No.

IN THE

# Supreme Court of the United States

October Term, 1995

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THOMAS YOUNG, *ET AL.*,

*Appellants,*

v.

KIRK FORDICE, *ET AL.*,

*Appellees.*

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**On Appeal from the**
**United States District Court**
**for the Southern District of Mississippi**

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# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether Mississippi, a state covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, may implement voting changes that create separate sets of registration requirements for federal and state elections, and remove thousands of previously registered voters from eligibility to vote in Mississippi elections, without obtaining preclearance for those changes from the United States Attorney General or the United States District Court for the District of Columbia?

2. Whether the district court erred in ruling, contrary to the holding of *McCain v. Lybrand*, 465 U.S. 236 (1984), that voting changes first announced by Mississippi on February 10, 1995, were precleared by a February 1, 1995, Attorney General preclearance letter addressed to a different set of circumstances?

3. Whether the district court erred in ruling, contrary to the holding of *Perkins v. Matthews*, 400 U.S. 379 (1971), that Mississippi's voting changes were exempt from Section 5 preclearance on the ground that the changes merely corrected a misapplication of state law?

4. Whether the district court erred in ruling, contrary to the holding of *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), that changes in voting procedures are exempt from Section 5 preclearance if adopted in response to federal law?

## PARTIES

Actual parties to the proceeding in the United States District Court were:

(1) Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, plaintiffs, appellants herein,

(2) Kirk Fordice, in his capacity as Governor of the State of Mississippi, defendant,

(3) Mike Moore, in his capacity as Attorney General of the State of Mississippi, defendant,

(4) Dick Molpus, in his capacity as Secretary of State of the State of Mississippi, defendant,

(5) Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services, defendant,

(6) United States, plaintiff, and

(7) State of Mississippi, defendant.

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## OPINIONS BELOW

The July 24, 1995, opinion of the three-judge United States District Court for the Southern District of Mississippi granting partial summary judgment to the State of Mississippi is unreported and appears in the Appendix ("App.") at 1a-9a. The February 9, 1996, final judgment entered by the district court is unreported and appears at App. 10a-11a.

## JURISDICTION

The final judgment of the court below was entered on February 9, 1996. The *Young* appellants, Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, filed their notice of appeal on April 8, 1996. App. 12a-14a. On May 30, 1996, Justice Scalia extended the time in which to file a jurisdictional statement to June 17, 1996, and this appeal is being docketed within the time provided by that extension. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Right Act, 42 U.S.C. § 1973c, is set forth at App. 26a-27a. The pertinent provisions of Sections 8 and 11 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-6, 1973gg-9, are set forth at App. 28a.

## STATEMENT OF THE CASE

This case arises out of the State of Mississippi's response to the passage of the National Voter Registration Act of 1993 ("NVRA"). The NVRA, which became effective in Mississippi on January 1, 1995, requires states to make voter registration more easily accessible and limits the circumstances under which

a registered voter's name may be removed from the voter rolls.[1] Its requirements apply only to registration and record-keeping for federal elections, although, as the district court found, states have discretion "to meld the NVRA requirements into the existing state system for registration of voters." App. 2a. The NVRA provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act . . . ." 42 U.S.C. 1973gg-9(d)(2).

## A. Mississippi's Pre-NVRA Voter Registration System.

At the time the NVRA was enacted, and continuing through the present, Mississippi's statutes have provided for a unified system of voter registration, such that when qualified persons complete the registration process in their county of residence, they are eligible to vote in all local, county, state and federal

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[1] The NVRA created nationwide standards requiring the States to end "discriminatory and unfair registration laws and procedures" which Congress found "have a direct and damaging effect on voter participation" including disproportionate harm to racial minorities. 42 U.S.C. § 1973gg(a)(3). The purpose of the NVRA was to provide citizens in covered states access to a registration process that is as convenient as possible. § 1973gg-2(a). Eligible citizens must be able to register as easily as they receive other services and assistance from state agencies and in state offices. The primary requirements of the NVRA are: (1) states must permit voter registration simultaneously with applications for, or renewal of, drivers' licenses at motor vehicle offices, *see* 42 U.S.C. § 1973gg-3; (2) states must accept mail-in voter registration forms and make such forms widely available, *see* 42 U.S.C. § 1973gg-4; (3) states must designate and provide voter registration opportunities in public assistance offices, offices primarily engaged in providing state-funded programs for persons with disabilities, armed forces recruitment offices, and in other governmental or non-governmental offices designated by the state, *see* 42 U.S.C. § 1973gg-5; and (4) states must maintain an accurate and current voter registration roll through uniform and non-discriminatory procedures, with limits on purges of voter rolls, *see* 42 U.S.C. § 1973gg-6.

elections. Miss. Code Ann. §23-15-11. The State adopted this "unitary" registration system after Mississippi was found to have violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by maintaining a "dual" voter registration system that required separate registration for state and municipal elections. *Mississippi Chapter of Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991). Specifically, the *PUSH* court found that Mississippi had adopted and maintained this dual registration system for a discriminatory purpose, and that the dual system had a racially discriminatory impact in depressing black registration rates.[2] *Id.* at 1252, 1268. Mississippi's unitary registration provisions were enacted for the purpose of curing this violation of Section 2. *PUSH v. Allain*, 717 F. Supp. 1189, 1193 (N.D. Miss. 1989), *aff'd*, 932 F. 2d 400 (5th Cir. 1991).

Some of Mississippi's registration procedures, nevertheless, remained more restrictive than those now permitted by the NVRA. For example, Mississippi's voter registration statutes allow the purging of voters who have not voted in four years at the discretion of county registration officials. Miss. Code Ann. § 23-15-159. In addition, the statutory state mail-in registration form requires an attesting witness, and requires more information than is necessary for determining voter eligibility and maintaining

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[2] The lower court decision in *PUSH v. Allain* documents the long legacy of intense racial discrimination that has pervaded every aspect of life in Mississippi, including the process of registration and the exercise of the right to vote. 674 F. Supp. at 1250-52. The court found that serious disparities in registration and voter turnout rates of blacks and whites in Mississippi were the direct legacy of this racial discrimination, and were exacerbated by the State's onerous dual registration requirements. *Id.* at 1252-56. At the time of the *PUSH* decision, Mississippi was the only state with a dual registration system. *Id.* at 1252. However, even under this dual system, registration for state and county elections made a voter eligible to vote in federal elections. *Id.* at 1249.

registration rolls, all of which are prohibited by the NVRA. Miss. Code Ann. § 23-15-47.

**B. Mississippi's Response to the NVRA.**

Following the enactment of the NVRA in 1993, Mississippi Governor Kirk Fordice issued an executive order that named Secretary of State Dick Molpus as "the chief state election officer for the purposes of compliance with the National Voter Registration Act of 1993" and created a National Voter Registration Act Implementation Committee, which had the responsibility of "ensuring Mississippi's compliance with the Act." Young Plaintiffs' Cross-Motion For Summary Judgment ("Summ. Judg. Mot.") Ex. 1. Although the Committee produced a report describing the legislative changes necessary to bring Mississippi into substantial compliance with the NVRA, in 1994 the Mississippi Legislature made only one change in response to the Act: it changed the mail-in voter registration period from 60 to 30 days before an election. Comp. ¶ 35; Amended Ans. ¶ 35.

However, starting in February 1994, the Implementation Committee and the Secretary of State's office developed substantial materials and conducted extensive NVRA training for county clerks and election officials as well as for officials and personnel of the various agencies that would become voter registration sites in accordance with the NVRA. Summ. Judg. Mot. Ex. 3. The training materials included a manual to guide the registration activities of these public officials and employees. Summ. Judg. Mot. Ex. 4. The procedures and forms described in the manual were to be implemented as of January 1, 1995. Summ. Judg. Mot. Ex. 3 and 10. Legislation to conform Mississippi's practices to the NVRA more generally was introduced in the January 1995 legislative session.

## C. Mississippi's NVRA Submission to the United States Attorney General.

In late October 1994, the Department of Justice learned that Mississippi was proceeding with plans to implement the NVRA administratively effective January 1, 1995, despite the fact that none of its implementation plans, revised forms, or training materials, which described substantial changes in voter registration procedures, had been submitted for Section 5 preclearance. The Department of Justice informed the State that preclearance of these new procedures and forms was necessary prior to their implementation. Summ. Judg. Mot. Ex. 9. The Secretary of State's office complied with the request, making a submission to the Department of Justice through transmission of several letters and a packet of materials setting forth the NVRA practices that were to be implemented "prior to the passage of the state legislation." Summ. Judg. Mot. Ex. 9. A letter dated December 20, 1994 from Constance Slaughter-Harvey, General Counsel to the Secretary of State and Assistant Secretary of State, Elections, stated:

> [C]onsider this letter as a request for preclearance under Section 5 of the Voting Rights Act of Mississippi's plan to administratively implement the provisions of NVRA, in accordance with the package of materials which were submitted to your office on December 5 and December 14, 1994.
>
> In particular, please regard the publication dated November 1994 and entitled "The National Voter Registration Act" as Mississippi's plan to administratively implement NVRA on January 1, 1995. [Summ. Judg. Mot. Ex. 10.]

This manual described a set of registration and record-keeping procedures to be used generally by circuit clerks and other election officials, with no provisions indicating that a separate set of registration requirements and procedures would be maintained for state and local elections, and no provisions suggesting that registrants would be advised that they would be limited to voting in federal elections only. None of the submission letters sent to the Department of Justice makes reference to implementing a dual registration system. Indeed, the manual provided copies of the new voter registration forms that would replace the State's prior forms when implementation of the NVRA began on January 1, 1995, and the forms make no distinction between eligibility for state and federal elections. For example, the new registration form for use at the driver's license agency stated: ". . . you may register to vote in Mississippi while renewing your driver license. If you would like to apply to register to vote, complete Sections 1 and 2 of this form . . . ." Summ. Judg. Mot., Ex. 4.[3] In addition to the manual, the packet of materials sent to the Attorney General included background materials such as Implementation Committee reports, schedules of training that had occurred, and draft legislation to be introduced in early 1995 conforming state law to these NVRA procedures.

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[3] Similarly, the new mail-in form, which was also to be used at public assistance and other voter registration agencies asked: "If you are not registered to vote where you now live, would you like to register to vote here today?" *Id.* Further, among items under the heading "Current methods that will change," the manual included the following statements: "'the optional 4-year purge is prohibited', [and] "a registrant's name cannot be removed solely for not voting." *Id.*

In early January 1995, registrars and other local election officials began registering voters under the Secretary of State's administrative plan set forth in the implementation manual. App. 7a. Voters were registered under the assumption that they would be eligible to vote in all elections, and were not advised that they would be required to register under separate procedures for state and local elections. App. 7a.

On January 25, 1995, the bill that was designed to amend Mississippi's election statutes so as to integrate the NVRA requirements was tabled in a legislative committee.[4] The United States Attorney General was aware of the committee's action, but the State did not amend or withdraw its Section 5 submission.

On February 1, 1995, the United States Attorney General, acting through the Department of Justice, precleared certain specifically defined aspects of the State's submission. App. 15a-19a. The preclearance letter sent to the State by the Department of Justice addressed only the changes set forth in the Secretary of State's submission, and makes no mention of any change from Mississippi's unified system of voter registration to a dual system of registration. Summ. Judg. Mot. Ex. 10.

**D. Mississippi's Change to a Dual Registration System.**

On February 10, 1995, Phil Carter, Assistant Attorney General, and Reese Partridge, Staff Attorney, Secretary of State's

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[4] This was the last day that bills could be voted out of committee in the regular session. App. 21a. It was still possible, however, for the legislature to vote to suspend the rules and bring the bill to the floor. Thus, tabling the bill in committee did not necessarily mean that the legislature could not act on the bill later in the session. Although the legislature would remain in session for almost three more months, no successful vote to suspend the rules and bring the bill to the floor was taken.

Office, issued a memorandum to the Circuit Clerks of the various counties of the state and the chairpersons of the Mississippi County Election Commissions on the subject of implementation of the NVRA. App. 20a-23a. This memorandum stated that "Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections," App. 21a , and that "[a]nyone who has thus far registered under NVRA, or will do so in the future. . . [should] be informed that they presently are only authorized to vote in federal elections." *Id.*

The memorandum also addressed the topic of "[d]esignating voters registered under NVRA on the voter registration rolls." App. 22a. It stated that "circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must 'flag' voters registered under NVRA on the voter registration books and poll books to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections." *Id.* The memorandum also stated that all voters who registered to vote under the NVRA procedures should be notified of their federal-election-only eligibility status and provided with a reasonable opportunity to re-register for state elections, although it did not prescribe specific procedures that must be followed in giving such notice or opportunity to re-register, leaving that up to the discretion of individual officials.[5] App. 21a-22a.

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[5] Mississippi and Illinois are the only states that have sought to implement the NVRA through a dual registration system. In Illinois, the legislature also failed to pass legislation merging the NVRA with existing state procedures, and the state administratively implemented a dual registration system. Illinois' dual system was recently invalidated on state constitutional and statutory grounds. *Orr v. Edgar*, 95 CO 0246 (Cir. Ct. Cook Co., May 1, 1996).

The result of this was the division of the electorate into two classes of voters for the first time since the resolution of the *PUSH v. Allain* litigation. All of these voters met the same statutorily defined voter eligibility criteria, and differed only in what forms they had filled out and at what site they had obtained the eligibility form. This dual eligibility status and new record-keeping and purging procedures required the circuit clerks to institute numerous changes in registration procedures.[6] Some several thousand voters who registered under the presumption of eligibility for all elections using the NVRA procedures were removed from the regular voter rolls and/or given federal election only eligibility status. App. 7a. There was substantial variation among different county circuit clerks in the manner in which they implemented this new dual system, and in the procedures they followed to notify NVRA registrants of their limited eligibility and provide them with an opportunity to register for state elections.[7]

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[6] Among these changes were creating of new "federal voter only" registration cards for NVRA registrants, dep. of Barbara Dunn, Hinds Co. Circuit Clerk, Summ. Judg. Mot. Ex. 17, p. 26, and Rose Simmons, Bolivar Co. Circuit Clerk, Summ. Judg. Mot. Ex. 15, p. 14; sending only letters rather than voter registration cards to NVRA registrants, dep. of Carol Horton, Lee Co. Deputy Circuit Clerk, Summ. Judg. Mot. Ex. 16, p. 14; and distinguishing NVRA registrants from state voters in voter registration records, dep. of Marian Brown, Forrest Co. Circuit Clerk Co., Summ. Judg. Mot. Ex. 19, p. 17.

[7] These practices ranged from sending a notification letter with no voter registration form, dep. of Brenda Williams, Warren Co. Circuit Clerk, Summ. Judg. Mot. Ex. 20 p. 12, to sending a letter along with a blank state form, Dunn dep., pp. 9-10, to sending a notification letter accompanied by a partially completed registration form, dep. of Mahala Salazar, Lowndes Co. Circuit Clerk, Summ. Judg. Mot. Ex. 18, pp. 11-12. Only one of the six counties whose practices were covered in deposition issued public service announcements in the local media and followed up on this notification with telephone calls, Brown dep., p. 11.

## E. The Department of Justice's Response to the Creation of a Dual Registration System.

On February 16, 1995, the Department of Justice sent a letter informing the State that the changed voting procedures described in the February 10, 1995, memorandum constituted implementation of a dual voter registration and purge system, that these procedures had not been submitted by the State for § 5 review, and that they were legally unenforceable until they had received § 5 preclearance. App. 24a-25a. This letter specifically stated that the submission which had been the subject of the February 1, 1995, preclearance, ". . . did not seek preclearance for a dual registration and purge system . . ." App. 25a.

On March 9, 1995, the State responded to this letter by asserting that it had ". . . not initiated, nor implemented any change affecting voting within the State, other than the implementation of the NVRA . . . . The changes affecting voter registration most recently implemented by the State are those mandated by NVRA, not any change initiated or instituted by the State." Summ. Judg. Mot. Ex. 14, at 1-2. To this date, the State of Mississippi has not filed a Section 5 submission regarding these voting changes and has continued to implement them.

## F. Proceedings in the District Court.

With the State of Mississippi refusing to submit the voting changes that created the dual registration and purge system for Section 5 preclearance despite the prompt request of the Department of Justice and making only a limited effort to comply with the NVRA, the Young plaintiffs filed suit against the State

on April 20, 1995.[8] The action sought declaratory relief under Section 5 of the Voting Rights Act and the NVRA.[9]

Specifically, Count II of the Young plaintiffs' complaint sought declaratory relief under Section 5 alleging that these changes related to voter registration and purging had not been precleared and therefore were not enforceable until preclearance was obtained. Comp. ¶ 2. The Young plaintiffs advanced two theories for establishing Section 5 liability. First, their Section 5 claim alleged that the change from the State's pre-NVRA statutory unitary registration system to the dual registration system was an unprecleared voting change, the implementation of which should be enjoined. *Id.* ¶ 68. The Young plaintiffs' Section 5 claim also alleged that the change from the previously precleared unitary administrative NVRA implementation plan to this dual registration system created by the February 10 memo was an unprecleared voting change whose implementation should be enjoined. *Id.* ¶ 69. The State's answer denied that the voting

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[8] Appellants, plaintiffs below, are a group of black and white citizens of the State of Mississippi who meet the State's qualifications to register to vote. The defendants below were Kirk Fordice, Governor of Mississippi, Mike Moore, Attorney General of Mississippi, Dick Molpus, Secretary of State of Mississippi, and Don Taylor, Executive Director of the Mississippi Department of Human Services. Mr. Taylor, the current Executive Director, was substituted for Gregg Phillips, who was Executive Director when the suit was instituted. This case was consolidated below with *United States v. State of Mississippi, et al.*, Civil Action No. 3:95CV198(L)(N), a similar action brought by the United States seeking relief under Section 5 of the Voting Rights Act and the NVRA.

[9] The NVRA cause of action alleged that the State had not fully implemented the requirements of the NVRA even for federal elections. Those allegations are not at issue on this appeal, as the plaintiffs agreed to dismissal of the NVRA claim after the state improved its implementation later in 1995.

changes were subject to preclearance, alleging that changes made to comply with the NVRA were outside the scope of Section 5, and that the changes presented in the Secretary of State's Section 5 submission had not been applicable to state or local elections. Answer ¶¶ 41, 43.

All parties subsequently moved for partial summary judgment on the Section 5 count of the two complaints. The State's motion asserted that the State was not "administering or seeking to administer" any unprecleared changes relating to the implementation of the NVRA because

> no changes to state registration or purging for state elections were mandated or contemplated by the Act and no such changes were necessary for full implementation of the NVRA. No changes to the State system for registration or purging were made in conjunction with the implementation of the NVRA. Accordingly, no Section 5 submissions for preclearance relating to State registration or purging were necessary or made. [State Summ. Judg. Mot., ¶¶ 3-4].

The State also asserted that the Attorney General's February 1, 1995, letter had the effect of preclearing a limited number of voting changes, but only so far as they related to federal elections.[10] Ignoring the reality of its own directives to county election officials and the resultant practices, the State's motion asserted that "[t]here is no requirement of dual registration

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[10] Those allegedly precleared changes consisted of certain discretionary choices related to (1) the selection of optional voter registration agencies (42 U.S.C. §1973gg-5) and (2) procedures for removal of voters from voter registration rolls, "purging" (42 U.S.C. §1973gg-6). State Summ. Judg. Mot. ¶ 5, Brief In Support of Consolidated Motions For Partial Summary Judgment, p. 7.

administered by the State or any of its political subdivisions." State Summ. Judg. Mot. ¶ 9. The Young plaintiffs' cross-motion for partial summary judgment argued that "[t]he State of Mississippi has not filed a Section 5 submission regarding the changes in voter registration and list maintenance procedures that were set out in the February 10 memorandum." Summ. Judg. Mot. ¶ 15.

In a decision that cites no case authority, the district court granted the State's motion for summary judgment as to the plaintiffs' Section 5 claims on July 24, 1995, holding that Mississippi was not required to obtain Section 5 preclearance for the changes that established the dual registration and purging system. The district court held that the United States Attorney General's February 1, 1995, preclearance letter had not served to preclear the unitary registration system submitted by the Mississippi Secretary of State, because the Secretary of State lacked authority to implement such a unitary system without passage of new legislation by Mississippi. App. 7a. The court then held that "it is equally clear -- and this does not appear to be in dispute -- that the contents of the package regarding only administrative decisions of the state have been precleared." App. 8a. The district court did not specify precisely what "administrative decisions" made by the State it was holding to have been precleared.[11] It appears that the court, in effect, redefined the scope of the State's prior Section 5 submission, concluding that some changes in registration procedures were selectively precleared *only for use in relation to federal elections*, even though the State's submission had not distinguished between federal and state elections. The court believed that this

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[11] The plaintiffs consistently argued that the February 1, 1995, preclearance letter did not effect preclearance of changes for use in a dual registration system.

redefinition of the submission was required because the Attorney General could not have intended to preclear a unitary system when it was aware that conforming legislation had not yet been enacted.

The court further reasoned, based on its finding that the Secretary of State could not properly apply NVRA registration procedures to state and local elections without an enactment by the legislature, that the new procedures spelled out in the State's February 10, 1995, memorandum were intended merely to correct a misapplication of state law and therefore could be implemented without preclearance:

> We hold that the February 10 letter did not effect a change subject to § 5 preclearance. We hold that the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General. [App. 8a.]

Finally, the Court accepted the State's argument that adoption of a dual registration system in response to an enactment of Congress placed these changes outside the scope of Section 5 and obviated the need for preclearance. The district court held:

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General. [App. 8a-9a.]

## REASONS FOR NOTING PROBABLE JURISDICTION

The court below held that Mississippi need not obtain Section 5 preclearance for dramatic changes to voter registration procedures that the State implemented beginning February 10, 1995. The lower court's decision creates three new exceptions to the preclearance requirement, each of which this Court has decisively rejected in its rulings interpreting Section 5. The district court failed to cite a single decision by any court supporting the result it reached. Plenary review or summary reversal by this Court is necessary to assure that Section 5 will be properly enforced in Mississippi, and that states implementing the requirements of the National Voter Registration Act of 1993 do not abridge rights guaranteed by the Voting Rights Act.

1. The district court's decision conflicts with *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Clark v. Roemer*, 500 U.S. 646 (1991), by holding that the Attorney General's February 1, 1995, preclearance of a unitary voter registration system submitted by the Mississippi Secretary of State implicitly precleared later changes that created separate systems of voter registration and record-keeping for federal and state elections in Mississippi. Mississippi's Section 5 submission never identified at all, much less "with specificity," *Clark*, 500 U.S. at 658, any changes that would create separate systems of registration and record-keeping for federal and state elections. Section 5 places upon covered jurisdictions the responsibility of submitting proposed voting changes to the Attorney General, and informing the Attorney General of the nature of those changes, *McCain*, 465 U.S. at 249. Any ambiguity as to what was submitted must be resolved against the State. *Clark*, 500 U.S. at 659. The district court therefore erred in accepting Mississippi's after-the-fact effort to redefine the State's Section 5 submission.

2. The district court further erred in holding that Mississippi's February 10, 1995, voting changes were exempt from preclearance on the ground that the changes merely corrected "a misapplication of state law." App. 8a. The court reached this result by ruling that the registration of thousands of voters in early 1995 under an administrative plan developed by the Secretary of State was not authorized by Mississippi's existing statutes, and that the State could therefore implement separate registration and record-keeping systems for federal and state elections and remove thousands of previously registered voters from the state's rolls without obtaining Section 5 preclearance from the Attorney General. This ruling squarely conflicts with *Perkins v. Matthews*, 400 U.S. 379 (1971), in which this Court held that covered jurisdictions cannot avoid the preclearance requirements of Section 5 by treating their own previous voting procedures as a nullity. Indeed, under *Perkins* and other decisions, the motives of the State in making a voting change are irrelevant in a Section 5 enforcement action such as this.

3. Finally, the district court opened a gaping loophole in Section 5 coverage by holding that voting changes are exempt from the Section 5 preclearance requirement when made to comply with a federal statute such as the NVRA. In *Allen v. State Bd. Of Elections*, 393 U.S. 544 (1969), this Court rejected precisely that argument, holding that voting changes made by covered states are not exempt from preclearance even when implemented in an effort to comply with the Voting Rights Act itself. Further, the district court's holding ignores the express language of the NVRA, which provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965," 42 U.S.C. 1973gg-9(d)(2).

For all these reasons, this Court should review the decision of the court below to assure that Section 5 enforcement will not

be compromised by the creation of erroneous exceptions to long-standing decisions of this Court.

## I. THE DISTRICT COURT'S RULING CONFLICTS WITH *McCAIN V. LYBRAND* BY HOLDING THAT VOTING CHANGES FIRST ANNOUNCED BY MISSISSIPPI ON FEBRUARY 10, 1995, WERE PRECLEARED BY A FEBRUARY 1, 1995, ATTORNEY GENERAL PRECLEARANCE LETTER ADDRESSED TO A DIFFERENT SET OF CIRCUMSTANCES.

Section 5 requires that before a covered jurisdiction such as Mississippi "shall enact or seek to administer" any voting change, it must first obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. Such changes in procedures affecting voting are legally unenforceable unless and until Section 5 preclearance has been obtained. *Allen*, 393 U.S. at 548-549; *Clark*, 500 U.S. at 652; *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1193 (1996).

The State of Mississippi is now using a set of voter registration procedures dramatically different from those it was using in 1994, prior to the effective date of the NVRA, *and* different from those for which preclearance was granted by the Department of Justice on February 1, 1995. The State's February 10, 1995, memorandum instituted changes affecting how and where an eligible person may register to vote, the elections in which a voter will be deemed eligible to participate, how a registered voter can be removed from the voter rolls, the content of registration forms, the locations where various forms will be distributed, and publicity concerning assistance in registration, among other matters. App. 20a-23a. *See* Statement of the Case, *supra* at 7-9.

These changes, which directly affect access to the franchise, are clearly changes affecting voting that have the "*potential* for discrimination," *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Indeed, black voters in Mississippi were disproportionately disqualified from voting in municipal elections under Mississippi's prior dual registration system for state and local elections, according to the district court's 1987 findings striking down that dual system under Section 2 of the Voting Rights Act in *PUSH v. Allain.* 674 F. Supp. at 1255. Further, unless careful safeguards are maintained, voters who take advantage of the liberalized registration procedures for federal elections may not realize that their registration is invalid for state and local elections, and may appear at the polls on election day only to be turned away. The State's February 10, 1995, memorandum exacerbates the potential for discrimination by leaving wide discretion to circuit clerks in determining how to set up and implement the new dual registration requirement. *PUSH*, 674 F. Supp. at 1267 (finding that "widespread variations among counties in voter registration practices, as attested to by the various circuit clerks, may result in the unequal treatment of similarly situated persons"). Changes such as these clearly fall within the Section 5 preclearance requirement.[12]

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[12] "[T]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Bd.*, 393 U.S. at 566. The Attorney General's regulations enforcing Section 5 include as examples of voting changes: "(a) Any change in qualifications or **eligibility** for voting," and " (b) Any change concerning **registration**, balloting, . . .and any change concerning **publicity for or assistance in registration** or voting." Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.12 and § 51.13 (emphasis added).

The district court's decision holding that preclearance is not required for these changes rests on theories that this Court has repeatedly rejected in cases interpreting the preclearance requirements of Section 5. Key to the district court's decision is its statement that "the contents of the package regarding only administrative decisions of the state have been precleared." App. 8a. Whatever the court means by the "administrative decisions of the state,"[13] the court's conclusion is incorrect as a matter of law. The only submission that received preclearance from the United States Attorney General on February 1, 1995 was the Secretary of State's submission of a unitary set of voting changes to be used in all elections, federal, state and local. That submission did not include *any* procedures for distinguishing "federal" registrants from registrants for other elections; such procedures were first created by Mississippi in the State's February 10, 1995, memorandum. Thus, only by retroactively redefining the submission that the United States Attorney General precleared on February 1, 1995, could the district court conclude that any of the

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[13] Although neither the quoted passage, nor any other portion of the opinion, makes clear what voting changes the district court deems to have been precleared, the relief sought by the State in its motion for summary judgment should define the limits of the court's ruling. The State did not allege that all of the voting changes instituted by the February 10, 1995, memorandum, including the dual voter registration system, had been precleared by the February 1, 1995, letter from the Department of Justice. The State's motion for summary judgment argued only that preclearance had been obtained for certain limited discretionary choices granted to the States by the NVRA, specifically: (1) the selection of optional voter registration agencies (42 U.S.C. §1973gg-5) and (2) procedures for removal of voters from voter registration rolls, or "purging," (42 U.S.C. §1973gg-6). State Summ. Judg. Mot., ¶ 5; Brief In Support of Consolidated Motions For Partial Summary Judgment at 7. To the extent the district court's opinion concludes that any broader preclearance was granted, such an interpretation would be outside the scope of the claim advanced by the State.

changes announced in the State's February 10, 1995, memorandum had somehow been precleared.

Such after-the-fact efforts to redefine Section 5 submissions have been emphatically rejected by this Court, because "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *McCain*, 465 U.S. at 249. Section 5 thus places upon covered jurisdictions the responsibility of submitting proposed voting changes to the Attorney General, and informing the Attorney General of the nature of those changes. *Id.*

In *McCain,* this Court reversed a district court judgment denying plaintiffs' request for an injunction prohibiting further elections under a system of county government created by a 1966 statute that was never submitted for preclearance. The district court had ruled that the 1966 statute was implicitly precleared when the United States Attorney General granted preclearance to a 1971 South Carolina statute increasing the size of the county council from three seats to five seats, because the seats were all to be elected using the election system set forth in the 1966 statute. In reversing, this Court announced the principle that should dispose of this issue in the instant case:

> A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices.

*Id.* at 256-257.

Mississippi's December 1994 submission describes changes that are to be implemented in a unified voter registration system. The request for preclearance failed to identify the many changes

that are required to implement the dual system set forth in the State's February 10, 1995, memorandum. The submission makes no reference to the implementation of a two-tier system of voter registration and record-keeping, or to the registration and purging of voters who are eligible to vote only in federal elections. Summ. Judg. Mot. Ex. 2-4, 9 & 10. The February 1, 1995, preclearance letter did not, and could not, provide preclearance for changes that were not part of the submission.[14] The district court's decision is thus in clear conflict with *McCain v. Lybrand.*

*McCain* also emphasized that deference should be given to the United States Department of Justice when it determines that specific voting changes are outside the scope of a previous preclearance decision, holding that reliance on the Justice Department's interpretation of its own preclearance decision is appropriate "in determining whether a particular change was actually precleared . . . ." 465 U.S. at 255-56. As noted above, in this case the Justice Department responded to the February 10, 1995 memorandum with a letter dated February 16, 1995, stating that the Department had not precleared voting changes for a dual registration system, and requesting that the changes described in the memorandum be submitted for preclearance prior to implementation. App. 24a.

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[14] Just as the numbered posts used for elections in *Lockhart v. United States*, 460 U.S. 125 (1983), were "integral part[s] of the new election plan," and subject to Section 5 review as part of the whole election plan, 460 U.S. at 131, the various practices that are part of Mississippi's dual registration and record-keeping system are integral to its operation. To determine whether these changes are discriminatory in purpose or effect, the Attorney General "cannot view these [changes] in isolation," without considering that they are part of a new two-tiered system. *Id.*

This Court unanimously reaffirmed the holding of *McCain* in *Clark v. Roemer*. In *Clark*, the district court agreed with Louisiana's theory that preclearance of an increase in the number of judgeships by implication precleared "all of the judicial positions necessary to reach that number." 500 U.S. at 657. This Court reversed that decision as explicitly contradicting the holding in *McCain*, holding that a covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider," *id.* at 658, and confirming the doctrine that "'any ambiguity in the scope of the preclearance request' must be construed against the submitting jurisdiction." *Id.* at 659 (citation omitted). As the Court explained, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5," *id.* at 658, and that acceptance of the district court's holding "would create incentives for [covered jurisdictions] to forego the submission process altogether." *Id.* at 659. Here, the submission upon which the Attorney General acted never identified at all, much less "with specificity," any changes that would create separate systems of voter registration, record-keeping, and purging for federal and state elections. *Id.* at 658. *See also Dupree v. Moore*, 776 F. Supp. 290 (S.D. Miss, 1991), *vacated*, 503 U.S. 903, *on remand*, 831 F. Supp. 1310 (1993), *appeal dism.*, 114 S.Ct. 872 (1994), *vacated*, 115 S.Ct. 1684 (1995), *aff'd*, ___ S.Ct. ___, (U.S. June 10, 1996) (No. 96-1624).

Further, although conforming legislation was tabled in committee shortly before the February 1, 1995, preclearance letter was issued, and the Attorney General learned of that fact, the state did not withdraw or alter its Section 5 submission. Even if the Attorney General could be charged with knowledge that the State might now wish to require separate registration procedures for federal and state elections, it is not sufficient that the Attorney General may have known of a potential change; the responsible authorities must "in some unambiguous and recordable manner

submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Allen*, 393 U.S. at 571.

In sum, the notion that the February 1, 1995, preclearance letter did *not* preclear the unitary system that was submitted, but selectively and prospectively precleared the voting changes first described in the State's February 10th memorandum, cannot be squared with the holdings of *McCain* or *Clark*.

## II. THE DISTRICT COURT'S RULING CONFLICTS WITH *PERKINS V. MATTHEWS* BY HOLDING THAT MISSISSIPPI'S VOTING CHANGES WERE EXEMPT FROM PRECLEARANCE ON THE GROUND THAT THE CHANGES MERELY CORRECTED A MISAPPLICATION OF STATE LAW.

The district court's opinion articulates a further Section 5 exception that directly conflicts with this Court's precedents. The court ruled that the Mississippi Secretary of State was without authority, under State law, "to effectuate a change in the election laws contrary to [Mississippi's] legislative enactments," and therefore could not implement procedures permitting NVRA registrants to vote in local and state elections. App. 7a. The court reasoned from this that the State's February 10, 1995, memorandum instructing election officials to remove NVRA registrants from the rolls and to implement a system of dual registration and record-keeping was not a change requiring preclearance, because the changes were made for the purpose of correcting a misapplication of state law. App. 8a.

This holding is in error for several reasons. First, states cannot avoid the preclearance requirements of Section 5 by treating their own previous voting procedures as a nullity. Such a loophole in Section 5 coverage was closed in *Perkins v.*

*Matthews*. In *Perkins*, black voters sued to enjoin the City of Canton, Mississippi from implementing a change from a ward system to a system of at-large elections for aldermanic elections scheduled for 1969. The City of Canton argued that its previous ward elections had been conducted contrary to a 1962 Mississippi statute requiring at-large aldermanic elections, and that the change to at-large elections was therefore exempt from preclearance because the change was necessary to conform Canton's procedures to State law. This Court reversed the district court's judgment in favor of Canton, holding that, regardless of whether ward elections were authorized by State law at the time, the City's previous use of ward elections showed that "the procedure . . . 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards." *Perkins*, 400 U.S. at 395. A change from that procedure was therefore a change requiring preclearance under Section 5, regardless of the mandates of the 1962 Mississippi statute.

The *Perkins* Court pointed out that the local district court had exceeded its jurisdiction in a Section 5 enforcement action by inquiring into the motives of the City of Canton in adopting the changes in question. The jurisdiction of a local three-judge district court in cases brought to enjoin use of an unprecleared voting change is "limited to the determination whether 'a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny.'" *Perkins*, 400 U.S. at 383, quoting *Allen*, 393 U.S. at 561. The City of Canton's desire to conform its practices to state law might be relevant in determining the substantive question of whether Canton was entitled to preclearance for the change in voting procedures, but that question, the Court held, was reserved to either the District Court for the District of Columbia or the United States Attorney General. *Perkins*, 400 U.S. at 384 ("it is not the function or prerogative of [the local three-judge district court] to determine the motive" of a covered jurisdiction in adopting a voting

change). This Court therefore held that the "bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide." *Id.* at 395.

Thus, the holding in *Perkins* means that the State's reasons for implementing the voting changes described in the February 10, 1995, memorandum will become relevant only if and when the State seeks preclearance of those changes pursuant to Section 5. *See also City of Lockhart*, 460 U.S. at 132-133 (following *Perkins*). Indeed, if the district court's ruling in this case were correct, the City of Canton could have evaded the holding in *Perkins*, and avoided submission of its voting changes, simply by asking the State to issue a memorandum ordering it to "correct" its "misapplication of state law" by instituting at-large elections. *Cf.* App. 8a.[15]

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[15] In any event, the district court's conclusion that the Secretary of State lacked authority for his actions is incorrect, even if, contrary to *Perkins*, the question were relevant here. The Secretary of State was designated the chief election official of the State for purposes of implementing the NVRA, and his oath of office placed upon him serious responsibilities regarding compliance with the U.S. Constitution and statutes, which required him to implement the NVRA by January 1, 1995. Moreover, the administrative implementation plan developed by the Secretary of State was widely communicated to election officials throughout the State beginning nearly a year prior to January 1, 1995, and election officials throughout the State actually registered thousands of voters under those procedures and added them to the rolls for all elections, federal, state and local, in early 1995. Further, the statutory policy of the State of Mississippi was to have a unitary voter registration system, and the district court never explained how the Secretary of State could be authorized to ignore that State statutory policy but unauthorized to implement the administrative changes he did make to the content of voter registration forms, procedures, and locations. Indeed, the difficulty of determining what State law requires in this situation shows the wisdom of keeping questions of state law authority out of Section 5 enforcement actions such as this.

Second, even if, contrary to *Perkins*, the question of the Secretary of State's authority under Mississippi law were controlling, the district court's decision would still have to be reversed. If the district court were correct in treating the Secretary of State's implementation procedures, and their submission to the Attorney General for preclearance, as nullities because the Secretary of State lacked authority, the State's February 10, 1995, memorandum still reflects a change from the procedures in use in 1994, prior to the Secretary of State's submission. Under this theory, then, Mississippi still is clearly in violation of Section 5, having implemented changes set forth in its February 10, 1995, memorandum in the absence of effective preclearance of *any* changes to its registration system.[16]

*Perkins* and *Lockhart* establish that questions of state law authority for voting changes cannot serve to carve out an exception to the Section 5 preclearance requirement. The new election systems implemented in those cases were changes affecting voting that required preclearance. There can be no doubt that the same is true for the State of Mississippi's changes to a dual voter registration and record-keeping system.[17]

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[16] The first of the Young plaintiffs' two claims for Section 5 relief alleges that the new voter registration and record-keeping procedures that were put into place by the State's February 10, 1995, memorandum were unprecleared voting changes compared to the voting practices that prevailed in Mississippi in December of 1994. Comp., ¶ 68.

[17] *See also McDaniel v. Sanchez*, 452 U.S. 130, 152 (1981), "The application of the statute also is not dependent upon any showing that the Commissioners Court had the authority under state law to enact the apportionment plan at issue in this case."

## III. THE DISTRICT COURT'S RULING CONFLICTS WITH *ALLEN V. STATE BD. OF ELECTIONS* BY HOLDING THAT CHANGES IN VOTING PROCEDURES ARE EXEMPT FROM SECTION 5 PRECLEARANCE IF ADOPTED IN RESPONSE TO FEDERAL LAW.

The district court's decision carved out a third troubling exception to Section 5 's preclearance requirement by accepting the State's argument that the voting changes instituted by the February 10, 1995, memorandum were exempt from Section 5 preclearance because they were necessary to comply with the NVRA.

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General. [App. 8a-9a.]

The district court again ignored settled precedent of this Court in concluding that voting changes are exempt from the preclearance requirement when made to comply with a federal statute. In *Allen v. State Bd.*, this Court directly addressed whether the preclearance requirement of Section 5 applied to a "bulletin issued by the Virginia Board of Elections . . . [in] an attempt to modify the provisions of § 24-252 of the Code of Virginia of 1950. . ." so as to assure compliance with the provisions of the Voting Rights Act of 1965. 393 U.S. at 552. The *Allen* Court held that the Virginia bulletin was a covered change, rejecting Virginia's argument "that § 5 [did] not apply to

the regulation in their case, because that regulation was issued in an attempt to comply with the provisions of the Voting Rights Act." *Id.* at 565, n. 29. As the Court explained, "[t]o hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from §5 coverage - - even though it would have the effect of racial discrimination. It is precisely this situation [that] Congress sought to avoid in passing §5." *Id.*[18]

Similarly, this Court has ruled that voting changes made by covered jurisdictions in response to orders of federal courts instructing them to create a remedy for a district court's finding of a violation of the one-person, one-vote doctrine or the Voting Rights Act must be precleared pursuant to Section 5 before implementation. *McDaniel v. Sanchez*, 452 U.S. at 145-153, n. 30. Indeed, if the district court's theory were correct, most redistricting plans would not be subject to the requirement of Section 5 preclearance, because such plans are usually enacted to comply with the one-person, one-vote requirements of the Fourteenth Amendment.

In addition, the district court's conclusion is in direct conflict with the express language of the NVRA, which states that "neither the rights and remedies established by this section nor

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[18] The Board of Elections' bulletin "outline[d] new procedures for casting write-in votes," *id.* 393 U.S. at 570, and added illiteracy to the conditions already contained in a Virginia statute that specified when a person could receive assistance in casting a write-in ballot. *Id.* at 581. In addition, the facts of *Allen* show that a bulletin, like the manuals and memoranda in this case, sent from state election officials to the local officials who actually would implement the new voting procedure, is a change covered by §5 and requires submission for preclearance. The lack of apparent authority of the Board of Elections to modify a Virginia statute was not discussed in *Allen*, but it was not an impediment to this Court's decision.

any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965," 42 U.S.C. § 1973gg-9(d)(1), and further provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act," 42 U.S.C. § 1973gg-9(d)(2).[19]

This Court has refused to create sweeping exceptions to the requirements of Section 5, holding, "[t]he prophylactic purposes of the § 5 remedy are achieved by automatically requiring 'review of *all* voting changes prior to implementation by the covered jurisdictions. *McDaniel*, 452 U.S. at 151, *citing* S Rep No. 94-295, p. 15; *Presley v. Etowah County Comm'n.*, 502 U.S. 491, 509 (1992). Application of that principle here clearly requires reversal of the decision below.[20]

## CONCLUSION

In attempting to "forego the preclearance process altogether," *Clark*, 500 U.S. at 659, Mississippi has relied upon several legal theories that this Court has repeatedly rejected as inimical to the effective enforcement of Section 5. Because the district court's decision is in direct conflict with this Court's long-established principles governing the application of Section 5 to voting changes made by covered jurisdictions, the Court should summarily reverse the decision of the district court and hold that plaintiffs are entitled to a declaratory judgment that the voting

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[19] Congress rejected an amendment to the NVRA that would have exempted NVRA-related voting changes from the Section 5 preclearance requirement. HR Rep. No. 9, 103rd Congress, 1st Session 1993, p. 37.

[20] In this portion of its ruling, the district court again exceeded its subject matter jurisdiction by delving into the State's motives for making the voting changes announced in the February 10, 1995, memorandum. *See* discussion of district court's limited jurisdiction in Part II, *supra* at 24-25.

changes made in the State's February 10, 1995, memorandum are covered by Section 5 and have not been precleared, leaving the issue of appropriate relief to the district court in the first instance. In the alternative, the Court should note probable jurisdiction.

Respectfully submitted,

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**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:95CV197(L)(N)

THOMAS YOUNG, et al., Plaintiffs

v.

KIRK FORDICE, et al., Defendants

consolidated with

Civil Action No. 3:95CV198(L)(N)

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF MISSISSIPPI, et al., Defendants

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July 24, 1995

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ORDER

This three-judge court, consisting of Judge E. Grady Jolly of the United States Court of Appeals for the Fifth Circuit, and Chief Judge William H. Barbour and Judge Tom S. Lee of the United States District Court for the Southern District of Mississippi, was convened pursuant to an order of Chief Judge Henry A. Politz of the United States Court of Appeals for the Fifth Circuit, on June 19, 1995, to hear and determine the alleged violation of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, in the captioned case.

1. At the time Congress enacted the National Voter Registration Act (the "NVRA"), to be effective January 1, 1995, Mississippi operated a unified voter registration system (the "pre-NVRA system"), that is, once a Mississippi citizen registered to vote through any of the available methods or at any of the available places, as provided under the state registration system, he was eligible to vote in municipal, county, state, and federal elections. Consequently, each county in Mississippi maintained only one voter registration list.

2. The NVRA was enacted for the express purpose to encourage voter participation in federal elections. In its essence, it simplified registration for federal elections and directed that the state make federal voter registration available in state drivers license offices, state agencies providing public assistance, (and any other agencies as the state may choose or not choose), and by mail. The NVRA further allowed the state, at its option, to take measures to meld the NVRA requirements into the existing state system for registration of voters.

3. In anticipation of the effective date of the NVRA, January 1, 1995, Dick Molpus, the Secretary of State of Mississippi and the officially designated chief election official for purposes of Mississippi's compliance with the NVRA, and the NVRA Implementation Committee (the "Committee") developed an implementation plan to guide state agencies in registering voters under the NVRA. The plan, at least in part, was based on the assumption that state election laws would be amended by the Mississippi state legislature to permit citizens registering pursuant to the NVRA also to vote under state and local election laws. To this end, Molpus and the Committee developed and proposed state legislation to amend the state election laws. Also during 1994, Molpus conducted training seminars on implementation of the NVRA for Mississippi's circuit clerks, election commissioners, and state agency personnel.

4. On December 1 and again on December 14, the Secretary of State informed the United States Attorney General that his intention had been to send materials for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, only after the proposed legislation had passed. At the request of the United States Attorney General, however, he would proceed to submit

for preclearance a package containing the entire plan, prior to the passage of the state legislation.

5. On December 20, therefore, Molpus submitted to the United States Attorney General for § 5 preclearance Mississippi's plan to administratively implement the NVRA. This submission included a manual drafted by the Secretary of State listing basic changes necessary to bring Mississippi's voter registration procedures in compliance with the NVRA, including various registration forms needed for NVRA compliance and a draft of the proposed legislation that would amend Mississippi's voter registration laws so as to comply with the NVRA.

6. On January 25, 1995, the proposed Mississippi legislation, which would have qualified citizens registering under the NVRA also to vote in state and local elections, was tabled in a meeting of the Senate Elections Committee. To date, the proposed amendment to Mississippi's election laws has not been enacted. No federal statute or regulation requires Mississippi to enact such statute.

7. On February 1, the United States Attorney General granted § 5 preclearance to the plan and package submitted on December 20.

The parties dispute exactly what was precleared. Mississippi contends that the proposed state legislation, never having been enacted, was never precleared, although admittedly it was included in the § 5 submission. Mississippi contends that the United States Attorney General precleared only those changes necessary to allow Mississippi to administratively implement the NVRA for federal elections, such as Mississippi's choices regarding the agencies designated for federal registration and the methods used to purge federal voter registration lists.

The Young plaintiffs and the United States contend that the entire submission, as earlier noted, was precleared, including the proposed state legislation coordinating Mississippi's voter registration system with the NVRA.

8. At the aforementioned training seminar on the implementation of the NVRA, the offices of the Secretary of State advised at least some of the election officials in attendance that citizens registering pursuant to the NVRA would be eligible for both federal and state elections. This advice was given under

the admittedly mistaken assumption that the state legislature would enact proposed legislation changing voter registration procedures for state elections that would allow this result. Some election officials operated under this advice from January 1 through February 10. It is undisputed that between January 1 and February 10, all persons who registered pursuant to the NVRA, and who were thereupon placed on the qualified list of voters for local and state elections, were not qualified under the terms of the statutes of the State of Mississippi to vote in local and state elections. It is also undisputed that all such persons who registered only under the NVRA were removed from the list of qualified voters for local and state elections pursuant to the February 10 memorandum referred to in paragraph 9 below.

9. Sometime after January 25, the Secretary of State became aware that the legislature would not enact the proposed legislation, and thus realized that the NVRA registrants had been registered contrary to the laws of the state. On February 10, Mississippi's Assistant Attorney General issued a memorandum notifying circuit clerks and county election commissions that NVRA registrants were qualified to vote only in federal elections because the anticipated state legislation had not been enacted. The memorandum stated that NVRA registrants would be required additionally to register under the state election system to qualify to vote in state elections.

Furthermore, on February 24, the Secretary of State sent a memorandum to the state agencies that were conducting NVRA registration asking these agencies to inform potential registrants that the NVRA form would register them only for federal elections. The Secretary of State further advised these agencies that to be registered for both state and federal elections, these registrants would be required to complete either the state registration form only or this form together with the NVRA form.

10. On February 16, the United States Attorney General wrote the Mississippi Attorney General and stated that this new "dual registration system" (as reflected in the advice of the February 10 memorandum) had not received § 5 preclearance and thus was unenforceable until Mississippi received preclearance for this change. On March 9, Mississippi responded that its current

voter registration system reflected no change in voting subject to § 5 preclearance.

11. On April 20, Thomas Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, on behalf of themselves and all others similarly situated (collectively, the "Young plaintiffs"), filed suit in the United States District Court for the Southern District of Mississippi against several individuals in their official capacities as representatives of Mississippi (collectively, the "defendants"). Also on April 20, the United States filed suit against these same defendants and additionally against the State of Mississippi (also, collectively, the "defendants"). Each of these complaints alleged that the State of Mississippi effected a change subject to § 5 preclearance when, pursuant to its February 10, 1995 letter, it advised all Mississippi election officials that NVRA registrants could only vote in federal elections. These complaints further alleged that because this change had not been precleared, the change was unenforceable. Each of the complaints sought injunctive relief against the state's maintaining this "dual registration system." (In practical terms, the complaints requested this court to qualify all NVRA registrants for voting in local and state elections.) On May 30, these cases were consolidated.

12. The defendants request partial summary judgment on the claims of both the Young plaintiffs and the United States that they violated § 5 of the Voting Rights Act. Both the Young plaintiffs and the United States oppose the defendants' motion and file cross-motions for summary judgment on this issue. The United States additionally requests a preliminary injunction with regard to this issue.

13. Both the Young plaintiffs and the United States argue that before January 1, 1995, Mississippi maintained a unitary voter registration system for all elections, local, state, and federal; on January 1, that unitary system was modified in accordance with the practice adopted by the Secretary of State of including NVRA registrants within the state unitary voter rolls, i.e., that the NVRA registrants were deemed qualified to vote in local and state elections; that this change was effectively precleared one month later by the United States Attorney General on February 1; that on February 10 the State of Mississippi withdrew the

practice started on January 1 of qualifying NVRA registrants for local and state elections; and that election officials thereafter were required to maintain a dual system of voter registration, i.e., a list of voters eligible for all elections and a second list of voters eligible only for federal elections (the NVRA registrants). The plaintiffs, including the United States, argue that Mississippi failed to preclear this change, effected on February 10, which converted a unitary system of voter registration into a dual system of voter registration.

14. The defendants argue that Mississippi's voter registration system for state elections has remained unchanged. The defendants contend that under the NVRA the federal government merely created an additional method for registering voters for federal elections only. Consequently, the NVRA does not affect state election laws. The defendants, in effect, argue that the dual registration system was enacted by Congress through the NVRA, not by any action of the State of Mississippi. The defendants admit that some state election officials erroneously qualified NVRA registrants for local and state elections, but contend that these officials acted contrary to state law. Thus, on February 10, the state simply acted to correct a violation of law and to conform official conduct with requirements of statutory law. The defendants argue, therefore, that Mississippi was not required to obtain preclearance from the United States Attorney General to cease misguided conduct contrary to its statutes.

15. The precise issue before this three-judge court is whether the February 10 letter, which effectively required the maintenance of two voter registration lists, constitutes a change subject to preclearance by the United States Attorney General. Practically speaking, the underlying issue is simply whether Mississippi is required to allow NVRA registrants to vote in state elections, even though not qualified under state voter eligibility statutes, because the office of the Secretary of State promulgated advice, which was followed in some instances, that NVRA registrants would be qualified for all elections pursuant to proposed and anticipated, but never enacted legislation.

We find and conclude as follows:

16. Prior to the effective date of the NVRA, Mississippi maintained a unitary system of voter registration: once a voter was registered properly for any election, he was registered effectively for all elections--local, state, and federal. Miss. Code Ann. § 23-15-1 et seq. (1972). These state statutes providing for the qualification of Mississippi voters are valid under all applicable state and federal law. When Congress passed the NVRA, it made explicit that the NVRA applied only to voters in federal elections. The NVRA did not require that states enact laws that would provide NVRA registrants the right to vote in state and local elections, and Mississippi was under no obligation to pass a law to that effect.

17. The Secretary of State has no authority or power under Mississippi law to effectuate a change in the election laws contrary to legislative enactments. The Secretary of State (and the Committee), however, proposed legislation that would permit NVRA registrants to vote in local and state elections, as well as federal elections. The Secretary of State assumed that such legislation would be enacted in due course. Therefore, in an effort to implement the proposed state plan on January 1, 1995, the effective date of the NVRA, the Secretary of State, although unauthorized under state law, advised certain election officials to qualify NVRA registrants for state and local, as well as federal elections. A few thousand (the record is unclear on the precise number) citizens were registered under NVRA procedures between January 1 and February 10 under the assumption of eligibility for all elections.

18. At the instance of the United States Attorney General, the Secretary of State submitted for preclearance its total package implementing the NVRA, including the proposed legislation that was never enacted, but also administrative changes that the Secretary of State was authorized to make under both the NVRA and existing state law. On February 1, the Attorney General precleared the package submitted by the Secretary of State. It is clear to us that the unenacted legislation was not precleared because under the express terms of the applicable regulations, the United States Attorney General "will not consider on the merits...[a]ny proposal for a change affecting voting submitted prior to final enactment or administrative decision." 28 C.F.R. §

51.22 (1994). There is nothing in the record to indicate the United States Attorney General disregarded these regulations; we thus assume she acted according to law. Accordingly, it is equally clear--and this does not appear to be in dispute--that the contents of the package regarding only administrative decisions of the state have been precleared.

19. We hold that the February 10 letter did not effect a change subject to § 5 preclearance. We hold that the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General. Practically speaking, any other conclusion would be absurd. There is no evidence of ratification here. For example, there is no evidence that the governor or the legislature or the Mississippi Attorney General condoned the month long practice on the part of some election officials to qualify voters contrary to applicable state law. As we have indicated, no one, including the Secretary of State himself, contends that the Secretary of State possesses the authority to override the election statutes of the State of Mississippi. Once it became clear that the legislature was not going to enact the proposed legislation, Mississippi's Attorney General and Secretary of State took prompt action to comply with the state statutes. Thus, the act of the state to correct a misapplication of law that it has not ratified is not a change subject to § 5 preclearance.

20. Furthermore--although the argument has not been specifically raised in the pleadings or briefs but was alluded to only in the last minutes of oral argument before this court and in the unsolicited last minute brief of the Young plaintiffs--the fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance. The NVRA records are maintained at the instance of the federal government and pursuant to federal law. The fact is that NVRA voters in Mississippi can only vote in federal elections. The further fact is that this limited right is a creation of federal legislation. In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records,

is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General.

It is therefore

ORDERED, ADJUDGED, and DECREED

That the Motion for Partial Summary Judgment filed by the defendants is GRANTED.

That the Cross-motions for Summary Judgment filed by the Young plaintiffs and the United States are DENIED.

That the Motion for Preliminary Injunction filed by the United States is DISMISSED as moot.

That Count II of the Young plaintiffs' complaint and Count I of the United States complaint are DISMISSED.

SO ORDERED this the 24th day of July 1995.

/s/ E. Grady Jolly
United States Circuit Judge

/s/ William H. Barbour, Jr.
United States District Judge

/s/ Tom S. Lee
United States District Judge

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:95CV197(L)(N)

THOMAS YOUNG, et al., Plaintiffs

v.

KIRK FORDICE, et al., Defendants

consolidated with

Civil Action No. 3:95CV198(L)(N)

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF MISSISSIPPI, et al., Defendants

---

February 9, 1996

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FINAL JUDGMENT

Pursuant to Rule 58, Fed. R. Civ. P., this Court hereby enters final judgment against the United States and the Young plaintiffs in accordance with the Order issued on July 24, 1995, granting Defendants motion for partial summary judgment against the United States on Count I of its Complaint and against the Young plaintiffs on Count II of their Complaint, and in accordance with the Order of September 7, 1995, denying the United States' motion to alter or amend. The Court incorporates

into this judgment the orders issued on July 24, 1995, and September 7, 1995.

ENTERED this 9th day of February, 1996.

/s/ E. Grady Jolly
United States Circuit Judge

/s/ William H. Barbour, Jr.
United States District Judge

/s/ Tom S. Lee
United States District Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:95CV197(L)(N)

THOMAS YOUNG, et al., Plaintiffs

v.

KIRK FORDICE, et al., Defendants

consolidated with

Civil Action No. 3:95CV198(L)(N)

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF MISSISSIPPI, et al., Defendants

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April 8, 1996

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NOTICE OF APPEAL OF PLAINTIFFS YOUNG, *et al.*,
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all of the plaintiffs in *Young, et al., v. Fordice, et al.,* Civil Action No. 3:95CV197(L)(N), Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, hereby appeal to the United States Supreme Court from the final judgment of the three-judge district court, entered on February 9, 1996. This judgment finalized the order entered on July 24, 1995, which granted Defendants' motion for summary

judgment against the Young plaintiffs on Count II of their complaint and against the United States on Count I of their complaint and the order of September 7, 1995, which denied the United States' motion to alter or amend the July 24, 1995, order. The Young plaintiffs' appeal is taken pursuant to 42 U.S.C. § 1973c.

Respectfully submitted,

/s/ J. William Manuel
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## APPENDIX D

[DOJ logo] **U.S. Department of Justice**

Civil Rights Division

DLP:MAP:DHH:tlb
DJ 166-012-3
94-4505

*Voting Section*
*P.O. Box 66128*
*Washington, D.C. 20035-6128*

February 1, 1995

Constance Slaughter-Harvey, Esq.
Assistant Secretary of State, Elections
and General Counsel
State of Mississippi
P.O. Box 136
Jackson, Mississippi 39205

Dear Ms. Slaughter-Harvey:

This refers to the submission to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, of the plan to implement administratively the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg et seq., as described in publications of the Office of the Mississippi Secretary of State ("The National Voter Registration Act" (November 1994) and "The National Voter Registration Act: Agency Registration Procedures") and as subsequently clarified by the January 30, 1995, letter from your office. The implementation plan includes the following changes to voter registration and related procedures in the state:

1. voter registration at state agencies, including the offices of the Department of Human Services, the Department of Health, WIC Independent Clinics, Medicaid, and the Department of Rehabilitation Services;

2. the registration procedures to be followed by the agencies specified in paragraph 1, and the agency registration/declination form;

3. the designation of armed forces recruitment offices as voter registration locations;

4. voter registration at driver's license offices by simultaneous application, and the application forms (a combined voter registration/driver's license application form and a combined voter registration/license renewal form);

5. modification of the mail-in registration form including discontinuing the attesting witness requirement;

6. the deadline for transmitting voter registration applications from public assistance offices and driver's license offices to circuit clerks;

7. modification of voter registration purge procedures, including discontinuing the optional "four-year purge," prohibiting purging because a registrant has not voted for a period of time or has moved within the county of registration, and altering the procedures for purging registrants who may have moved outside their county of registration (including an ongoing program where each county may utilize either the postal service's National Change of Address program or a mass mailing of postcards to all registrants, sending address confirmation notices and the form to be used in that regard, use of an inactive registration list, and cancelling the registration of those on the inactive list who fail to vote or appear to vote within two subsequent federal elections or fail to otherwise have contact with election officials);

8. implementation of the NVRA's "fail-safe" voting requirements; and

9. modification of record keeping and reporting procedures and requirements.

We received your submission on December 20, 1994; supplemental information was received on January 13, 24, 26, and 31, 1995.

The Attorney General does not interpose any objection to the specified changes. However, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43). In addition, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In that regard, the granting of Section 5 preclearance does not preclude the Attorney General or private individuals from filing a civil enforcement action pursuant to Section 11 of the NVRA, 42 U.S.C. 1973gg-9.

In addition, the preclearance of those portions of the administrative implementation plan that enable or permit the state or its political subdivisions to adopt future voting changes does not constitute preclearance of those future changes and, accordingly, Section 5 review will separately be required when such changes are adopted or finalized. See 28 C.F.R. 51.15. The matters for which Section 5 review will be required include (but are not limited to): each county's selection of the procedure to be utilized in its program for identifying registrants who have moved outside their county of registration; and any change in the location or hours of public assistance offices that offer voter registration or driver's license offices. Moreover, any future changes in the state's NVRA implementation procedures (e.g., through the adoption of state legislation or the modification of precleared forms) will be subject to Section 5 review.

We further note that it appears that the State of Mississippi and/or its counties may need to address several additional matters in order to come into full compliance with the requirements of the NVRA and the Voting Rights Act, including the following:

- Section 7(a)(3) of the NVRA requires each state to designate government or nongovernment offices to serve as voter registration agencies in addition to the mandatory agencies specified in Section 7(a)(2); your submission does not address this issue. Also, the mandatory agencies specified in Section 7(a)(2) include "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," and we understand that your office will be examining the question whether certain offices that serve persons with nonphysical disabilities have not been designated as voter registration agencies.

- As you are aware, six of Mississippi's counties (Jones, Kemper, Leake, Neshoba, Newton, and Winston) are subject to the minority language requirements of Section 203 of the Voting Rights Act, 42 U.S.C. 1973aa-1a, with respect to Native Americans who speak the Choctaw language. Accordingly, procedures to implement the NVRA in these counties must be conducted in accordance with these requirements. See the Attorney General's minority language guidelines, 28 C.F.R. Part 55.

Finally, we note that the November 1994 manual indicates that individual counties may continue to conduct voter re-registration programs under the NVRA, so long as Section 5 preclearance is obtained. However, to the extent that a re-registration program would result in persons being disqualified from voting in elections for federal office for reasons other than those permitted by Section 8(a) (3) and (4) of the NVRA, that program would not be permissible. That section specifies that a person may not be removed from the registration list except at the registrant's request, because of a criminal conviction or mental incapacity as provided by state law, the registrant's death, or a change in residence pursuant to the procedures specified in Section 8. It further is our view that any re-registration program that currently is ongoing is subject to this limitation, irrespective of whether it may previously have been precleared under Section 5.

If you or any county election officials have any questions about any of these matters, please telephone David H. Hunter, an attorney in the Voting Section, at 202-307-2898.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

[By: /s/ John K. Tanner]

John K. Tanner
Acting Chief, Voting Section

**APPENDIX E**

# Memorandum

To: Mississippi Circuit Clerks
Chairman, Mississippi County Election Commissions

From: Phil Carter, Assistant Attorney General
Reese Partridge, Staff Attorney, Secretary of State's Office

Date: February 10, 1995

Subject: Implementation of the National Voter Registration Act of 1993 (NVRA)

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Purpose of this memorandum. As all of you are aware, the National Voter Registration Act took effect nationwide on January 1, 1995. NVRA is a federal law which mandates certain changes in the way the states must register voters for federal elections, as well as the manner in which voter registration rolls must be purged for federal elections.

State legislation which would provide a common registration system for state and federal elections has apparently died in the Mississippi Legislature. The purpose of this joint memo from the Mississippi Secretary of State's Office and the Mississippi Attorney General's Office is to offer additional direction to circuit clerks and county election commissioners as to how they should proceed.

In particular, we will address three areas: (1) Notifying voters registered under NVRA that they cannot vote in state or municipal elections; (2) Designating on the voter registration rolls

voters registered under NVRA; (3) Purging voter registration rolls this year; and (4) Reporting requirements. First, however, we have provided some background on the current situation regarding NVRA.

Background. Legislation was drafted at the direction of the Governor's NVRA Implementation Committee, which was named on December 15, 1993, in Executive Order No. 739. The draft legislation was completed in August of 1994 and distributed to all members of the Implementation Committee, including the representatives of the Circuit Clerks Association and the Election Commissioners Association of Mississippi. The Senate Elections Committee conducted a public hearing on the draft legislation on November 16, 1994, and all indications were that the legislation would be top priority of that committee.

However, Senate Bill 2539, the proposed legislation which conformed state law to NVRA was tabled at a meeting of the Senate Elections Committee on January 25, 1995. Tabling of a bill is an action which generally means the legislation is dead. Although the Legislature can revive SB 2539 by suspending its procedural rules, it presently appears unlikely that the Legislature will do so.

Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections.

Notification of voters registered under NVRA. Anyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections. It is important, therefore, that they be informed that they presently are only authorized to vote in federal elections. Additionally, they should also be given a reasonable opportunity to register for state elections.

Several circuit clerks have already begun notifying voters registered under NVRA that they must also register by

completing a state mail-in voter registration form, or, register in the courthouse in order to be eligible to vote in state elections.

The position of the Secretary of State and the Attorney General is that all voters registered under NVRA should be similarly notified and given the opportunity to register for state elections.

Accordingly, the Secretary of State's office is offering to notify by mail all voters registered under NVRA and present them the option of either visiting their circuit clerk's office and registering, or, completing a state mail-in voter registration form to be forwarded to their circuit clerk. The Secretary of State's office will bear the postage and printing cost for this effort. In order to complete this mailing, circuit clerks will be asked to provide to the Secretary of State a list of names and mailing addresses of all voters registered under NVRA. Clerks may, of course, elect to provide such notification themselves.

Designating voters registered under NVRA on the voter registration rolls. Voters who register under NVRA are presently not authorized to vote in state elections. Accordingly, circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must "flag" voters registered under NVRA on the voter registration books and pollbooks to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections.

Purging voter registration books during 1995. Since there are no federal elections scheduled in 1995 and it appears that there will be no state legislation that will affect current state purging laws, there is no legal requirement that the NVRA purging procedures be implemented this year. However, any voter whose name is purged under state law for a change in residence remains eligible to vote in the federal elections until the procedure prescribed in the NVRA has been completed.

To purge <u>for federal elections</u> the "confirmation cards" that are required by NVRA must be sent to any person who has moved

before placing the voter on the NVRA inactive list or purging the voter. For example, if an election commission makes a factual determination that a voter has moved from the county, they must send the voter a "confirmation card" to the voter's last known address before they can place the voter's name on the inactive list. If the voter returns the confirmation card, they may immediately purge his or her last name. Otherwise, the election commission must wait two federal general elections before purging the voter's name.

The "ongoing program" which is required by NVRA for federal elections must still be conducted by county election commissions. Therefore, counties must still employ either the National Change of Address (NCOA) system or "mass mailing" method discussed in the NVRA Information Manual.

Reporting requirements. In order for the Secretary of State's Office to complete the 1995 NVRA Report, the circuit clerks of each county must provide the total number of voters registered as of the 1995 General Election to the Secretary of State's Office not later than March 3, 1995.

In order to comply with the requirements for the March 31, 1997 Report, more detailed information will be required. You may obtain a free copy of the Rules and Regulations outlining the reporting requirements from the Federal Election Commission (FEC) by calling 1-800-424-9530.

Conclusion. NVRA is a federal law which must be implemented in Mississippi. While the failure to pass state legislation will cause additional difficulties for both election administrators and citizens who register under NVRA, both the Secretary of State and the Attorney General offer their assistance in resolving any questions you may have.

## APPENDIX F

[DOJ seal] **U.S. Department of Justice**

Civil Rights Division

DLP:MAP:DHH:tlb
DJ 166-012-3
95-0418

*Voting Section*
*P.O. Box 66128*
*Washington, D.C. 20035-6128*

February 16, 1995

Sandra Murphy Shelson
Special Assistant Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Ms. Shelson:

We have been advised by the Mississippi Secretary of State's office that the State of Mississippi has determined that in implementing the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg-1 through 1973gg-10, it will institute a dual registration and voter purge system under which those persons who are on the registration list pursuant to the provisions of the NVRA will be eligible to vote only in elections for federal offices, while persons who are on the registration list pursuant to the laws enacted by the state will be eligible to vote both in elections for federal offices and in elections for state and local offices.

Our review of this matter indicates that the implementation of this dual voter registration and purge system has not been submitted for review under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. In this regard, we note that while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that

submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1. Accordingly, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes in procedure which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.2, 51.10, 51.12, and 51.13).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Mississippi plans to take concerning this matter. If you have any questions, you should call Voting Section attorney David H. Hunter at (202) 307-2898. Refer to File No. 95-0418 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/ Elizabeth Johnson

Elizabeth Johnson
Acting Chief, Voting Section

cc: Constance Slaughter-Harvey
Assistant Secretary of State, Elections
and General Counsel

## APPENDIX G

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides:

> 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 does not have the purpose and will not 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 of the United States Code and any appeal shall lie to the Supreme Court.

## APPENDIX H

Section 8 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-6, entitled REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION, provides:

> (b) CONFIRMATION OF VOTER REGISTRATION. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--
>
> (1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and
>
> (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

Section 11 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-9, entitled CIVIL ENFORCEMENT AND PRIVATE RIGHT OF ACTION, provides:

> (d) RELATION TO OTHER LAWS.--(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).
>
> (2) Nothing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).