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Supreme Court, U.S.
FILED

07-77 JUL 17 2007

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No. __-____

In the

Supreme Court of the United States

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

v.

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,
Appellees.

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

JURISDICTIONAL STATEMENT

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July 17, 2007

QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDINGS

A. Parties To This Proceeding.

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

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

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JURISDICTIONAL STATEMENT

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

OPINIONS BELOW

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

JURISDICTION

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

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

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

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

CONSTITUTIONAL PROVISION INVOLVED

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

constitutional and workability concerns raised by Governor Riley.

STATEMENT OF THE CASE

A. Legal Proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Statement of Facts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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Attorney General

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July 17, 2007

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	2:05cv1100-MHT
	)	(WO)
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

ORDER

On August 18, 2006, this three-judge court held that two Alabama Supreme Court decisions, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005), must be precleared before they can be implemented. *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1337 (M.D. Ala. 2006). On January 8, 2007, after the State of Alabama had submitted the state-court decisions for preclearance, the United States Department of Justice refused to preclear them, and, on March 12, 2007, refused to reconsider its decision. This matter is now before us on the plaintiffs' renewed motion for further relief.

We conclude that, because *Stokes v. Noonan* and *Riley v. Kennedy* were not precleared, Governor Bob Riley's appointment of Juan Chastang to the Mobile County

Commission pursuant to these two decisions was unlawful under federal law. Chastang's appointment must therefore be vacated.

Accordingly, it is the ORDER, JUDGMENT and DECREE of the court that the plaintiffs' renewed motion for further relief (Doc. No. 44) is granted to the extent that the appointment of Juan Chastang to the Mobile County Commission is vacated.

Done, this the 1st day of May, 2007.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	2:05cv1100-MHT
	)	(WO)
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

OPINION

Myron H. Thompson, District Judge:

This three-judge court has been convened to consider the claim of plaintiffs Yvonne Kennedy , James Buskey , and William Clark that, under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c , the State of Alaba.na was required, but failed, to preclear two decisions of the Alabama Supreme Court: *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005). For the reasons that follow, we hold that the state court decisions should have been precleared before they were implemented.

I.

A brief chronology of the events leading up to the challenge to these two state court decisions is helpful:

April through June 1985: Act No. 85-237, a local law providing, in certain circumstances, for a special election to fill vacancies on the Mobile County Commission, was enacted and, shortly thereafter, precleared by the United States Attorney General.[1] Prior to Act No. 85-237, such vacancies were filled by gubernatorial appointment.

June and July 1987: Pursuant to Act No. 85-237, a special election was held to fill a vacancy on the Mobile County Commission. Sam Jones won and assumed office.

September and October 1988: In *Stokes v. Noonan*, the Alabama Supreme Court held that, because Act No. 85-237 was a local statute and because it conflicted with and was subsumed by another state law of general application, it violated the Alabama Constitution. The governor then appointed Jones to the Mobile County Commission seat to which he was previously elected. The State did not submit *Stokes v. Noonan* for preclearance.

May through September 2004: The Alabama Legislature passed Act No. 2004-455 expressly to allow local laws to make exceptions to the general rule of filling vacancies by

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1 Act No. 85-237 states that:

"Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant...."

Act of Apr. 8, 1985, No. 85-237, 1985 Ala. Acts 137.

gubernatorial appointments.[2] The United States Attorney General precleared Act No. 2004-455.

September and October 2005: Jones was elected Mayor of Mobile and vacated his Mobile County Commission position.

November 2005: In *Riley v. Kennedy*, the Alabama Supreme Court rejected claims that Act No. 2004-455 revived Act No. 85-237 and that, as a result, Act. No. 85-237 now required that the vacancy on the Mobile County Commission be filled by special election rather than by gubernatorial appointment; the court held that Act No. 2004-455 applied only prospectively. Relying on *Riley v. Kennedy*, the governor appointed Juan Chastang to the vacated position on the Mobile County Commission. As with *Stokes v. Noonan*, the State did not submit *Riley v. Kennedy* for preclearance.

The plaintiffs then filed this lawsuit claiming that *Riley v. Kennedy* and the earlier decision in *Stokes v. Noonan* could not be implemented without first being precleared.

II.

The thrust of the plaintiffs' argument is that , because Act No. 85-237 was precleared and enforced, *Stokes v. Noonan* (the decision invalidating it) and *Riley v. Kennedy* (the later decision refusing to revive, and therefore, to enforce it) should not have been implemented without first being precleared.

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[2] Act No. 2004-455 amended the general law, Ala. Code § 11-3-6, to read as follows:

> "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

A.

Section 5 of the Voting Rights Act requires certain States, such as Alabama, to obtain preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia when they "or [their] political subdivision[s] . . . enact or seek to administer any ... standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Generally, a change from an elected to an appointed office requires preclearance, *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70 (1969), and a § 5 change may be brought about by state court decisions. *Branch v. Smith*, 538 U.S. 254, 262 (2003).

"The State may preclear a voting change in one of two ways: it may obtain a declaratory judgment in the United States District Court for the District of Columbia, or it may submit the change to the Attorney General of the United States for approval. If the Attorney General approves the change, or fails to register an objection to the change within 60 days, the change is precleared." *Boxx v. Bennett*, 50 F. Supp.2d 1219, 1223 (M.D. Ala. 1999) (three- judge court)

In reviewing the plaintiffs' § 5 claim, we are tasked with the limited purpose of determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate." *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). Because it is undisputed that *Stokes v. Noonan* and *Riley v. Kennedy* were not precleared, the critical inquiries for this court are whether these decisions brought about a change covered by § 5, and, if so, the appropriate remedy.

In determining whether a change covered by § 5 occurred, we must first determine if there was, in fact, a change. Changes are measured by comparing the new

challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect. *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997) (citing 28 CFR § 51.54); *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990).

Here, the parties dispute what constitutes the baseline practice. The plaintiffs argue that the baseline is Act No. 85-237, which provided for the filling of the vacancy on the Mobile County Commission by special election; they maintain that *Stokes v. Noonan* and *Riley v. Kennedy* were changes because the former invalidated the Act and the latter still refused to enforce it. The State responds that the baseline could not be Act No. 85-237 because the Alabama Supreme Court declared it unconstitutional; the State posits that *Stokes v. Noonan* and *Riley v. Kennedy* did not reflect a change but were rather a mere reaffirmation of the correct scope of the governor's preexisting appointment power under Alabama general law.

We think the plaintiffs have the better argument. Because Act No. 85-237 was the most recent precleared practice put into force and effect with the election of Jones in 1987, it is the baseline against which we must determine if there was a change. To be sure, the Alabama Supreme Court declared Act No. 85-237 unconstitutional under state law; this was, however, after Act No. 85-237 had been put into effect. We are required to determine the baseline "without regard for [its] legality under state law." *Lockhart*, 460 U.S. at 133 (relying on *Perkins v. Matthews*, 400 U.S. 379, 394-395 (1971)).

We therefore hold that, because Act No. 85-237 is the baseline and because *Stokes v. Noonan* invalidated Act No. 85-237 and *Riley v. Kennedy* held that Act No. 85-237 was not rendered enforceable by Act No. 2004-455, the two decisions constituted changes that should have been

precleared before they were implemented. In reaching this holding, we emphasize that we are in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in these two cases, or that the governors acted in accordance with state law in making the appointments. Indeed, this court does not have jurisdiction to address such purely state-law questions. Whether Act No. 85-237 is, in fact, unconstitutional under state law and whether positions on the Mobile County Commission must be filled by special election or gubernatorial appointment are state-law questions we do not reach and should not be understood in any way as reaching; our holding today does not in any way undermine these two decisions under state law. We merely hold that federal law requires that they be precleared before they are implemented.

B.

The plaintiffs suggest that rather than enjoin enforcement of *Stokes v. Noonan* and *Riley v. Kennedy*, or otherwise even consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission, we should give the State 90 days to obtain the necessary preclearance. We agree.

An appropriate judgment will be entered.

Done this the 18th day of August, 2006.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	2:05cv1100-MHT
	)	(WO)
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) Judgment is entered in favor of plaintiffs Yvonne Kennedy, James Buskey, and William Clark and against defendant Bob Riley.

(2) The State of Alabama has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c; if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy. Defendant Riley is to keep the court informed of

what action, if any, the State decides to take and the result of that action.

It is further ORDERED that costs are taxed against defendant Riley, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done this the 18th day of August, 2006.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 2:05 CV 1100-T**
HONORABLE BOB RILEY, as Governor of the State of Alabama	)	
Defendant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Bob Riley, in his official capacity as Governor of the State of Alabama, the defendant in this action, hereby appeals to the Supreme Court of the United States from the final Order of the three-judge court vacating his appointment of Juan Chastang to fill a vacancy in the Mobile County Commission, entered in this action on May 1, 2007 (doc. 48), and from prior orders, judgments and decrees of the three-judge court upon which the May 1, 2007 Order necessarily relies, specifically including the Judgment entered on August 18, 2006 (doc. 23) and the Opinion of the same date (doc. 22).

This appeal is taken pursuant to 42 U.S.C. § 1973c, as amended by Pub.L. No. 109-246, § 5, July 27, 2006, 120 Stat. 577, 580, and 28 U.S.C. § 1253.

Respectfully submitted,

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Governor of the State of Alabama

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Counsel for the Honorable Bob Riley,
Governor of the State of Alabama

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until

the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred

candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Supreme Court of Alabama.

Willie H. STOKES
v.
Lionel W. "Red" NOONAN, in his capacity as Judge of the Probate Court of Mobile County, et al.
86-1082.

Sept. 30, 1988.

BEATTY, Justice.

The plaintiff, Willie H. Stokes, appeals from a judgment in favor of defendant Lionel W. "Red" Noonan, et al., holding that Act No. 85-237, Acts of Alabama 1985, is valid and constitutional.

Stokes, as a registered voter, taxpayer, and real property owner of Mobile County, filed suit in April 1987 contesting the constitutionality of Act No. 85-237, which provides for the filling of vacancies on the Mobile County Commission by a special election when at least 12 months remain on any commissioner's unexpired term:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Stokes contends that the subject of local Act No. 85-237 is

subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala.1978), is unconstitutional.

Section 105, in pertinent part, states: "No special, private, or local law ... shall be enacted in any case which is provided by a general law." Section 11-3-6, Code of 1975, is contained in the chapter pertaining to county commissions and refers to vacancies:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

Stokes also contends that Act No. 85-237 violates Art. IV, § 104(29), Constitution of 1901, which states, in pertinent part:"The legislature shall not pass a special, private, or local law in any of the following cases:

> "....
>
> "(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of organization of new counties, or the changing of the lines of old counties...."

We need not address the plaintiff's attacks under § 104(29) because we are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.

In *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala.1978), this Court explained at length the difference between a local law and a general law, and, applying the literal language of the Constitution of 1901, held that the presence of a general law upon a given subject was *primary,*

meaning "that a local law cannot be passed upon that subject." This Court added at 813:

> "By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute."

Section 11-3-6 is a statewide statute governing the general subject of filling vacancies on county commissions. Its language is substantially the same as its complementary section that appeared in Ala.Code 1940 as Title 12, § 6. See also Ala.Code 1940, Title 12, § 6 (Recomp.1958).

Act No. 85-237 was approved April 8, 1985. By its terms, it is made applicable only to Mobile County. Hence, when it became law it applied to a political subdivision of the state less than the whole, and thus, it was a local law on the same subject as the previously enacted general law, § 11-3-6; see Constitution of 1901, § 110; *Peddycoart*, 354 So.2d at 814; and, accordingly, it is unconstitutional under § 105. We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law. To approve such a proposition here would run directly counter to the language of our constitution. Surely, it cannot be held that the legislature is proscribed from enacting general laws on subjects already covered by local laws, even if by application such local laws are repealed, when the intent of the legislature is clear-and it is in this case. See *Buskey v. Mobile County Board of Registrars,* 501 So. 2d 447 (Ala.1986).

In *Baldwin County v. Jenkins,* 494 So. 2d 584 (Ala.1986), a similar question dealing with the constitutionality of a local act was resolved. In that case, this Court was confronted with two statutes dealing with the election and terms of the office of county commissioners. This Court held that the general statute, Code of 1975, § 11-3-1, as amended, having contained the language, "unless otherwise provided by local law," manifested a legislative intent that the subject it dealt with not be subsumed within it:

> "A situation completely opposite and contrary to the one presented here was contemplated and prohibited by the constitutional framers, which is to say that the legislature, by enacting a general law *containing no such provision or exception for contrary local laws,* thereby intended that general law to be *primary* and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit the enactment of contrary local laws. Such is not the case with respect to § 11-3-1 and Act No. 84-639. Because the language of the statute provides for the existence of and prevailing effect of contrary local laws, it must be that the legislature did not intend the subject to be 'subsumed' exclusively within § 11-3-1. That being the case, the co-existence of the general law (§ 11-3-1) and the *contrary* local law (Act No. 84-639) deferred to in the general law, cannot be said to be repugnant to § 105 because 'the constitutional framers have [only] prohibited the enactment of a local act when the subject [as intended by the legislature] is already subsumed by the general statute.' *Peddycoart,* [354 So.2d at 813]."

494 So. 2d at 587. (Emphasis in *Jenkins.*)

No such intent is demonstrated by the language of § 11-3-6 regarding filling of vacancies, and that language must be

given effect according to its terms. Thus, it is our duty to declare Act No. 85-237 unconstitutional as violating § 105. It follows that the judgment appealed from must be, and it is hereby, reversed, and a judgment rendered declaring that Act unconstitutional.

REVERSED AND JUDGMENT RENDERED.

TORBERT, C.J., and JONES, SHORES and HOUSTON, JJ., concur.

MADDOX, J., concurs specially.

ALMON, J., concurs in the result.

ADAMS and STEAGALL, JJ., dissent.

MADDOX, Justice (concurring specially).

I concur completely with the opinion holding that Act No. 86-237 is unconstitutional under § 105, under this Court's decision in *Peddycoart*, cited in the majority opinion.

I do not believe it is necessary to distinguish *Baldwin County v. Jenkins,* 494 So.2d 584 (Ala.1986), which I thought was incorrectly decided, for the reasons I expressed in a dissent in that case; therefore, I concur specially.

STEAGALL, Justice (dissenting).

I respectfully dissent as to the majority opinion's reversal of the trial court's decision that Act No. 85-237 is valid and constitutional.

The Mobile County Commission was created on August 7, 1957, when the Alabama Legislature passed Act No. 181, Acts of Alabama 1957, a local act. The Act created the Mobile County Commission out of the existing board of revenue and road commissioners and provided for the election of its members, those members' terms of office, qualifications for that office, and various other requirements

dealing with that body, including the filling of vacancies when they occurred. That Act states specifically:

> "Vacancies on the commission shall be filled by appointment by the Governor, but the office of president of the commission shall be filled by the members thereof. Any person appointed to fill a vacancy shall serve the unexpired term, and until his successor is elected and qualified."

Act No. 181, § 2(b), Acts of Alabama 1957, at 234.

The local act being question here, Act No. 85-237, Acts of Alabama 1985, states, in regard to vacancies on the Mobile County Commission:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Act No. 85-237, Acts of Alabama 1985, at 137.

This Court has on several occasions upheld trial courts' rulings that a local act amending a local act is not unconstitutional. In *Freeman v. Purvis*, 400 So.2d 389 (Ala.1981), the Court upheld a trial court ruling which found that:

> "Act 80-797 passed in the 1980 regular session of the Legislature of Alabama, is a Local Act which amends a local act and is not unconstitutional."

400 So.2d at 390. The Court then stated: "Accordingly, the trial court was correct when it held that Act No. 797 was a local law which amended Act No. 710, a pre-existing local law." 400 So.2d at 392.

Local Act 85-237 is amendatory in nature, affecting the already-existing local legislation, which created the Mobile County Commission and provided for the filling of vacancies.

In *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala.1978), we stated, regarding legislation passed before and after that decision:

> "Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases."

354 So.2d at 814.

The effect of this passage was to say that the new standard established in *Peddycoart* as to the constitutionality of local legislation would be applied only prospectively. *Ex parte Bracewell,* 407 So.2d 845 (Ala.1979), *reversed on other grounds,* 457 U.S. 1114, 102 S. Ct. 2920, 73 L.Ed.2d 1325 (1982). Where, as here, we are looking at legislation enacted prior to *Peddycoart* but amended afterwards, this Court is required to apply the law as it stood before *Peddycoart.* That law can be found in the case of *Johnson v. State ex rel. City of Birmingham,* 245 Ala. 499, 17 So.2d 662 (1944):

> "Sec. 105 of the Constitution is not construed to inhibit local legislation on a subject not prohibited by the Constitution, merely because the local law is

different, and works a partial repeal of a general law."

245 Ala. at 503, 17 So.2d at 664, citing *Talley v. Webster,* 225 Ala. 384, 143 So. 555 (1932). This Court, in *Talley v. Webster,* in determining whether a statute violated Section 105 of the Constitution, stated: "We need not review the numerous cases construing this section. Suffice it to say it does not inhibit the passage of local laws on subjects, not prohibited by Section 104, merely because such local law is different, and works a partial repeal of the general law of the state in the territory affected." 225 Ala. at 385, 143 So. at 555.

In the case of *Norris v. Seibels,* 353 So.2d 1165 (Ala.1977), this Court reversed a judgment of the Alabama Court of Civil Appeals and held that a showing of specific legislative intent was necessary to effect any such repeal: "This general statute cannot be repealed by implication found in the local statute unless the legislative intent to effect such a repeal is clearly manifested." 353 So. 2d at 1167. This Court held that the language used in the questioned local statute contained no express repeal of the general statute. However, such is not the case here. Section 3 of Act 85-237, Acts of Alabama 1985, demonstrates a specific legislative intent by expressly repealing "[a]ll laws or parts of laws which are in conflict with this act."

Because I believe that Act 85-237, a local act, is amendatory in nature and therefore that the law to be applied is that existing prior to our decision in *Peddycoart,* supra, I believe the trial court's judgment should be affirmed.

ADAMS, J., concurs.

Supreme Court of Alabama.
Bob RILEY, as Governor of Alabama
v.
Yvonne KENNEDY et al.
1050087.

Nov. 9, 2005.
Rehearing Denied Nov. 15, 2005.

STUART, Justice.

Bob Riley, in his official capacity as Governor of Alabama, appeals a judgment of the Montgomery Circuit Court holding that a vacancy on the Mobile County Commission should be filled by a special election. We reverse and remand.

Facts

In an election held on September 13, 2005, Sam Jones, the county commissioner for district 1, Mobile County Commission, was elected to the office of mayor of the City of Mobile. On September 19, 2005, Yvonne Kennedy, James Buskey, and William Clark, registered voters in Mobile County and residents of district 1 (hereinafter referred to collectively as "Kennedy"), filed a pleading in the Montgomery Circuit Court containing the following: a complaint seeking a declaration as to whether Alabama law requires the vacancy in the district 1 seat on the County Commission to be filled by a special election; a petition for a writ of mandamus directing Don Davis, probate judge of Mobile County to conduct such a special election to fill the district 1 seat; and a request for an injunction prohibiting Governor Riley and the other defendants[1] from acting to the

[1] In addition to naming Governor Riley as a defendant, the complaint also named Don Davis, in his official capacity as probate judge of Mobile County; the Mobile County Commission; and Stephen Nodine and Mike

contrary.

According to the complaint, Governor Riley, through his legal advisers, had made public statements indicating that he would fill by appointment the vacancy created when Jones resigned his seat on the County Commission to assume the office of mayor. Kennedy averred that Governor Riley could not make such an appointment, because, she argued, Act No. 85-237, Ala. Acts 1985, requires that "a special election be held to fill the vacancy, and, if a special election is not held, [Kennedy] and other similarly situated registered voters of the County of Mobile will be disenfranchised and denied the opportunity to vote for a candidate of their choice to fill the vacancy mentioned."

Governor Riley answered the complaint, asserting that he is authorized by general law to fill the vacancy and that Act No. 85-237, Ala. Acts 1985, relied on by Kennedy, was declared unconstitutional by this Court in *Stokes v. Noonan,* 534 So.2d 237 (Ala.1988). Act No. 85-237, he argues, is therefore void, and it was not revived, as Kennedy argues, by the legislature's subsequent enactment of Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975.

On September 29, 2005, after hearing argument by counsel, the Montgomery Circuit Court, apparently giving a field of operation to Act No. 85-237, Ala. Acts 1985, held that the vacancy on the Mobile County Commission must be filled by a special election rather than by appointment by the Governor. On October 3, 2005, Sam Jones, the commissioner for district 1, resigned to assume the office of mayor of the City of Mobile. On October 11, 2005, Governor Riley appealed.

Standard of Review

Dean, in their official capacities as members of the Mobile County Commission. Governor Riley is the only defendant who appealed.

> "'This court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.' *Scott Bridge Co. v. Wright,* 883 So.2d 1221, 1223 (Ala.2003). Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. *Carter v. City of Haleyville,* 669 So.2d 812, 815 (Ala.1995)."

Continental Nat'l Indem. Co. v. Fields, 926 So.2d 1033, 1034-35 (Ala.2005).

Discussion

Governor Riley contends that Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975, did not revive Act No. 85-237, Ala. Acts 1985, which this Court had held unconstitutional, see *Stokes v. Noonan,* and that, therefore, the trial court erred in declaring that the vacancy on the Mobile County Commission created by Jones's resignation should be filled by a special election.[2]

In *Stokes,* this Court addressed the constitutionality of Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election when at least 12 months remained on the unexpired term of any commissioner. The registered voter challenging Act No. 85-237 in *Stokes* argued that Act No. 85-237, a local act, was subsumed by a general law, § 11-3-6, Ala. Code 1975, and, consequently, was unconstitutional under Art. IV, § 105, Alabama Constitution 1901.

Act No. 85-237 provided:

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[2] We review this issue only as presented by these facts and by the parties' arguments regarding these facts; we do not address any other possible impediments that may exist to the constitutionality or enforceability of Act No. 85-237.

> "'Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.'"

534 So.2d at 238. We held that Act No. 85-237, applicable only to Mobile County, constituted a local law on the same subject as the previously enacted general law. We then considered § 11-3-6, Ala.Code 1975, which appears in Chapter 3, Title 11, of the Alabama Code pertaining to county commissions. It provided at the time we decided *Stokes:* "'In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.'" 534 So.2d at 238. We recognized that § 11-3-6 is clearly a general law, a statewide statute addressing the filling of vacancies on county commissions throughout the State, and that the legislature did not in the language of § 11-3-6, Ala.Code 1975, manifest an intent to except the local law from the general law. Therefore, we held that Act No. 85-237 was contrary to § 11-3-6, Ala. Code 1975, and, consequently, that it violated Art. IV, § 105, Alabama Constitution 1901, which provides, in pertinent part: "No special, private, or local law ... shall be enacted in any case which is provided for by a general law." We reasoned that because the legislature did not in § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law, the contrary local law, in that case Act No. 85-237, must defer to the general law, §

11-3-6, Ala. Code 1975, and, consequently, we held, Act No. 85-237 violated Art. IV, § 105, Alabama Constitution 1901.

On May 14, 2004, Governor Riley approved Act No. 2004-455 and it became effective. Act No. 2004-455 amends § 11-3-6, Ala. Code 1975, to read as follows: "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala. Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation. We cannot agree with that conclusion because the language of Act No. 2004-455 does not clearly so indicate.

This Court has consistently held that

> "'statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984).'

"*Dennis v. Pendley*, 518 So. 2d 688, 690 (Ala.1987)."

Gotcher v. Teague, 583 So. 2d 267, 268 (Ala.1991). Moreover, although curative statutes are "of necessity" retroactive, *Horton v. Carter*, 253 Ala. 325, 328, 45 So. 2d 10, 12 (1950), even they are subject to the same rule of

statutory construction, i.e., they will not be construed as retroactive unless the intent of the legislature that the statute have such retroactive effect is clearly expressed. The act under consideration in *Horton* expressly provided: "This Act shall be deemed retroactive in its effect upon its passage and approval by the Governor or upon its otherwise becoming a law." 253 Ala. at 328, 45 So. 2d at 12. On numerous other occasions the legislature has demonstrated its ability to provide expressly for retroactive effect when enacting curative legislation. See, *e.g.*, § 34-8-28(h), Ala. Code 1975 ("The provisions of this amendatory section are remedial and curative and shall be retroactive to January 1, 1998."); § 11-50-16(c), Ala. Code 1975 ("The provisions of this section shall be curative and retroactive ...."); § 11-43-80(d), Ala.Code 1975 ("The provisions of this section shall be curative and retroactive ...."); and Act No. 2001-891, § 5, Ala. Acts 2001 ("It is the intent of the Legislature that this act be construed as retroactive and curative.").

Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala. Code 1975, provides for prospective application only, and that language must be given effect according to its terms. Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively. The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is "[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, *to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of the county commission.*" (Emphasis added.) The language "to authorize the Legislature ... to provide" the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies

prospectively only; consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment.

Conclusion

Based on the foregoing, we conclude that the trial court erred in holding that the vacancy on the Mobile County Commission should be filled by a special election. Its judgment so holding is, therefore, reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NABERS, C.J., and SEE, LYONS, HARWOOD, SMITH, BOLIN, and PARKER, JJ., concur.

WOODALL, J., concurs in the result.