." Strong at 444.

[16] Of course, Alabama's use of a literacy test perpetuated the impact of the inferior educational opportunities provided to African Americans in the era of *de jure* school segregation by

Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 89th Cong. 6-7 (1965). Accordingly, like the earlier version, its use was enjoined around the state before passage of the VRA. *See, e.g., United States v. Parker*, 236 F. Supp. 511, 519-29 (M.D. Ala. 1964) (Montgomery County); *United States v. Hines*, 9 Race Rel. Rep. 1332 (N.D. Ala. 1964) (Sumter County); *United States v. Perry*, 9 Race Rel. Rep. 1330 (S.D. Ala. 1964) (Choctaw County).

Accordingly, the Alabama Supreme Court played a pivotal role in creating Alabama's literacy test and then guaranteeing that judicial review of discriminatory decisions by voter registrars who administered the test was fruitless in the years preceding passage of the VRA. Such changes are precisely the type of official action impacting voting that Congress sought to cover through Section 5.

2. The Alabama Judiciary's Hostility to the Civil Rights Acts of 1957 and 1960.

In the period preceding enactment of the VRA, the Alabama judiciary instituted other voting changes that later would fall within the ambit of Section 5's coverage. This was the case, for example, when it issued extra-jurisdictional decrees and orders that sought both to frustrate efforts by African

---

linking access to the franchise to literacy. *See Gaston County v. United States*, 395 U.S. 285, 296-97 (1969).

Americans to secure the franchise and undermine Congress's efforts to enforce the guarantees of the Fifteenth Amendment through the Civil Rights Acts of 1957 and 1960. These two laws represented Congress's first post-Reconstruction attempts to eradicate voting discrimination in the South, and congressional experience with the state's resistance influenced the structure of the VRA.

The Civil Rights Act of 1957 (the "1957 Act"), the first federal civil rights law passed after Reconstruction, included three major provisions related to voting. *See* Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (1957) (codified as amended at 42 U.S.C. § 1971(a)-(d)). *First*, it affirmed that "[a]ll citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude." 42 U.S.C. § 1971(a)(1). *Second*, it stated that it is unlawful for a private individual or a person acting under color of law to interfere or attempt to interfere with the right to vote. *Id.* § 1971(b). *Third*, it authorized the Attorney General, on behalf of the United States, to institute civil actions for preventive relief when there were reasonable grounds to believe that any person would deprive a person of the right to vote. *Id.* § 1971(c).[17]

---

[17] In addition, the 1957 Act provided for the creation of the U.S. Commission on Civil Rights, which would have investigative, but not prosecutorial powers. Pub. L. No. 85-315, §§ 104-06, 71 Stat. 634, 634-36 (1957) (codified as amended at 42 U.S.C. § 1975 *et seq.*). Further, the 1957 Act provided for the appointment of an Assistant Attorney General for Civil Rights. *Id.* § 111, 71 Stat. at 637.

In seeking to enforce the 1957 Act, both the U.S. Commission on Civil Rights (the "Commission") and the Department of Justice, by way of the newly appointed Assistant Attorney General for Civil Rights, encountered recalcitrance and intransigence from state officials — particularly Alabama state court judges — when they attempted to take action in accordance with the 1957 Act. In response to complaints of voting discrimination from Black citizens in Alabama, the Commission subpoenaed records and held field hearings in the state in 1958. Berl I. Bernhard, *The Federal Fact-Finding Experience—A Guide to Negro Enfranchisement*, 27 Law & Contemp. Probs. 468, 470 (1962). The Commission initially requested voter and registration records from Dallas and Wilcox Counties. However, a defiant state court judge in the circuit covering those counties responded immediately:

> At once Judge Hare summoned the counties' grand juries into emergency session, charged them to investigate whether there had been any maladministration of the registration laws, and impounded all the registrars' records while the supposed investigation continued, thus forestalling their production before the commission. Hare emphasized to the jurors that they could take as long as they needed to look into the matter. Thereafter, as grand jury succeeded grand jury, the records remained under impoundment. . . .
>
> The Civil Rights Commission never did get to examine the records, but in August 1959 its staff reported that the

> evidence of discrimination in registration in the counties nevertheless was clear.

Thornton at 441.

Subpoenaed voter registrars followed the lead of hostile state court judges by appearing at Commission hearings, but refusing to testify. *In re Wallace*, 170 F. Supp. 63, 66-67 (M.D. Ala. 1959); Richard L. Lyons, *Alabama Aides' Action Called Reprehensible*, Wash. Post, Dec. 11, 1958, at A1. George Wallace, then an Alabama Circuit Court judge, who had set the course followed by Judge Hare in Dallas and Wilcox counties, refused to provide the registration records subpoenaed by the Commission for Barbour and Bullock counties. *In re Wallace*, 170 F. Supp. at 67. In a federal action to enforce the Commission's subpoena requiring production of the registration and voting records, both the registrars and Judge Wallace mounted an argument that bears a striking resemblance to the claims presented by Appellant in this case: that enforcement "would constitute an improper inquiry into judicial acts of judicial officers." *Id.* A federal district court rejected this argument, and ultimately ordered Judge Wallace and the registrars to produce the records. *Id.* at 70.

In response to the evidence of hostile state judiciaries and recalcitrant state officials, Congress attempted to broaden the scope of relief available under the 1957 Act by enacting the Civil Rights Act of 1960 (the "1960 Act"). Following the Commission's recommendations, which were directly informed by its experience in Alabama, the 1960 Act's key provision related to enforcement of the Fifteenth Amendment and required that voter registrars retain

and preserve voter registration records for 22 months following any election. *See* Pub. L. No. 86-449, §§ 301-06, 74 Stat. 86, 88-89 (codified as amended at 42 U.S.C. § 1974 *et seq.*).

Following enactment of the 1960 Act, the Alabama judiciary, once again, played a critical role in undermining federal legislative efforts to extend the franchise and enforce the guarantees of the Fifteenth Amendment. When the Attorney General sought to inspect records in Montgomery County, a circuit court judge — without jurisdiction — declared the 1960 Act unconstitutional and immediately issued "a temporary injunction and restraining order forbidding the Attorney General of the United States, his agent, servants, employees and attorneys . . . to inspect or copy the records and papers in the possession, custody and control of [all Alabama] Boards of Registrars . . . under the color of authority purportedly given by the Civil Rights Act of 1960." *See Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 851 (M.D. Ala. 1960) (describing state court action) (internal quotation marks omitted; ellipses in original), *aff'd per curiam*, 285 F.2d 430 (5th Cir. 1961).[18]

Similarly, without regard for the fact that the 1960 Act provided the federal courts with exclusive jurisdiction to settle disputes under its provisions, another state court granted the Wilcox County Board

---

[18] Extra-jurisdictional decisions like the circuit court's concerning the 1960 Act's constitutionality likely influenced Congress's decision to mandate that declaratory judgment actions concerning Section 5 be brought in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973*l*(b).

of Registrars' request for declaratory and injunctive relief, enjoining the United States from "attempting to enforce the demand for voting records." *See Kennedy v. Bruce*, 298 F.2d 860, 862 (5th Cir. 1962) (describing state court action).

Plainly, the Alabama judiciary did not stand idly by when other state officials sought to perpetuate the disfranchisement of African-American Alabamians. Instead, the Alabama judiciary repeatedly facilitated various state actions taken to frustrate enforcement of federal laws aimed at extending the franchise to African Americans.

When Congress passed the Voting Rights Act in 1965, it did so explicitly in response to this long history of discrimination in the covered jurisdictions and the ineffectiveness of prior federal legislative efforts aimed at extending the franchise to minority voters. This evidence included the discriminatory actions taken by state courts in covered jurisdictions, including their active participation in official attempts to thwart civil rights, particularly the federally-protected voting rights of African Americans.

Like other state institutions, state courts effected changes to voting that Congress unquestionably sought to cover by Section 5. To read Section 5 to exempt state court decisions would create a result at odds with this Court's precedents and the statute's plain text and purpose, thereby insulating from scrutiny precisely the types of actions Congress sought to bring within the statute's scope.

II. Legislative History Indicates that Congress Knew State Courts Were Hostile to Black Voting Rights and Intended to Address the Problem.

The VRA's legislative history leaves no doubt that Congress intended to address the actions of state courts that had the potential to create barriers to the franchise. The centerpiece of the evidence Congress heard when considering initial enactment of the VRA concerned the Alabama literacy test's extraordinary efficacy in disfranchising potential Black voters.

As explained above, the Alabama Supreme Court played a significant role in ensuring that the literacy test was implemented and executed in a manner that resulted in the widespread disfranchisement of African American citizens. In crafting Section 5, which reaches "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c (emphasis added), Congress could not have meant to exclude voting changes implemented by the very state institution that drafted what was arguably the most effective disfranchisement tool and demonstrated such eagerness to disfranchise African Americans. *See* H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441-42 (1965) (describing experience with literacy test in Selma, Alabama); S. Rep. No. 89-162, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2546 (1965) (same). In short, Congress had no reason to determine that state courts in covered jurisdictions would adjudicate fairly cases involving the voting rights of African Americans.

Moreover, the record of Congress's efforts to remedy the extensive voting discrimination against

African Americans in covered jurisdictions begins with the Civil Rights Acts of 1957 and that experience further bolsters this point. The legislative history of the 1957 Act illustrates that Congress understood that state courts frequently sustained violations of African Americans' constitutional rights, and nothing occurred between 1957 and 1965 to alter this understanding.

As described above, the central provision of the 1957 Act provided the Department of Justice with new authority to pursue civil remedies for violations of the Fifteenth Amendment and of the statutes prohibiting racial discrimination in voting. *See* Pub. L. No. 85-315, § 111, 71 Stat. 634, 637 (1957), (codified as amended at 42 U.S.C. § 1971). Essential to the effectiveness of that new authority was the 1957 Act's provision that allowed the Department of Justice to bypass state courts by mandating federal jurisdiction of claims and allowing waiver of exhaustion of state remedies. *Id.* (codified as amended at 42 U.S.C. § 1971(d)).[19]

In hearings before the House of Representatives and the Senate, Attorney General Herbert Brownell, Jr., stressed the importance of this subsection to ensure that federal enforcement efforts would no longer be tied to hostile and resistant state courts. In his statement to the House Judiciary Committee, he

---

[19] The statute provides: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." 42 U.S.C. § 1971(d).

cited "elimination of the requirement that all State administrative and judicial remedies must be exhausted before access can be had to the Federal court," among the top three changes to the civil voting statute. H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1980. In addition, a Georgia Supreme Court decision, reversed by this Court, figured prominently among his examples of blatant disregard for constitutional rights in state administrative agencies and courts. *Proposals to Secure, Protect, and Strengthen Civil Rights of Persons Under the Constitution and Laws of the United States: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong. 6 (1957) ("The United States Supreme Court recently reversed the conviction of a Negro sentenced to death by a State court because of a showing that Negroes had been systematically excluded from the panels of the grand and petit juries that had indicted and tried him.").[20]

In his Senate testimony, the Attorney General further stressed the abdication of responsibility by state agencies and courts to adhere to the Constitution: "[I]n those areas where the local

---

[20] Attorney General Brownell referred to *Williams v. Georgia*, 349 U.S. 375 (1955), in which this Court considered the Georgia Supreme Court's holding that an African-American defendant did not make out a prima facie claim for jury discrimination where a superior court judge drew the names of jurors from a box using color coded tickets. *Id.* at 378 n.3 ("[T]he practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance . . . ." (quoting *Avery v. State*, 70 S.E.2d 716, 722 (Ga. 1952)).

community completely fails to respect Federal rights, the Federal Government must have power to act, and to act effectively, if the Federal Constitution and the Federal laws are to be, in the words of the Constitution, the 'supreme law of the land.'" *Id.* at 9.

Congress heeded this advice, and the House Judiciary Committee commented on the importance of the jurisdictional provision in its report to the Congress. *See* H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1975. ("The Committee on the Judiciary believes that a waiver of the doctrine of exhaustion of State administrative remedies is necessary in civil-rights cases, particularly when injunctive relief is sought."). When it accepted Attorney General Brownell's suggestion to allow 1957 Act claims to proceed to federal court without state court exhaustion, Congress provided an alternative to state courts and agencies that frequently disrespected the constitutional rights of African Americans.[21]

Nothing happened between 1957 and 1965 to alter the characteristics of state courts in covered jurisdictions that would have led Congress to exempt state court decisions from Section 5 coverage. Instead, as explained in the House Report accompanying the VRA, "the essential justification for the . . . bill," was the Department of Justice's inability to enforce the Fifteenth Amendment under

---

[21] Indeed, the Minority Report confirmed this intent, arguing that this portion of the 1957 Act "provide[s] a device to bypass State laws, State remedies, State courts, State judges, and State agencies." H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 2015.

the 1957 Act — a failure attributable in no small part to state courts such as Alabama's. H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2442 (1965). In fact, the very first witness who appeared at the House hearings on the VRA, Attorney General Katzenbach, described a 1957 Act enforcement action against, among others, Judge James Hare of Dallas County, Alabama, who had issued an unconstitutional injunction that barred civil rights activists from meeting at the height of the Selma voting rights campaign. *See Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 8 (1965); *United States v. Clark*, 249 F. Supp. 720, 726 (S.D. Ala. 1965) (three-judge court) (per curiam).

Further, as detailed above, Congress knew that Alabama courts were fundamentally unfair forums for hearings on claims involving race discrimination and erected precisely the types of barriers to adjudication that Congress helped the Department of Justice bypass in the 1957 Act. Voter registrars demonstrated extraordinary creativity in administering Alabama's literacy test to disfranchise African Americans, and, having already effectively eliminated judicial review of the registrars' decisions, the Alabama Supreme Court further guaranteed disfranchisement by frequently rewriting and restructuring, in increasingly restrictive ways, Alabama's literacy test. It was with this record in mind that Congress enacted Section 5 of the Voting Rights Act in 1965.

Congress gave Section 5 the broadest possible language and intended that the statute's scope reach

all changes that impact voting, including any that took effect because of state court decisions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
*DEBO P. ADEGBILE
RYAN P. HAYGOOD
ALEXIS KARTERON
NAACP LEGAL DEFENSE
AND EDUCATIONAL
FUND, INC.
99 HUDSON STREET,
16TH FLOOR
NEW YORK, NY 10013
(212) 965-2200

KRISTEN CLARKE
NAACP LEGAL DEFENSE
AND EDUCATIONAL
FUND, INC.
1444 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-1300

**Counsel of Record*

February 20, 2008