(6)

No. 95-2031

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THOMAS YOUNG, *et al.*,
Appellants,

v.

KIRK FORDICE, *et al.*,
Appellees.

On Appeal From The United States District Court
For The Southern District of Mississippi

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether Mississippi is violating Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by implementing dual registration procedures and other voting changes, including procedures removing thousands of previously registered voters from eligibility to vote in state and local elections, without obtaining preclearance from the United States Attorney General or the United States District Court for the District of Columbia.

2. Whether voting changes first announced by Mississippi on February 10, 1995, were implicitly precleared by a February 1, 1995, Attorney General letter addressed to a different set of circumstances, when Mississippi never submitted its February 10, 1995, changes for preclearance.

3. Whether Mississippi's voting changes are exempt from Section 5 preclearance on the ground that the changes merely corrected a misapplication of state law.

4. Whether Mississippi's voting changes are exempt from Section 5 preclearance if adopted in response to the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.*

PARTIES TO THE PROCEEDINGS

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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BRIEF FOR APPELLANTS

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 to the Jurisdictional Statement ("J.S. App.") at 1a-9a. The February 9, 1996, final judgment entered by the district court is unreported and appears at J.S. App. 10a-11a.

JURISDICTION

The final judgment of the court below, which had jurisdiction pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 2201, and 2284, 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. J.S. App. 12a-14a. On May 30, 1996, Justice Scalia extended the time in which to file a jurisdictional statement on behalf of the *Young* appellants to June 17, 1996, and they timely filed their jurisdictional statement. The Court has jurisdiction of this appeal 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 ("Section 5"), is set forth at J.S. 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 J.S. App. 28a. Miss. Code Ann. § 23-15-11 (1990) is set forth in the Joint Appendix ("J.A.") at 167.

STATEMENT OF THE CASE

This case arises out of the State of Mississippi's failure to comply with the preclearance requirements of Section 5 of the Voting Rights Act when it implemented changes in its voter registration and purge procedures in early 1995. Section 5 requires covered jurisdictions such as Mississippi to obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes in voting practices or procedures. 42 U.S.C. § 1973c.

The unprecleared changes at issue here were implemented as part of Mississippi's response to the passage of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.* The NVRA requires states to provide voter registration at agencies serving the public, such as drivers' license and public assistance offices, and limits the circumstances under which a registered voter's name may be removed from the voter rolls.[1] It applies only to registration and record-keeping for federal elections, although, as the court below found, states have discretion "to meld the NVRA requirements into the existing state system for registration of voters." J.S. App. 2a. The NVRA 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).

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[1] The NVRA created nationwide standards requiring states to end "discriminatory and unfair registration laws and procedures" that 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 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. The requirements of the NVRA do not apply to a handful of states that, on and after March 11, 1993, permitted election-day registration at the polls, or did not require registration as a precondition to voting. 42 U.S.C. § 1973gg-2.

Mississippi was required to implement the NVRA by January 1, 1995. 42 U.S.C. 1973gg note.

Prior to January 1, 1995, Mississippi state law provided for a unitary system of voter registration, under which one registration made a voter eligible to vote in all elections, federal, state and local. Miss. Code Ann. § 23-15-11 (1990); *see* J.S. App. 2a, 7a. Effective January 1, 1995, Mississippi election officials began implementing the NVRA under a unitary system of voter registration procedures that also made no distinction between eligibility for federal and state elections. J.S. App. 7a. The procedures establishing that unitary NVRA system received Section 5 preclearance on February 1, 1995. J. S. App. 15a-19a. However, on February 10, 1995, State officials issued a memorandum implementing a dual registration system, under which NVRA registrants, including those who had already registered assuming they would be eligible to vote in all elections, would be ineligible to vote in state and local elections unless they registered separately at the circuit clerk's office or by submitting a separate state mail-in form. J.S. App. 20a-23a. The new procedures set forth in the February 10, 1995, memorandum are changes affecting voting for which the State has never sought or received Section 5 preclearance. As a result, more than 30 years after enactment of the Voting Rights Act, Mississippi is conducting voter registration under an unprecleared and unlawful system, in defiance of Congress' mandate for Section 5 review of all changes in voting practices.

A. Voter Registration in Mississippi Prior to the NVRA.

The history of Mississippi's voting laws is a history of racial discrimination against the state's black citizens that has gradually, and with painful delay, been curbed by stringent application of the guarantees of the Voting Rights Act of 1965.

Mississippi has employed nearly every disfranchising stratagem ever devised to deprive black citizens of the right to vote: poll taxes, literacy tests, lengthy residency requirements, tests of "good moral character," white primaries, publication of registrants' names to facilitate retaliation, prohibitions on registration outside of a county clerk's office, reregistration programs, and dual registration requirements. *See* Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965*, 26-29, 185 (1990); *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1250-1252 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991). Mississippi's history of discrimination in voting was a primary impetus for Congress' enactment of the Voting Rights Act of 1965. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-313 (1966).[2] The State's continued resistance to the Act's guarantees also has been an important consideration in Congress' several extensions of the Act since 1965. Parker, *Black Votes Count*, at 180-181.

From 1892 to 1987, Mississippi maintained, in one form or another, a requirement of "dual registration" that had the purpose and effect of disproportionately denying black citizens the full opportunity to vote in all elections. *PUSH v. Allain*, 674 F. Supp. at 1252, 1255, 1268. Mississippi law required a citizen wishing to vote in municipal elections first to register with the circuit clerk of his or her county, and then to register separately with the municipal clerk. *PUSH*, 674 F. Supp. at 1248-49. This dual registration requirement "was enacted as part of the 'Mississippi plan' to deny blacks the right to vote

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[2] Mississippi is one of the seven states originally designated in their entirety as jurisdictions to which the Section 5 preclearance requirement applied. *See South Carolina v. Katzenbach*, 383 U.S. at 318.

following the Constitutional Convention of 1890." *Id.* at 1251. By 1984 Mississippi was the only state still to require dual registration. *Id.* at 1252. Even under Mississippi's dual registration requirement for municipal elections, however, registration with the circuit clerk had made a voter eligible to vote in federal as well as state elections. *See id.* at 1249.

In 1987, the *PUSH* court held that Mississippi's remaining dual registration requirements, as well as several other features of Mississippi's registration practices, had a racially discriminatory impact in depressing black voter participation and disproportionately disqualifying black citizens from voting, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *PUSH,* 674 F. Supp. at 1255. The Mississippi legislature subsequently enacted remedial legislation which the district court approved in 1989. *Mississippi State Chapter, Operation PUSH v. Mabus,* 717 F. Supp. 1189, 1193 (N.D. Miss. 1989), *aff'd,* 932 F.2d 400 (5th Cir. 1991).

Thus, 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 a single registration in their county of residence, they are eligible to vote in all local, county, state and federal elections. Miss. Code Ann. § 23-15-11 (1990); *see* J.S. App. 2a, 7a.

B. Mississippi's Response to the NVRA.

As of the effective date of the NVRA in Mississippi, January 1, 1995, some of Mississippi's registration and purge procedures were inconsistent with those permitted by the NVRA. For example, the state mail-in registration form requires the signature of an attesting witness who already is registered to vote in the applicant's county, and requires more

information than is necessary for determining voter eligibility and maintaining registration rolls, Miss. Code Ann. § 23-15-47 (1990 & Supp. 1996), all of which are prohibited by the NVRA. 42 U.S.C. § 1973gg-7(b)(1) and (b)(3). In addition, Mississippi law permits the purging of voters who have not voted in four years at the discretion of local election officials, and permits purges based on local officials' determination, without notice to the voter, that the voter is no longer qualified under state law. Miss. Code Ann. §§ 23-15-153 (1990 & Supp. 1996), 23-15-159 (1990). The NVRA prohibits purges for non-voting and requires written confirmation of information before it is used to purge a voter from the rolls. *See* 42 U.S.C. § 1973gg-6(d). The NVRA also contains more detailed requirements for registration opportunities at driver's license offices and other agencies than does Mississippi law, *compare* Miss. Code Ann. § 23-15-47(4)(b) (1990 & Supp. 1996) *with* 42 U.S.C. § 1973gg-3 and 42 U.S.C. § 1973gg-5.

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, Ex. 1. The Implementation Committee included the chairs of the Mississippi House and Senate election committees, representatives of the Mississippi Attorney General's office, the Governor's office, and the Secretary of State's office, and representatives of several other state agencies and organizations. J.A. 77-78.

Starting in February 1994, the Secretary of State's office, in conjunction with the Implementation Committee,

developed written materials and registration forms to be used by circuit clerks and other local officials in implementing the revised registration and purging procedures prompted by the NVRA. *See* J.S. App. 2a; J.A. 14-25. The materials included a manual, first published in July 1994 and published in final form in November 1994, to guide the registration activities of these public officials and employees, J.A. 26-49, and a set of instructions to be used by personnel at the drivers' license bureaus, public assistance agencies, and other offices designated to conduct registrations. J.A. 51-60. They also included new voter registration forms to be used at agencies, J.A. 61-66, and a redesigned mail-in registration form that conformed to NVRA requirements and eliminated the requirement of an attesting witness. J.A. 50. The new procedures and forms were to be implemented as of January 1, 1995. J.A. 14, 22, 110. None of these new procedures and registration forms made any distinction between registration for federal elections and registration for other elections, nor suggested that the new procedures would result in eligibility only for federal elections.

The new procedures were widely disseminated and publicized in 1994. The Secretary of State's office sponsored numerous training sessions throughout the state for local election officials, members of the public, and personnel of the agencies that would become voter registration sites under the NVRA. J.S. App. 2a; J.A. 14-25, 76-77. The NVRA manual, J.A. 26-49, was distributed at these sessions. J.A. 14-25. The purpose of these training sessions was "to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995." J.A. 22; *see* J.A. 24-25 (describing meeting attended by 133 officials representing 68 counties).

In 1994 the Mississippi Legislature adopted one statutory change to facilitate implementation of the NVRA,

moving back the last date for accepting mail-in voter registration from 60 to 30 days before an election. Comp. ¶ 35; Amended Ans. ¶ 35. Legislation to conform Mississippi's practices to the NVRA more generally was the subject of a Senate Election Committee hearing in November 1994, J.A. 85, and was introduced in the January 1995 legislative session. J.S. App. 21a.

C. Mississippi's December 1994 Submission to the United States Attorney General.

In the latter part of 1994, the Department of Justice learned that Mississippi planned to implement administratively its new registration procedures starting January 1, 1995, although none of the State's 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 Secretary of State that preclearance of these new procedures and forms was necessary prior to their implementation, sending a formal "please submit" letter to the Secretary of State on December 5, 1994. J.A. 105.

The Secretary of State's office complied with the request, submitting to the Department of Justice materials setting forth the NVRA practices that were to be implemented "prior to the passage of the state legislation." J.A. 107-108. On December 20, 1994, the Secretary of State formally requested preclearance for this implementation plan:

> [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.

J.A. 109-110 (letter dated December 20, 1994, from Constance Slaughter-Harvey, General Counsel to the Secretary of State and Assistant Secretary of State, Elections). The November 1994 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.

Indeed, the new voter registration forms that were included in the Section 5 submission and that were to be used beginning January 1, 1995, 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 apply to 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 . . . ." J.A. 45 (emphasis added). Similarly, the new form to be used at public assistance agencies asked: "If you are not registered to vote where you now live, would you like to register to vote here today?" J.A. 46. The revised mail-in form contains similar language, stating "If you are not registered to vote where you now live, you can use this form to register to vote or report that your address has changed." J.A. 50. Nothing in these forms advises the applicants that their registration will be invalid for state and local elections.

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." J.A. 35. Again, these instructions did not suggest that the new limitations on voter purges would apply only to federal elections.

In addition to the manual, the packet of materials sent to the Attorney General included background materials such as Implementation Committee reports, J.A. 67-73, schedules of training that had occurred, J.A. 14-25, newsletters published periodically by the Secretary of State, J.A. 74-84, and the draft legislation to be introduced in early 1995. J.A. 86-104. Among these background materials was a July 1994 "Status Report" that included, in a list of "New Legislation," the phrase "Make NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72. No procedures establishing a dual registration system, however, were ever submitted to the Attorney General.

D. Implementation of the NVRA Plan.

In January 1995, local officials began implementing the Secretary of State's administrative plan set forth in the November 1994 manual. Drivers' license offices and other designated agencies began accepting voter registration applications on the forms developed by the Secretary of State, and forwarding those registrations to the circuit clerks of their respective counties. *See* February 25, 1995, memorandum, Status Report on NVRA, J.A. 114 (estimating that 4,000 citizens registered under NVRA since January 1, 1995). Based on the Secretary of State's instructions, many circuit clerks added these registrants to the voter rolls for all elections. Defendants' Itemization of Facts, ¶ 10, June 19, 1995; *see also*

J.S. App. 6a, 7a.[3] Others accepted NVRA applications on the new forms but did not immediately add those registrants to the rolls for state elections. Ex. D-1, J.A. 167. Whether a particular circuit clerk placed the NVRA registrant on the rolls for all elections or for federal elections only, the registration forms given to applicants at driver's license offices and other designated agencies were the forms included in the Secretary of State's Section 5 submission -- forms that did not advise applicants that they were registering only for federal elections. *See*, Evans Test., 7/19/95 Prelim. Inj. Tr., at 16-17; Horton Dep., J.A. 132; J.S. App. 7a ("A few thousand . . . citizens were registered under NVRA procedures between January 1 and February 10 under the assumption of eligibility for all elections.")

On January 25, 1995, the Mississippi Senate Elections Committee, chaired by State Senator Kay Cobb, tabled the bill that was designed to amend Mississippi's election statutes so as to integrate the NVRA requirements.[4] J.S. App. 21a. The United States Attorney General was aware of the committee's

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[3] According to an informal survey conducted by personnel of the Mississippi Attorney General's office for an evidentiary hearing held on the United States' motion for preliminary injunction, 29 of Mississippi's 82 circuit clerks added NVRA registrants to the existing voting rolls for all elections, state, federal and local. J.A. 161. These included the circuit clerk for Hinds County, the State's most populous county.

[4] This was the last day that bills could be voted out of committee in the regular session. It was still possible, however, for the legislature to vote to suspend the rules and bring the bill to the floor. J.S. App. 21a. Thus, tabling the bill in committee did not necessarily mean that the legislature could not act on the bill later in the session. J.A. 115. Although the legislature would remain in session for almost three more months, no vote to suspend the rules and bring the bill to the floor was taken.

action, but the State did not amend or withdraw its Section 5 submission. State officials communicated in writing with Justice Department officials concerning various aspects of the submission between January 25th and January 31st, but those communications do not address the legislative committee's action, nor its impact, if any, on Mississippi's plans for administering the NVRA. *See, e.g.*, J.A. 111-113 (letter of January 30, 1995).

On February 1, 1995, the United States Attorney General, acting through the Department of Justice, precleared the State's plan to implement administratively the NVRA "as described in the 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." J.S. App. 15a.[5] The Attorney General's preclearance letter 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. J. S. App. 15a-19a.

E. 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 Office, issued a memorandum to Mississippi circuit clerks and the chairpersons of the Mississippi County Election

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[5] The documents referred to appear at J.A. 26-49 (November 1994 manual), J.A. 51-60 (agency registration procedures), and J.A. 111-113 (letter of January 30, 1995). The document referred to as "The National Voter Registration Act (November 1994)" is the same document referred to in this brief as the November 1994 manual.

Commissions. J.S. App. 20a-23a. Explaining that the Senate Elections Committee had tabled the anticipated state NVRA legislation, the memorandum stated that its purpose was "to offer additional direction to circuit clerks and county election commissioners as to how they should proceed." J.S. App. 20a.

First, the memorandum announced 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," J.S. App. 21a. The memorandum acknowledged that "[a]nyone 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." *Id.* The memorandum therefore asked circuit clerks to notify NVRA registrants of their limited eligibility to vote, and to provide "the opportunity to register for state elections." J.S. App. 21a.

Second, to prevent NVRA registrants from voting in state elections, the memorandum directed circuit clerks to adopt procedures for distinguishing NVRA registrants from other registrants on their voting rolls. J.S. 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." J.S. App. 21a-22a.

Third, the memorandum gave directions as to which aspects of the purge procedures set forth in the November 1994 NVRA manual (the manual precleared by the United States Attorney General) were still operative. J.S. App. 22a-23a. Contrary to the instructions of the November 1994 NVRA manual, the February 10, 1995, memorandum stated that "there is no legal requirement that NVRA purging procedures be

implemented this year." J.S. App. 22a. Among other matters, the memorandum instructed circuit clerks that they could resume state-law purges for change of address, but could not thereby cancel the voter's eligibility for federal elections without following confirmation procedures described in the memorandum. J.S. App. 22a-23a.

In implementing the State's new dual registration system, Mississippi circuit clerks have adopted varying practices for establishing the limited eligibility of NVRA registrants, notifying such registrants of their limited eligibility, and providing opportunities to register for state elections. For example, some clerks send NVRA registrants only a letter telling them that they will be limited to voting in federal elections and advising them that they may register separately for state and local elections, without enclosing any state voter registration form. Williams Dep., J.A. 159. Other clerks send NVRA registrants a letter along with a blank state form, but do not provide postage for returning the form. Dunn Dep., J.A. 135-136, 139. Others go much further, sending a notification letter accompanied by a partially completed state registration form, with pre-paid return postage, and following up with telephone calls. Salazar Dep., J.A. 141-145.

The February 10, 1995, memorandum thus instituted numerous changes in Mississippi's registration procedures, whether measured against the procedures in effect as of December 1994 or those the State had implemented from January 1 through February 10, 1995. *See, e.g.*, Horton Dep., J.A. 133 ("Q. Have you in the past in your time in the circuit clerk's office had to send out letters with state mail-in forms, for example, telling people they were only registered for certain elections? A. No."); Simmons Dep., J.A. 126-127 ("Q. Now, as far as these things that you are doing to go out and catch up with these people who've registered under the NVRA, are these

things you've ever had to do before, or is this something new? A. This is something new.")

The result of these new procedures is 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 meet the same statutorily defined voter eligibility criteria,[6] and differ only in what forms they fill out and at what site they obtain a registration form. Mississippi is now the only state that does not permit NVRA registrants to vote in state and local elections.[7]

F. 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 voting procedures described in the February 10, 1995, memorandum constituted unprecleared changes that had not been submitted by the State for Section 5 review, and that they were legally unenforceable

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[6] NVRA registrants, like all other Mississippi registrants, must be citizens of the United States, eighteen years of age or older, mentally competent, and have resided for 30 days in the state, county, supervisor's district, and municipality (if any) in which they wish to vote. In addition, they must not have been convicted of any of a list of disqualifying crimes. *Compare* Miss. Code Ann. § 23-15-11(1990) *with* oath set forth in NVRA registration forms, J.A. 44, 45, 46, 50, 63, 64, 65, and 66.

[7] In Illinois, the legislature also failed to pass legislation merging the NVRA with state practices, and the state administratively implemented a dual registration system, but the requirement of dual registration was subsequently invalidated on state constitutional and statutory grounds. *Orr v. Edgar*, 95 CO 0246 (Ill. Cir. Ct. May 1, 1996), *aff'd*, 1996 WL 549559 (Ill. App. 1 Dist. September 26, 1996).

until they had received Section 5 preclearance. J.S. App. 24a-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." J.A. 117-118. To this date, the State of Mississippi has not filed a Section 5 submission regarding these voting changes and has continued to implement them without preclearance.

G. Proceedings in the District Court.

Appellants Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, citizens of the State of Mississippi who meet the State's qualifications to register to vote, filed suit against Governor Kirk Fordice and other executive officials on April 20, 1995.[8] The Young plaintiffs sought declaratory relief under Section 5 of the Voting Rights Act and the NVRA, and an injunction against further implementation of unprecleared changes. The United States filed suit the same day, seeking similar relief, and the district court consolidated the two actions.

Specifically, Count II of the Young plaintiffs' complaint alleged that the State's changes related to voter registration and

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[8] The other defendants below were 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.

purging had not been precleared and that their enforcement accordingly violated Section 5 of the Voting Rights Act. Comp. ¶ 2. Plaintiffs alleged that the procedures initiated by the State's February 10, 1995 memorandum were unprecleared changes from the State's pre-NVRA statutory unitary registration system, in violation of Section 5. *Id.* ¶ 68. They also alleged that the February 10, 1995 memorandum initiated changes from the precleared unitary NVRA implementation plan that the State had implemented starting January 1, 1995. *Id.* ¶ 69. The State's answer denied that the voting 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. Ans. ¶¶ 41, 43.

A three-judge court was convened to hear the Section 5 claim pursuant to 42 U.S.C. § 1973c. All parties subsequently moved for partial summary judgment on the Section 5 cause of action. The Young plaintiffs' cross-motion for summary judgment requested, among other relief, a permanent injunction prohibiting the defendants from implementing the unprecleared changes, and requiring that NVRA registrants be permitted to vote in all elections. The United States, in addition, filed a motion for a preliminary injunction.

In a decision that cited 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. J.S. 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." J.S. App. 8a. Although the court did not identify with precision the "administrative decisions" that were deemed precleared, it apparently concluded that the United States Attorney General had selectively precleared some changes in registration procedures *only for use in relation to federal elections*, even though the State's Section 5 submission had not distinguished between federal and state elections.[9] The court believed that this redefinition of the February 1, 1995 preclearance letter was required because the Attorney General could not have intended to preclear a unitary registration system when she was aware that the Mississippi Legislature had not yet enacted proposed conforming legislation. J.S. App. 7a-8a.

Because the court believed that implementation of the unitary NVRA system beginning January 1, 1995, was unauthorized, it further concluded that the instructions in the State's February 10, 1995, memorandum should not be considered changes, but instead were merely corrections of previous unauthorized practices:

> 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

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[9] The plaintiffs consistently argued that the February 1, 1995, preclearance letter did not effect preclearance of changes for use in a dual registration system. Complaint, ¶¶ 48, 53, 56, and 59; Cross-Motion for Summary Judgment, ¶ 6.

> preclearance of the United States Attorney General. Practically speaking, any other conclusion would be absurd.

J.S. App. 8a. The court found that no "ratification" had occurred because "there was no evidence that the governor, 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." J.S. App. 8a.

Finally, the Court accepted the State's argument that adoption of a dual registration system in response to an enactment of Congress did not reflect a change covered by Section 5 because Mississippi was merely complying with federal law:

> 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. J.S. App. 8a-9a.

On September 7, 1995, the district court denied without opinion the United States' motion for reconsideration of its decision on the Section 5 claims. J.S. App. 10a. After the parties voluntarily resolved the claims based on the NVRA, the court entered final judgment on February 9, 1996. J.S. App. 10a-11a.

SUMMARY OF ARGUMENT

The preclearance requirement of Section 5 of the Voting Rights Act covers, at its very core, changes in any practices affecting the opportunity to register to vote. Mississippi is one of the states whose history of racial discrimination in voting prompted Congress to enact Section 5 in 1965 and to extend it three times. Statement of the Case, *supra*, at 4-6. Despite Mississippi's status as a Section 5-covered jurisdiction, the State implemented substantial changes in its voter registration practices through its February 10, 1995, memorandum, and has neither sought nor obtained Section 5 preclearance for those changes. By permitting Mississippi to "forgo the preclearance process altogether," *Clark v. Roemer*, 500 U.S. 646, 659 (1991), the decision below ignored controlling law and undermined Section 5's critical safeguards against discrimination.

Time and again, this Court's decisions enforcing the preclearance requirement have rejected a regime of uncertain, case-by-case determinations of the need for preclearance, in favor of clear commands: all changes in practices related to voting must be submitted for Section 5 review by the United States Attorney General or the District Court for the District of Columbia; all proposed changes must be unambiguously identified when they are submitted; and no decision on the merits of a proposed change may be rendered by a local three-judge district court, such as the court below. The court below did not apply, distinguish, or even mention any of the controlling decisions of this Court that establish these commands. Because Mississippi's voting changes have not received preclearance and are not exempt from the preclearance requirement, the district court's decision must be reversed.

1. The district court's decision conflicts with *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Clark v. Roemer*, 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 purging 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 procedures or practices that would create separate systems of registration and purging for federal and state elections, nor any procedures for canceling the eligibility of NVRA registrants to vote in state and local 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 as an implicit request for preclearance of a dual system.

2. The district court further erred in holding that Mississippi's February 10, 1995, voting changes were exempt from preclearance.

A. Mississippi's February 10, 1995, voting changes were not exempt from the preclearance requirement on the ground that the changes merely corrected "a misapplication of state law." J.S. App. 8a. 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 based on their alleged conflict with state law. Because the voting procedures initiated in the State's

February 10, 1995, memorandum reflect a change from the practices "*in fact* 'in force or effect'" prior to February 10, 1995, Mississippi was required to secure Section 5 preclearance before implementing them, regardless of the legal status under state law of the practices previously in use. *Perkins*, 400 U.S. at 395 (quoting Section 5).

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, because a local three-judge district court does not have jurisdiction to determine whether voting changes were in fact adopted for a benign purpose or a discriminatory one. The only questions for the court are whether Section 5 covers the contested change, whether the state has satisfied the Section 5 approval requirements, and, if Section 5's requirements have not been satisfied, what relief is appropriate. *Lopez v. Monterey County*, 1996 WL 637045, at *7 (U.S. November 6, 1996); *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). The motives and justifications for the State's voting changes will become relevant only if and when Mississippi submits its procedures for Section 5 review by the United States Attorney General or the United States District Court for the District of Columbia. Conditioning the requirement of preclearance review on a case-by-case examination of the legality of the state's past practices would thwart Congress' determination that "[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 v. Sanchez*, 452 U.S. 130, 151 (1982) (citation omitted).

Furthermore, the procedures initiated by the State's February 10, 1995, memorandum constitute changes from the voting practices in place prior to January 1, 1995, as well as from those implemented in early 1995. Because the State was

obligated to obtain preclearance at some point, treating the Secretary of State's Section 5 submission and the Attorney General's preclearance determination as nullities would not alter the conclusion that the State has implemented unprecleared voting changes in violation of Section 5.

B. 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. *Id.* at 565 n. 29. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992) ("[T]he scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting. . . .") 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 reverse the decision of the court below and direct that the court enter appropriate relief enjoining further implementation of the unprecleared dual registration procedures established by the State's February 10, 1995, memorandum, unless and until the State obtains Section 5 preclearance for its voting changes.

ARGUMENT

I. THE DISTRICT COURT ERRED IN 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 change in procedures or practices affecting voting, 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, J.S. App. 26a-27a. If a covered jurisdiction has not obtained preclearance for changes in its voting practices or procedures, "§ 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Clark*, 500 U.S. at 653 (citing *Allen*, 393 U.S. at 572); *Lopez v. Monterey County*, 1996 WL 637045, at *7.

In an action such as this, alleging that a covered jurisdiction has instituted voting changes without the required preclearance, the local three-judge district court does not have jurisdiction to determine "whether the changes at issue . . . in fact resulted in impairment of the right to vote, or whether they were intended to have that effect." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Instead, the only questions for the court are: "(i) whether a change is covered by § 5, (ii) if the change is covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements have not been satisfied, what relief is appropriate." *McCain*, 465 U.S. at 250 n.17; *Lopez*, 1996 WL 637045, at *9; *City of Lockhart*, 460 U.S. at 129 n.3.

Mississippi had a unitary voter registration system as of December 1994, under which one registration made a voter eligible to vote in all elections, federal, state and local. State officials in Mississippi developed a unitary system incorporating the registration and purge requirements of the NVRA, submitted that plan to the United States Attorney General for Section 5 preclearance in December 1994, and began implementing that plan as of January 1, 1995, registering thousands of voters "under the assumption of eligibility for all elections." J.S. App. 7a. On February 10, 1995, however, state officials determined that a different set of registration procedures should be instituted in the wake of the tabling of proposed NVRA legislation -- procedures establishing a two-tier system under which NVRA registrants would be eligible to vote only in federal elections absent a separate registration under separate state procedures. J.S. App. 20a-23a.

Once the State decided to implement the NVRA in that manner, it had to make numerous additional discretionary choices. The State had to determine, for example, the procedures for notifying NVRA registrants of their limited eligibility status, the procedures for canceling the state-election eligibility of those who had already registered, the procedures for offering or publicizing the opportunity to re-register for state and local elections, the procedures for separating federal-election-only registrants from all other registrants on election day, and the procedures for implementing the NVRA's purge limitations with respect to federal elections. *See supra* pp. 14 - 15. All of these procedures directly affect access to the franchise and therefore fall within the Section 5 preclearance

requirement.[10] Mississippi, therefore, could not lawfully implement the dual registration system set forth in the State's February 10, 1995, memorandum, without securing preclearance.

The district court ruled that the State had obtained the necessary preclearance, stating "the contents of the package regarding only administrative decisions of the state have been precleared." J.S. App. 8a. The district court thus treated the United States Attorney General's February 1, 1995, preclearance letter as implicitly authorizing the procedures necessary to implement the NVRA for federal elections only -- even though the procedures set forth in the State's Section 5 submission did not distinguish between federal and state elections. The court believed that this redefinition of the February 1, 1995, preclearance letter was required because the Attorney General could not have intended to preclear a unitary registration system when she was aware that the Mississippi Legislature had not yet enacted proposed conforming legislation. J.S. App. 7a-8a.

The court below erred as a matter of law in concluding that the Attorney General implicitly precleared procedures applicable to federal elections only. This Court has emphatically

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[10] The Act defines "vote" and "voting" as including "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this act, or other action required by law prerequisite to voting." 42 U.S.C. § 1973l(c)(1). 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 (1996) and § 51.13 (1996).

rejected the concept of preclearance by implication, 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.*

To comply with that obligation, as this Court unanimously held in 1991, a covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider," *Clark*, 500 U.S. at 658. "'[A]ny ambiguity in the scope of the preclearance request' must be construed against the submitting jurisdiction." *Id.* at 659 (citation omitted). As the Court explained in *Clark*, "[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. *See also Dupree v. Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), *vacated and remanded for clarification*, 115 S.Ct. 1684 (1995), *on remand*, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), *aff'd*, 116 S.Ct. 2493 (1996).

Here, the only submission that received preclearance from the United States Attorney General on February 1, 1995, was the Secretary of State's December 1994 submission of a set of voting changes to be used for registration generally, without restrictions on a voter's eligibility for all elections. That request for preclearance failed to identify at all, much less "with specificity," the many procedures that are required to implement the dual system set forth in the State's February 10, 1995, memorandum. *Clark*, 500 U.S. at 658. Unlike the February 10, 1995, memorandum, the December 1994 submission included no procedures establishing a two-tier system of voter

registration and record-keeping, no provisions for separate sets of voter purge procedures distinguishing NVRA registrants from state registrants, and no procedures for notifying NVRA registrants of their restricted eligibility. *See supra* pp. 9 - 13. The February 1, 1995, preclearance letter did not, and could not, provide preclearance for changes that were not part of the submission.

Indeed, the impact of the new registration forms, and the other practices and procedures for which the Secretary of State sought preclearance, cannot be "view[ed] . . . in isolation" from the unitary registration system of which they were to be a part, without frustrating meaningful Section 5 review. *City of Lockhart*, 460 U.S. at 131 (holding that § 5 preclearance requirement applied to continued use of numbered posts when city added two new seats to city council, even though numbered post requirement was not itself new). To illustrate, a voter registration form that does not identify the elections for which the registrant will be eligible may be perfectly innocuous and acceptable if an applicant who fills out the form will in fact be eligible to vote in all elections. That same form, however, may be misleading and, indeed, deceptive, if the circuit clerks who receive the form intend to exclude the registrant from voting in state and local elections absent a separate registration under separate procedures. Such considerations underscore the importance of applying preclearance determinations only to changes that are fully and unambiguously identified in the submission.

The district court's conclusion that changes implementing a dual registration system could be precleared by implication is particularly troubling as applied to Mississippi, where a federal court in 1987 struck down as racially discriminatory the State's previous requirement of separate registration for state and municipal elections. *PUSH v. Allain,*

674 F. Supp. at 1255, 1268. Under a system of dual registration voters who take advantage of 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. As State officials and legislators surely knew when the proposed state legislation was under consideration, the district court in *PUSH* found that black voters in Mississippi were disproportionately disqualified from voting in municipal elections under Mississippi's prior dual registration requirement. *Id.* Furthermore, the State's February 10, 1995, memorandum exacerbates the potential for discrimination by granting wide discretion to circuit clerks to determine how to set up and implement the new dual registration requirement. *Cf. 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").[11] Given the clear "*potential* for

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[11] As recounted in *PUSH*:

> In the March 10, 1987 municipal Democratic primary election in the City of Marks, Mississippi, 56 voters who had registered to vote with the Quitman County Circuit Clerk prior to August 3, 1984, but who had not registered with the Marks Municipal Clerk, were required to cast affidavit ballots by election officials. These affidavit ballots were later rejected and not counted by the Marks Municipal Democratic Committee. All 56 of these voters were black. In that election, two black candidates for the board of aldermen lost by voter margins less than the number of affidavit ballots that were rejected.

674 F. Supp. at 1255. *See also* Hearings on Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, 97th Cong., 1st Sess. (1981), at 2643 (testimony of Robert M. Walker, Mississippi Field

discrimination" inherent in such changes to Mississippi's registration practices, *NAACP v. Hampton County Election Comm'n,* 470 U.S. at 181 (emphasis original), it would frustrate the core purposes of Section 5 if covered states such as Mississippi could obtain preclearance for such procedures through a submission that does not identify them unambiguously and "with specificity." *Clark,* 500 U.S. at 658.

Although the United States Attorney General, before issuing the February 1, 1995, preclearance letter, was aware that the State's proposed legislation had been tabled in committee, that awareness does not transform the State's December 1994 submission into something it was not, and does not satisfy the requirement of a specific submission of the February 10, 1995, changes. The State did not withdraw or alter its Section 5 submission after the legislation was tabled on January 25, 1995. Even if the Attorney General could be charged with knowledge that the State might now wish to alter

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Director, NAACP, describing similar practices in numerous Mississippi localities).

In addition to the discriminatory practices resulting from the prior dual registration requirement, Mississippi counties have periodically resorted to so-called "reregistration" programs through which the registration of all voters in the county would be canceled, and new registration required, for the alleged purpose of eliminating unqualified voters from the rolls. As an Attorney General letter objecting to one such reregistration program noted: "The manner in which the reregistration was conducted resulted in the registration of less than 75% of the voters and the failure of over 25% of the black voters to requalify." Hearings before the Civil Rights Oversight Committee of the Committee on the Judiciary, 92nd Cong., 1st Sess. (1971), at 293 (reprinting Attorney General's letter). *See also id.* at 88-89, 97-99, 271-274, 276, 320. Actual experience in Mississippi thus confirms the discriminatory potential of changes such as those at issue here.

its NVRA implementation procedures in light of the legislative committee's action, 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. *See also NAACP v. Hampton County*, 470 U.S. at 182 ("A change that was never submitted at all does not meet . . . [the *Allen*] standard").

The State has pointed to one phrase in a background document submitted to the Attorney General as constituting the required submission of the State's dual registration procedures. The phrase appears in a list entitled "New Legislation" included in a July 1994 "Status Report," J.A. 67-73, and states in full "Make NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72. The list in which this phrase appears was not part of the November 1994 manual which the Secretary of State described as the State's NVRA submission. *See* J.A. 110 ("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"). There is simply nothing in the State's November 1994 NVRA manual setting out procedures for implementing a dual registration system. Thus, the buried nugget on which the State relies does not remotely serve to discharge the State's burden "to identify with specificity each change that it wishes the Attorney General to consider." *Clark*, 500 U.S. at 656; *see McCain*, 465 U.S. at 251-255.[12]

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[12] The district court emphasized that, under the Attorney General's Section 5 regulations, the Attorney General "'will not consider on the merits . . .[a]ny proposal for a change affecting voting submitted prior to final enactment or administrative decision.'" J.S. App. at 7a, quoting 28 C.F.R. § 51.22 (1994). The district court reasoned that the

Indeed, the facts in *McCain* and *Clark* presented a stronger case for recognizing a doctrine of implicit preclearance than those presented here, had this Court been inclined to adopt a doctrine so at odds with the purposes of Section 5. In *McCain*, 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. The seats were to be elected under a system of government created by a 1966 statute that had not itself received preclearance. Even though the United States Attorney General actually requested a copy of the 1966 statute and examined it during the Section 5 review process, this Court held that preclearance of the 1971 statute did not serve to preclear the 1966 statute, because the county never expressly asked the Attorney General for approval of the 1966 statute. *McCain*, 465 U.S. at 253

Attorney General's February 1, 1995, preclearance letter therefore should be read as granting selective preclearance only to the use of NVRA procedures for federal elections, because broader state legislation had not been enacted. J.S. App. 7a-8a. That reasoning is faulty. The Secretary of State's submission clearly advised the United States Attorney General that state election officials were planning to implement the procedures set forth in the November 1994 NVRA manual as of January 1, 1995, without awaiting legislative action. J.A. at 109-111 (submitting plan "to administratively implement NVRA on January 1, 1995"). Thus, in addressing the State's Section 5 submission, the Attorney General was addressing a "final . . . administrative decision" regarding the practices the State intended to follow beginning January 1, 1995. 28 C.F.R. § 51.22 (1994). Indeed, Texas, like Mississippi, administratively implemented the NVRA on a unitary basis through action of the Secretary of State, prior to action by the state legislature. *See* Attach. R, U.S. Mot. For Prelim. Inj. and Summ. Judg. (Section 5 submission letter from Texas Secretary of State, dated October 7, 1994). The Justice Department's regulations thus do not authorize the district court's conclusion that the Attorney General implicitly precleared a dual registration system in Mississippi.

(Attorney General's "request for and receipt of this information in no way suggest that he approved changes that he was not requested to approve"). Similarly, in *Clark*, where the Attorney General had precleared the creation of additional elected judgeships for certain Louisiana courts, this Court rejected the argument that seats added to those courts earlier were implicitly precleared as well, because the State had made no separate request to preclear those earlier seats. *Clark*, 500 U.S. at 657.

Here, the State seeks to rely on the Attorney General's implicit knowledge not of *past* enactments that were arguably encompassed by the submitted change, but potential *future* changes the State might be likely to seek in the wake of the Mississippi legislature's action -- a broader doctrine of implicit preclearance than was rejected in *McCain* and *Clark*. There is no warrant for a Section 5 doctrine that would create such uncertainty about the scope of an Attorney General preclearance decision.[13]

Finally, the district court further departed from the teachings of *McCain v. Lybrand* by failing to give deference to the United States Attorney General's determination that the February 10, 1995, changes were outside the scope of the previous preclearance decision. As noted above, in this case the Justice Department responded to the State's 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

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[13] The court below concluded that the February 1, 1995, letter could be construed as preclearing the February 10, 1995, changes without applying, distinguishing, or even citing this Court's decisions in *McCain v. Lybrand*, *Clark v. Roemer*, and similar cases. Those decisions, of course, were cited to the court by the parties below.

prior to implementation. J.S. App. 24a. Under *McCain*, the district court owed deference to that determination. 465 U.S. at 255-56.

In sum, this Court's controlling precedents require rejection of the district court's theory that the February 1, 1995, preclearance letter selectively and prospectively precleared the voting changes first described in the State's February 10th memorandum.

II. THE DISTRICT COURT ERRED IN HOLDING THAT MISSISSIPPI'S VOTING CHANGES WERE EXEMPT FROM SECTION 5 PRECLEARANCE.

A. The Voting Changes Were Not Exempt from Coverage on the Ground That the Changes Merely Corrected a Misapplication of State Law.

The district court relied on the alternative theory, equally at odds with this Court's precedents and the language, purpose and structure of Section 5, that the procedures set forth in the February 10, 1995, memorandum, were outside the coverage of Section 5. 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 that he therefore could not implement procedures permitting NVRA registrants to vote in local and state elections. J.S. 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. J.S. App. 8a.

The district court disregarded this Court's precedents in holding that changes in voting procedures are exempt from Section 5 coverage so long as the State is merely seeking to conform a set of practices to state law. That potential loophole in Section 5 coverage was closed in *Perkins v. Matthews*, 400 U.S. at 394-95. 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 aldermanic elections. The City of Canton argued that a Section 5 submission was unnecessary because Canton's previous ward elections had been conducted contrary to a 1962 Mississippi statute requiring at-large aldermanic elections , and the change to at-large elections was therefore necessary to conform Canton's procedures to State law. This Court reversed the district court's judgment in favor of Canton, holding that the City's previous use of ward elections showed that "the procedure . . . *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards." *Perkins*, 400 U.S. at 395 [(quoting Section 5)]. A change from that procedure was therefore a change requiring preclearance under Section 5, regardless of the mandates of the 1962 Mississippi statute.

Under *Perkins*, therefore, when Mississippi officials decided to halt implementation of the unitary NVRA registration system under which thousands of voters were registered starting January 1, 1995, the State was required to submit for Section 5 preclearance the changes it wished to make altering its registration practices. Indeed, if the district court's ruling in this case were correct, the City of Canton could have easily 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.* J.S. App. 8a.

Perkins further held 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 have been 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 395 (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").[14]

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[14] As this Court recently explained in *Lopez v. Monterey County*, 1996 WL 637045, at *9:

> Congress designed the preclearance procedure "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." *McDaniel*, 452 U.S., at 149. Congress chose to accomplish this purpose by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia. As we explained in *McDaniel*, "[b]ecause a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way." *Id.* at 151 (footnote omitted).

Thus, Mississippi'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.

This Court has consistently adhered to *Perkins*' holding that Section 5 addresses changes from election procedures "*in fact* in force or effect," *Perkins*, 400 U.S. at 395 (emphasis original), regardless of their legal status under state law. *City of Lockhart*, 460 U.S. at 133 ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect"); *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982).

In *Hathorn v. Lovorn*, a series of state court rulings had mandated changes in the election system for a school district in Winston County, Mississippi, and the final election plan ordered by the state Chancery Court incorporated a run-off requirement, in accordance with pre-existing Mississippi state law. The Chancery Court determined that this plan had to be submitted for Section 5 preclearance, and the United States Attorney General objected to the inclusion of the run-off requirement. After the Chancery Court ruled that its decree would have to comply with the Voting Rights Act, the Mississippi Supreme Court reversed, holding that Winston County must comply with the state-law run-off requirement in conducting its elections. 457 U.S. at 257-261. Although the primary issue addressed by this Court in reviewing the Mississippi Supreme Court's decision was whether the state court had jurisdiction to consider the requirements of Section 5 in fashioning its decree, this Court also took care to point out that "a state court decree directing compliance with a state election statute contemplates 'administ[ration]' of the state statute within the meaning of § 5." 457 U.S. at 265 n. 16. If a decree issued by a state court for the purpose of conforming an election system to existing

state law is subject to the Section 5 preclearance requirement, it follows that a directive issued by a state Assistant Attorney General for the asserted purpose of conforming an election system to existing state law -- such as the State's February 10, 1995, memorandum -- also is subject to the Section 5 preclearance requirement.

In any event, the district court's conclusion that the Secretary of State's actions were unratified and therefore not attributable to the state is incorrect, even if, contrary to *Perkins*, the question were relevant here. The Governor designated the Secretary of State as the chief election officer of the State for purposes of implementing the NVRA. J.A. 14. Moreover, the plan for implementing a unified NVRA registration system as of January 1, 1995, was not a secret confined to the Secretary of State's office. Instead, the Secretary of State's office developed that plan in conjunction with the State's NVRA Implementation Committee, which included the chairs of the election committees of the Mississippi House and Senate, a representative of the Mississippi Attorney General's office, legal counsel from the Governor's office, and representatives of many other state agencies, as well as the General Counsel to the Secretary of State, who was also the Assistant Attorney General for Elections. J.A. 77-78. Instructions for implementing this plan were conveyed to local election officials in numerous training sessions in 1994 at which the NVRA manual was distributed. The purpose of such training sessions was "to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995." J.A. 22. Election officials actually registered thousands of voters under those procedures and added them to the rolls for all elections, federal, state and local, in early 1995. J.A. 114. Mississippi cannot, consistent with Section 5, pretend that none of this ever happened, and proceed at will to implement changes

that dramatically depart from these procedures, without submitting those changes for preclearance review.

The district court appeared to believe that actions taken by state election officials do not attain any official status for Section 5 purposes unless "ratified" by the state legislature, or perhaps by the Mississippi Governor and Attorney General. J.S. App. at 8a. That is at odds with the express language of Section 5, which encompasses not only enacted laws but any "standard, practice or procedure" with respect to voting, and specifically requires preclearance of any changes that covered jurisdictions "shall enact or seek to administer." 42 U.S.C. § 1973c. *Cf. Morse v. Republican Party of Virginia*, 116 S. Ct. at 1223 (Thomas, J., dissenting) ("When the legislature passes a law, *or an administrative agency issues a policy directive*, official action has unquestionably been taken in the name of the State. Accordingly, voting changes administered by such entities have been governed consistently by § 5") (emphasis added). If it were otherwise, states could evade the requirements of Section 5 at will simply by allowing administrative agencies to issue directives requiring voting changes, rather than involving the legislature or governor.

Further, the statutory policy of the State of Mississippi at all times relevant to this case was to have a unitary voter registration system, under which qualified voters, once registered, are eligible to vote in all elections. Miss. Code Ann. § 23-15-11 (1990). It is unexplained how the Secretary of State could be authorized to ignore this fundamental state policy in implementing the NVRA, if he was unauthorized to depart in the slightest from any other Mississippi law. Such difficulties support the wisdom of keeping questions of state law authority out of Section 5 enforcement actions such as this.

Finally, even if, contrary to *Perkins* and other decisions of this Court, the question of the Secretary of State's authority under Mississippi law were controlling, the district court's decision still would have to be reversed. The procedures set forth in the State's February 10, 1995, memorandum reflect changes from the procedures that were in place in Mississippi in December 1994, prior to the effective date of the NVRA, regardless of the legal status of the procedures the State used in early 1995. Mississippi was required to obtain preclearance for its new registration procedures at some point. Thus, if the Secretary of State's NVRA plan, and the Attorney General's subsequent preclearance decision, could be treated as nullities because the Secretary of State lacked authority for his actions, it would follow that Mississippi's current registration system is being implemented without preclearance, in violation of Section 5. Thus, the State's clear violation of Section 5 simply cannot be finessed by treating the Secretary of State's NVRA plan and its implementation in early 1995 as nullities, even if such treatment were otherwise consistent with settled law.

B. The Voting Changes Were Not Exempt from Coverage on the Ground That They Were Adopted in Response to Federal Law.

The district court's decision carved out a further unwarranted 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 adopted 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. [J.S. App. 8a-9a.]

In so holding, the district court ignored the express language of the NVRA, which states that "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. § 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). 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 Cong., 1st Sess. 37 (1993).[15]

Even if Congress had not enacted an express requirement that states adhere to the Voting Rights Act when implementing the NVRA, application of this Court's settled precedent would compel the same conclusion. 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

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[15] The minority members of the Committee on House Administration unsuccessfully proposed an amendment "providing that mandates in the bill that are subject to pre-clearance for the nine southern states as required by the Voting Rights Act of 1965 be applied to all 50 states, or in the alternative eliminating the pre-clearance requirements of the Voting Rights Act for any new mandates required by the bill." H.R. Rep. No. 9, 103rd Cong., 1st Sess. 37 (1993).

as to assure compliance with the provisions of the Voting Rights Act of 1965. 393 U.S. at 552. The Board of Elections' bulletin provided that illiterate persons could receive assistance in casting write-in votes, thus adding to the conditions specified in state law under which assistance could be provided to voters. *Id.* at 570, 582. *Allen* 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. See also id.* at 566 ("the 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").

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*, 452 U.S. at 145-153. Indeed, if the district court's theory in this case 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.

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 (1975). That review must be conducted by the United States Attorney General or the District Court for the District of Columbia, not by the local three-judge district court, which had no jurisdiction to determine the motives for the voting changes initiated by the State's February 10, 1995, memorandum.

CONCLUSION

Because the changes set forth in the State's February 10, 1995, memorandum have not received the required preclearance under Section 5, this Court should reverse the judgment below and direct that an injunction be entered prohibiting further implementation of the unprecleared changes, including the holding of any further elections as to which registration has been conducted under unprecleared procedures. *Clark v. Roemer*, 500 U.S. at 655. Because registration itself cannot be halted without subverting the purposes both of Section 5 and the NVRA, the State should be directed to enroll all past and future NVRA registrants as voters entitled to vote in all elections, unless and until the State obtains preclearance for some other arrangement. *Cf. Clark*, 500 U.S. at 660 (district court "should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions.") Other questions concerning appropriate relief, such as those relating to elections that have already been conducted based on voter registration under the unprecleared procedures, should be addressed by the district court in the first instance. *See NAACP v. Hampton County*, 470 U.S. at 182-183.

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