(8)

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 APPELLEES

MIKE MOORE
Attorney General

*ROBERT E. SANDERS
Assistant Attorney General

Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3815

Counsel For Appellees

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether the district court erred in ruling that the State of Mississippi had made no voting change requiring preclearance under Section 5 of the Voting Rights Act when it implemented the requirements of the National Voter Registration Act without changing State law.

2. Whether the term, "[w]henever a State . . . shall . . . seek to administer", as used in Section 5 of the Voting Rights Act, encompasses acts of mid-level bureaucrats when those acts are contrary to State law and do not represent changes which the State wishes, or intends, to implement.

PARTIES TO PROCEEDING BELOW

Parties to the proceeding in the district court were:

Plaintiffs/Appellants

1. Thomas J. Young,

2. Richard L. Gardner,

3. Eleanor Faye Smith,

4. Rims Barber,

Defendants/Appellees

5. Kirk Fordice, in his capacity as Governor of the State of Mississippi,

6. Mike Moore, in his capacity as Attorney General of the State of Mississippi,

7. Dick Molpus, in his official capacity as Secretary of State of the State of Mississippi,

8. Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services.

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STATEMENT OF THE CASE

This case presents a Section 5 Voting Rights Act challenge to the State of Mississippi's implementation of the mandates of the National Voter Registration Act of 1993, 42 U.S.C. §§1973gg, et seq. (NVRA). By its express terms the NVRA mandates only that States provide citizens certain opportunities to register to vote in *federal* elections. Nothing in the NVRA has anything to do with voter registration for *State* elections. The plaintiffs and the United States begin their Statements of the Case with the oxymoronic propositions that in implementing the requirements of the NVRA the State of Mississippi both changed its voter registration laws without preclearance and, at the same time, wrongfully implemented the NVRA without changing its State registration laws, resulting in the existence of a separate federal-only registration system under the NVRA.

In fact, the State simply did what the NVRA requires. It made voter registration for federal elections available at locations where citizens apply for drivers' licenses and at various other agencies where citizens apply for government benefits. As found by the three-judge court below, the State voter registration statutes establishing eligibility for inclusion on State voter rolls were not in fact changed by the Mississippi Legislature or by operation of the NVRA. As before implementation of the NVRA, in order to be universally registered to vote in Mississippi one must comply with the extremely accommodating requirements of Mississippi law. As contemplated by the NVRA, those registering pursuant to the

NVRA requirements are registered only for federal elections. The plaintiffs and *amici* incorrectly assert that this results in a dual registration system notwithstanding the fact that no one is *required* to register twice in order to be universally registered. Both before the implementation of the NVRA and presently, an individual need register only one time, under the provisions of Mississippi law, to be a registered voter for every election, local, state, or federal, conducted in that voter's jurisdiction.

A. Mississippi's Implementation of The NVRA.

The plaintiffs' theory of a voting rights violation arises from a set of peculiar circumstances surrounding the State's submission of certain administrative changes for Section 5 preclearance. The confusion was caused in equal parts by the U.S. Department of Justice and by an employee of the Mississippi Secretary of State's office.

The NVRA was adopted into law in 1993. During 1993, Mississippi began planning for its January 1, 1995, implementation of the requirements of the NVRA. On December 15, 1993, Governor Kirk Fordice issued an Executive Order creating a committee to plan for implementation, and naming the Mississippi Secretary of State as the official responsible for coordinating State efforts. Plf.Summ.Jud.Mot.Ex.1. The committee had the responsibility only to give advice and make proposals to State agencies which had the authority to do those things required to accomplish implementation of the NVRA, and to give advice and make proposals to the Mississippi Legislature should the Legislature decide to change the

already liberal Mississippi voter registration laws to conform to the requirements of the NVRA. During 1994, the committee held various meetings and generated plans and materials designed to make implementation go smoothly.

Proposed changes envisioned by the committee were of two basic types, administrative and legislative. Administrative changes were the sort that could be implemented by administrative fiat from the head of the affected State agency. The head of a particular State agency such as the Department of Human Services or the Department of Public Safety could simply decree that employees within his agency would make certain voter registration forms available under certain conditions to agency patrons. The decision to designate certain agencies, the process those agencies would follow, and the choice of NVRA forms those agencies would use were administrative changes affecting voting that arguably required Section 5 preclearance.

On the other hand, legislative changes were those necessary to change anything previously set in place by State statute. Things controlled by statute included the qualifications for enrollment on State voter rolls, purging requirements, and the form of the State registration application. By custom and practice, and generally by statute, legislative changes are submitted for preclearance by the Mississippi Attorney General. Legislative enactments consistently designate that office as the proper submitting authority.

From time to time an Assistant Secretary of State, Constance Slaughter-Harvey, made informational mailings

of committee material to officials with the U.S. Department of Justice. Her purpose in making these informational mailings was to keep federal officials apprised of the progress of Mississippi's plan for implementing the NVRA. On December 20, 1994, Dave Hunter, an official with the Department of Justice, suggested in a telephone conversation with an attorney with the Office of the Secretary of State that the matters previously outlined in informational mailings should be submitted for Section 5 preclearance. In response Ms. Slaughter-Harvey wrote the Justice Department on the same day, December 20, and requested simply that the Department consider all the prior informational mailings as one large undifferentiated Section 5 submission. J.A. 109.

The prior informational mailings that were redesignated as a submission included a draft of legislation that would be proposed in the upcoming 1995 legislative session scheduled to get underway in January 1995. J.A. 86 (partial reproduction). Section 22 of that draft legislation provided that the Mississippi Attorney General, not the Secretary of State, was designated as the official with authority and responsibility to submit the legislation for preclearance should the legislation be adopted. J.A., 103. No one in the Attorney General's office was aware of Ms. Slaughter-Harvey's December 20 letter.

The informational material sent by Ms. Slaughter-Harvey also included such things as a proposed designation of State agencies where NVRA applications would be distributed, the process those agencies would follow, and a new voter registration form that would replace the State's old form should the proposed legislation be

adopted in the form suggested in the draft legislation.[1] The Department of Justice understood perfectly well that changes to requirements imposed by State law, such as the qualifications to be enrolled on State voter rolls and changes to State voter registration forms, could not be accomplished without passage of the legislation that was to be proposed in the January session of the legislature.

The appellants contend that one of those prior informational mailings, a December 14, 1994, letter to the Department of Justice from Ms. Slaughter-Harvey, J.A. 107-108, set forth "practices that were to be implemented 'prior to the passage of state legislation' ". In fact, the letter states that the writer had originally planned to submit a preclearance package including Mississippi's plans for implementation of the NVRA only after the proposed legislation had passed, but at the request of a Justice Department official she was sending the plans "prior to the passage" of the proposed legislation. The appellants' contention that the December 14 letter amounts to an indication that changes requiring legislative action were being submitted for preclearance prior to legislative action being taken, Brief, at p. 9, materially misconstrues the letter.

In early January, 1995, the Mississippi Legislature convened and the proposed legislation was introduced. It

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[1] The "submission" also contained an NVRA information manual, model office procedures, updates, status reports, a summary of legislative efforts, reports of committee hearings, summaries of committee discussions, summaries of community outreach programs, and reports of training programs, Def.Summ.Judg.Mot.Ex."A".

died in committee on January 25, 1995. The Department of Justice, with full knowledge that the proposed legislative changes were dead, U.S. Brief, pp. 26-27, n. 14, and with the apparent intention of doing what it could to change Mississippi statutory law by its own administrative fiat, promptly precleared Ms. Slaughter-Harvey's submission on February 1, 1995. J.S. App. 15a. The Justice Department's letter of February 1, 1995, listed the matters precleared. J.S. App. 15a-19a. Included in the list are changes to the Mississippi statutory mail-in registration form and changes to the Mississippi statutory purge provision. Both of these "changes" were proposed in the failed legislation. Neither provision was in reality changed at all. The other changes precleared by the Department of Justice were administrative changes relating only to NVRA registration at State agencies. The Department of Justice then announced that the proposed legislative changes had, by virtue of the preclearance, been accomplished without legislative approval.

Nothing in the submission ever represented that the State had changed its registration requirements for State elections as set forth in applicable statutes. Nothing in the materials ever represented that changes in State law had been accomplished or that anything required to be done by State law could be changed without legislative action. To the contrary the material included an express statement that the purpose of the proposed legislative changes was to prevent a "dual" system of registration from occurring. J.A. 72.

As found by the district court, the Attorney General's preclearance was not a preclearance of any accomplished change in Mississippi registration statutes controlling

State registration or elections. The preclearance operated to preclear only those things which could be changed without legislation, i.e. the administrative changes which would occur at State agency offices. The appellants contend, however, that officials with the Secretary of State and the U.S. Justice Department both believed that the Legislature would enact reconciling legislation. The appellants also contend that the informational mailings, therefore, implied that the forms and procedures set forth in the submission would eventually apply to State registration as well as federal registration. The appellants and the United States further contend that since the Attorney General purported to preclear changes she believed were implied in the submission, or which she expected would occur in State requirements, those imagined changes in State requirements now exist and represent the extant precleared condition of Mississippi law.

In the latter part of 1994, Ms. Slaughter-Harvey, believing that State statutes would be changed, took it upon herself to verbally advise circuit clerks in attendance at a seminar to begin enrolling NVRA registrants on State voter rolls on January 1, 1995, notwithstanding the fact that the legislature would not even have convened by that date. No one with the Mississippi Attorney General's Office was aware that this advice had been given. No one with the State Attorney General's Office was even aware that Ms. Slaughter-Harvey's submission to the Department of Justice had been made. Contrary to the assertion made by the appellants that "effective January 1, 1995, Mississippi election officials began implementing the NVRA under a unitary system", only 31 of the 82 county circuit clerks followed Ms. Slaughter-

Harvey's advice, J.A. 161-163, and only then for the short time from January 1, 1995, until correct advice was sent them on February 10, 1995. There is nothing in the record to support the appellants' claim that the approximately 4,000 persons who registered statewide under NVRA during the period between January 1 and February 10 were placed on State voter rolls. The record does not indicate how many NVRA registrants were actually, and temporarily, placed on State voter rolls in those 31 counties that followed the mistaken verbal advice to enroll NVRA registrants on State voter rolls. Obviously, some portion of the 4,000 statewide NVRA registrants were residents of the 51 counties where no NVRA registrants were placed on voter rolls.

After the proposed legislation died on January 25, 1995, concerned circuit clerks began calling the State Attorney General's Office inquiring about the propriety of enrolling NVRA registrants on State voter rolls. On February 10, 1995, an attorney with the office of the Secretary of State and an attorney with the Mississippi Attorney General's Office dispelled the confusion caused by Ms. Slaughter-Harvey's verbal advice by writing a memorandum to circuit clerks and chairmen of county election commissions across the State advising that the proposed legislation had died in committee and advising that Mississippi law for State and local elections remained unchanged. J.S. App. 20a. Contrary to appellants' assertion, Brief, pp. 14-15, the February 10 memorandum was not a directive, did not implement a dual registration system, and did not "instruct" circuit clerks to "resume" state law purges. Neither the Assistant Attorney General nor the attorney with the Secretary of

State who co-authored the memorandum had any authority to dictate anything to the circuit clerks.

The appellants contend that this memorandum effectively enacted an unprecleared "change" in State law from the pretended "changes" in State registration statutes which were "precleared" on February 1, 1995. In reality, the February 10 memorandum merely states the obvious point that there has been no change in State law. The appellants' Section 5 theory of liability is predicated entirely on the erroneous proposition that some change in State law was accomplished by the informational mailings and the "preclearance" that followed, and that the February 10 memorandum changed the law back to its previous condition without benefit of additional preclearance.

B. Mississippi's Voter Registration System.

As pointed out by the appellants, at one time the State did have a true dual registration system whereunder residents of municipalities were *required* to register twice in order to be eligible to vote in local and state elections. The first registration had to be with the county registrar. In order to vote in municipal elections voters then had to register with the municipal registrar. This condition was described in *Miss. State Operation PUSH v. Allain*, 674 F.Supp. 1245 (S.D. Miss. 1987). After the district court decision in *PUSH*, the State responded legislatively by first adopting the district court's remedial suggestions, 717 F.Supp. 1189 (N.D. Miss 1990), affd., 932 F.2d 400 (5th Cir. 1991), then further liberalized its voter registration system by passing a mail-in voter registration

system. Accordingly, the State has gone beyond the measures needed to address the concerns set out by the district court in the initial *PUSH* decision, and it has thoroughly revamped its voter registration requirements to expand voter registration opportunities, *see generally*, 788 F.Supp. at 1408-1412 (summarizing *PUSH* litigation and expansion of voter registration opportunities).

Before the enactment of the NVRA and subsequently, the State of Mississippi has operated one of the most accommodating voter registration systems in the nation. Pursuant to Miss. Code Ann. §23-15-35, a qualified individual may register one time, pursuant to State requirements, and be eligible for every local, state, or federal election. This was accomplished by cross-deputizing county and city clerks for purposes of registration. There is no requirement that anyone register more than one time in order to be fully registered to vote. Because of this section, an individual may complete his all-purpose registration at the office of his circuit clerk or at the office of the municipal clerk of his city, town, or village. Pursuant to Miss. Code Ann. §23-15-47, that individual is not even required to travel to any office in order to register. He may simply pick up the telephone or mail a letter to any office of any registrar, and request a voter registration form. He can then mail the form back to the office of his choosing and be fully registered for all elections. The plaintiffs misconstrue the universal registration system and state that prior to NVRA all registrants were universally registered, and that after NVRA this is no longer so. In reality, both before and after NVRA all persons *registering pursuant to State statutory requirements* were and are

universally registered. No change in this system was caused by the implementation of the NVRA.

By virtue of the mail-in provisions, anyone who wants to assist in voter registration drives is empowered to get a stack of mail-in forms and distribute them freely and act as a witness, in the county of his residence, for the potential registrants. The previous requirement, formerly set forth in §23-15-47, that only the county registrar or his deputy could perform this service has been abolished. Pursuant to §23-15-47 the Office of the Secretary of State is required to have mail-in registration forms available in bulk and to distribute them in bulk to any person or organization requesting them. The same forms must be provided in bulk without charge to the Commissioner of Public Safety for distribution to each drivers' license examining station, and made available in bulk to all public schools, any private school that requests them, and all public libraries.

In the event any completed mail-in form is in any way insufficient, the county registrar is required by §23-15-47 to contact the individual and get the necessary curative information and register the individual if he is eligible. If the registrar is unable to cure the defect the registrar must give the applicant written notice of rejection with the reason for the rejection and inform the applicant of his right to attempt to register in person or to reapply by mail. Section 23-15-37 requires extended office hours for the office of the county registrar immediately prior to the registration deadline for county and state elections, and for extended office hours for the city registrar immediately prior to the registration deadlines for city elections. The same statute empowers the county

registrar to visit any location in his county for the purpose of registering voters not less than 30 days before an election.

Section 23-15-37 requires the registrar or his deputy to visit, upon request, any disabled person and provide that person with an application for registration. All the disabled person need do is execute the application in the presence of the visiting registrar or his deputy.

As stated earlier, the Mississippi system is among the most accommodating systems in the nation. All of these code sections have been precleared by the Attorney General and were in effect prior to passage of the NVRA. The system described above is unchanged by anything contained in the NVRA or the State's implementation of the NVRA. The State administers the same system of voter registration today that it administered prior to implementation of the NVRA on January 1, 1995. As will be shown below, the NVRA merely added an additional method for registration for *federal* elections. There exists no dual registration system of the sort addressed in *PUSH*. There is no *requirement* that anyone register twice in order to be universally registered. Mississippi has not created a "dual" system of registration. With implementation of the NVRA a separate system of registration for federal elections exists, but it was the United States, not Mississippi, which created the additional method of registration. Mississippi made no change requiring preclearance other than the administrative changes described above which have been precleared.

C. Proceedings In The Court Below.

The plaintiffs' Complaint was filed on April 25, 1995. A three-judge court was promptly convened and cross-motions for partial summary judgment were filed on the Section 5 issue. The court granted the defendants' motion in an Opinion issued on July 24, 1995. J.S. App. 1a. Final judgment was entered for the defendants on February 9, 1996. J.S. App. 10a. Contrary to appellants' assertion, a separate claim for relief alleging insufficient compliance with the requirements of the NVRA was not "voluntarily resolved" among the parties. The plaintiffs, apparently realizing that the claim was meritless, simply dismissed that separate count of their Complaint.

The three-judge district court ruled that the administrative changes made by Mississippi in implementing the NVRA had received preclearance from the Attorney General. The court also ruled that no other changes had occurred. The court ruled that the unauthorized actions of Ms. Slaughter-Harvey and the 31 circuit clerks who followed her advice to enroll NVRA registrants on State voter rolls amounted to nothing more than a "misapplication" of State law. The Court recognized that the errant advice of an Assistant Secretary of State and the temporary actions of some circuit clerks did not in fact represent State choice and did not amount to a State initiated change affecting voting. J.S. App. 7a-8a.

Contrary to the interpretation of the appellants and *amici* the district court did not rule, and the defendants do not contend, that the State could initiate changes without submitting them for Section 5 scrutiny merely

because such changes might be a part of an NVRA implementation plan. The district court did rule, and the defendants do contend, that conditions initiated and required by *federal* law are not within the scope of Section 5 coverage. The court ruled that the separate federal-only registration system was a condition initiated and required by federal rather than State law, and that the fact that a separate system of federal-only registration now exists need not be submitted for preclearance. J.S. App. 8a-9a.

SUMMARY OF ARGUMENT

1. The plaintiffs' entire argument is based on two false notions. The first is the contention that Ms. Slaughter-Harvey's submission together with the Justice Department's letter of preclearance served to change Mississippi statutory law regarding registration for State elections. The second is the contention that the district court ruled that Mississippi, itself, could initiate changes without the necessity of obtaining Section 5 preclearance so long as any such changes were part of a plan to implement the NVRA. Neither contention is correct and the plaintiffs' brief is dedicated to a factual scenario that does not exist.

2. Actions of errant or rogue State officials which amount to a misapplication of State law, and which do not represent policy choices the State wishes, or intends, to implement, do not amount to changes a State "seek[s] to administer" within the meaning of Section 5 of the Voting Rights Act, *see, United States v. Saint Landry Parish School*, 601 F.2d 859 (5th Cir. 1971). Other remedies exist for correcting such actions of errant or rogue officials

without expanding the reach of Section 5 beyond its intended or permissible limits.

ARGUMENT

A. No Reconciliation Of State Law With NVRA Provisions Was Required Or Accomplished.

There are two broad precepts that underlie the analysis of the appellants' theory of Section 5 liability. First, States are free to maintain requirements for voter registration for State elections separate from and different from those requirements imposed by the federal government for federal elections, *see, Oregon v. Mitchell*, 400 U.S. 112 (1970) (States free to maintain different voting age requirement than that required for federal elections by the federal government). Second, only State-initiated changes in voting standards, practices, or procedures are required to be submitted for preclearance under Section 5 of the Voting Rights Act, *see, Beer v. United States*, 425 U.S. 130 (1976).

The NVRA is federal legislation, and as such does not require preclearance to be effective. However, as pointed out in the Statement of the Case, there are certain choices that the State made in implementing the NVRA which arguably amounted to changes affecting voting and required Section 5 preclearance. The State's designation of agencies to be utilized in implementation, the procedures to be utilized by those agencies, the manner of transmitting NVRA applications to circuit clerks, and the NVRA voter registration forms may have required Section 5 preclearance. The package of materials submitted

to the Attorney General by Ms. Slaughter-Harvey outlined the State's proposals for administratively implementing these NVRA choices and procedures. These administrative changes were precleared on February 1, 1995. Beyond this there were no State-initiated changes in standards, practices, or procedures which needed preclearance consideration. All the other items contained in the informational mailings/submission, including the proposed legislation, were superfluous for Section 5 purposes.

The major pretense of the appellants' position is that changes to the State's statutory registration requirements were accomplished. An example of this is found in the Attorney General's preclearance letter of February 1. J.S. App. 15a. The Attorney General expressed no objection to two "changes" which could only have been accomplished through legislative action. The first item was the elimination of the attesting witness requirement to the State mail-in registration form. The second item dealt with purging requirements. The proposed legislation would have eliminated the State provision allowing the purging of the names of any voters who had not voted for four years. Neither of these items could be changed administratively. Each would have required legislative action. In purporting to preclear these items as part of the *proposed* legislation the Attorney General violated a Department of Justice regulation, 28 C.F.R. §51.22, which expressly provides that "[t]he Attorney General will not consider on the merits: (a) any proposal for a change affecting voting submitted prior to final enactment or administrative decision".

More generally, the appellants posit that the entire submission was designed to preclear a single structure for reconciled registration for State and NVRA purposes. In fact, the idea of reconciled registration was never adopted by the State and could not, therefore, have been submitted by any State official or precleared by the Attorney General. The appellants' theory is that a reconciled State voter registration system was submitted and precleared. They then contend that the February 10 memorandum changed the requirements back to those requirements found all along in the Mississippi Code. In the appellants' view the "second" change created a dual registration system and has not been precleared. The District Court quite correctly made the factual finding that State law never changed.

B. Unauthorized And Unratified Acts Of A State Official Do Not Constitute A Change In State Law.

The appellants contend that the erroneous verbal advice given by Ms. Slaughter-Harvey regarding the placing of NVRA registrants on State voter rolls, and the fact that some circuit clerks followed that advice for a period of a few weeks, established a benchmark for measuring retrogression, notwithstanding the fact that the mistake was temporary, contrary to State law, and was rectified by the Mississippi Attorney General as soon as it came to his attention. The plaintiffs' contention is built on several false premises.

The appellants begin with the mistaken notion that the Governor's Executive Order 739 bestowed the Secretary of State with greater authority than was actually the case. The appellants refer to the Secretary of State, variously, as the chief election officer for purposes of *implementing* the NVRA, Brief, at 39, or the chief election officer for purposes of compliance with the NVRA, Brief, at 7. In fact, "compliance official" was merely the *title* given the Secretary of State. The extent of his responsibility and authority was clearly defined in the Executive Order as "the chief state election official, who shall be responsible for *coordination of state responsibilities* under the Act." (emphasis added). (Plf.Summ.Jud.Ex.1) This definition and limitation of responsibility and authority is prescribed and required by 42 U.S.C. §1973gg-8.

Clearly, the executive order did not designate the Secretary of State as an election czar with the power to supplant the legislature with regard to matters relating to elections, nor did it, or could it, give the Secretary of State the power to dictate changes in State registration or purging requirements. The appellants do not attempt to explain how such a transfer of power could be accomplished under State law. They also do not seem concerned that such new authority relating to elections would, itself, require preclearance before such new authority could be exercised. The appellants understandably try to elevate the role of the Secretary of State to bolster the false notion that actions of his assistant, Ms. Slaughter-Harvey, represent the actions of the State of Mississippi as a body politic and that the Assistant Secretary of State had

authority to submit matters which would change State law.[2]

The appellants and the United States attempt to bolster the argument that the mistakes of Ms. Slaughter-Harvey and the 31 circuit clerks were State practices by asserting that Ms. Slaughter-Harvey's advice to the circuit clerks was an "instruction" or a "directive" to "subordinate officials". The actual communication to the circuit clerks was verbal. No official opinion was delivered by the Office of The Secretary of State, and no formal regulation was adopted and filed. No transcription or other reproduction of the actual communication has been presented in this proceeding. Whatever the text of the communication, Ms. Slaughter-Harvey simply did not have the authority to dictate anything to the circuit clerks. She could offer her opinion, but no more. Her mistaken verbal advice does not rise to the level of "an administrative agency issu[ing] a policy directive" as contemplated by Justice Thomas' dissent in *Morse v. Republican Party of Virginia*, ___ U.S. ___, 116 S.Ct. 1186, 1223-1224 (1996). A February 24, 1995, memorandum from Ms. Slaughter-Harvey to agency representatives characterizes prior communications from the State Attorney General's Office and the Secretary of State's Office to circuit clerks as having contained merely "recommendations" and "advice" for circuit clerks. J.A. 114-116.

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[2] As set forth previously, the notion that the Assistant Secretary of State had authority to submit proposed changes to State law is refuted by the proposed legislation itself. Section 22 of the proposed legislation expressly directs that the Mississippi Attorney General would make the necessary submission if the legislation were adopted. J.A. 103.

In any event, circuit clerks are not "subordinate officials" to the Secretary of State or Ms. Slaughter-Harvey. Pursuant to Article 6, §168 of the Mississippi Constitution, and Miss. Code Ann. §§9-7-121, *et seq.*, circuit clerks are independent constitutional county officials answerable only to county voters.[3] The fact that only 31 of the State's 82 circuit clerks followed the advice, J.A. 161-163, demonstrates clearly that the circuit clerks were not subordinate officials given their marching orders verbally by an Assistant Secretary of State.

The appellants contend that a benchmark was established notwithstanding the temporary, illegal, and sporadic nature of the "practice" of placing NVRA registrants on state voter rolls. The appellants rely primarily on *Perkins v. Matthews*, 400 U.S. 370 (1971) in support of this position. In *Perkins* the City of Canton chose, by normal city council practice, to elect its aldermen by wards. State law at the time required at-large elections and did not allow the ward selection method adopted by the city. The city operated under its ward system for a number of years. Later the city attempted to return to at-large elections, citing State law as the reason.

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[3] The appellants and the United States also argue that different circuit clerks made different decisions about whether and how to contact NVRA registrants to advise them of their federal-only status. They argue that these decisions represent changes that have not been precleared. Regardless of the merit of this contention, the circuit clerks are local officials not under the control of these defendants. To the extent, if any, that those activities need preclearance, any submissions would be made by the local officials involved. The Section 5 status of those local matters does not affect this proceeding.

In a resulting Section 5 challenge it was determined that use of the ward system established a benchmark regardless of the requirements of State law, and that a return to an at-large system would be retrogressive. *Perkins* does not control here. In *Perkins* the City of Canton acted *qua* City of Canton. The body politic made its choice and implemented that choice as the choice of the City. There was no question of whether the original change to a ward system resulted from the actions of an errant or rogue official. The action may have been insupportable under Mississippi law, but it was clearly the conscious choice of the city itself. This Court correctly found that the political entity had consciously established a practice that served as a benchmark.

In the present case the body politic is the State of Mississippi. The State has not adopted or implemented a practice of placing NVRA registrants on State voter rolls. The political entity, the State, consciously rejected the proposition through its legislative process when the legislature rejected the proposed legislation. Neither the mistaken advice of Ms. Slaughter-Harvey nor the temporary following of that advice by 31 of the State's 82 circuit clerks represented a policy choice of the State.

The appellants have also cited *City of Lockhart v. United States*, 460 U.S. 125 (1983), in support of their theory that a benchmark was established between January 1 and February 10, and that the February 10 memorandum changed State law and amounts to a retrogression. *Lockhart* presents a circumstance which, in principle, is indistinguishable from *Perkins*. The City of Lockhart, Texas, acting as a political entity, changed its form of government in a manner which may have been

contrary to Texas law. A subsequent attempt to make another change to a different form resulted in the same ruling as was made in *Perkins* for the same reason. The language quoted by appellants and the United States merely reflects the rule in *Perkins*. The Court's use of the words "without regard for the legality under state law of the practices already in effect", merely reflects an ambiguity in Texas law regarding which statutes applied to this particular city.

A much more analogous case is *United States v. Saint Landry Parish School*, 601 F.2d 859 (5th Cir. 1971). There, three poll commissioners engaged in a pattern of buying votes. The poll commissioners would enter the polling booths with voters and cast the voters' ballot in the manner of the poll commissioners' choosing. The voters would then receive payment. The United States filed suit claiming that this practice was "an unapproved change in the state's procedure for assisting voters", *id*, at 861. The Court found that the practice did not constitute the action of the covered political entity, but, rather, was merely the action of errant officials. The Court stated clearly that

> [a]lthough the actions of these poll commissioners could possibly be viewed as a change in voting procedures within the meaning of §5, we conclude that these actions do not constitute a change that the state *has enacted or sought to administer* within the meaning of that section.
>
> We do not dispute that the actions of the three poll commissioner constitute actions of the state for certain purposes. (reference omitted) But one would not normally conclude that a state "enacts or administers" a new voting procedure every time a state official deviates from

> the state's required procedures. The common sense meaning of "shall enact" indicates that action of a state, *as a body*, is envisioned, and we think "shall seek to . . . administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the state governing body. (underlined emphasis added; italicized emphasis supplied), *id.* at 864

Neither the State nor any State governing body enacted, administered, or implicitly approved the errant advice given by Ms. Slaughter-Harvey. The factual scenario in *Saint Landry Parish* is clearly closer to the facts of the present case. While the Office of the Secretary of State has a role to play in administering the State's election machinery, the particular statutory provisions at issue were not ambiguous and left no room for discretionary interpretation by the Secretary of State. The actions of Ms. Slaughter-Harvey cannot be said to amount to a policy choice of the Secretary of State much less the State of Mississippi. An attorney with the Secretary of State's Office joined the February 10 repudiation of her verbal advice. The verbal advice given by her was simply wrong and did not represent any policy. It represented nothing but wishful thinking and poor judgment.

As stated earlier, the Secretary of State was granted no extraordinary power or authority relating to elections by reason of Executive Order 739. The actions of the Assistant Secretary of State were those of a mid-level functionary who incorrectly anticipated that the Mississippi Legislature would adopt legislative changes in the State's voting requirements. The rulings in *Perkins* and

Lockhart are inapposite. Here, the body politic has not made a change with regard to State registration procedures. No benchmark was established by the erroneous and temporary enrolling of NVRA registrants on state voter rolls in 31 of the 82 counties. The February 10 memorandum did not change State procedure regarding State registration. The February 10 memorandum is not a "change" within the meaning of section 5 and does not constitute retrogression. As stated in *Saint Landry Parish*, "[s]urely Congress did not intend the Attorney General and the district court for the District of Columbia to waste their time considering voting procedures that a state does not wish to enact or administer." *id.*, at 864.

It is probably futile to attempt to formulate a test that will apply in all scenarios for determining whether activities of a State employee represent actions of a State for purposes of Section 5 coverage. This Court has not before had a case that squarely presented the issue. The reasoning of the Fifth Circuit in *Saint Landry Parish* is clearly correct and should be adopted by this Court. This is especially so where, as here, the actions are clearly contrary to established law, are not widely followed and even then only for a short time, and are promptly corrected when brought to the attention of more responsible State officials. Actions of errant or rogue officials, even in conjunction with actions of officials in the Justice Department, cannot operate to change State law or set Section 5 benchmarks. Any other determination would be an open invitation to collusion, and would be contrary to the accepted procedures of seeking and obtaining Section 5 preclearance.

There are other policy reasons for refusing to assign benchmark status to acts of errant or rogue officials. Garden variety election challenges prosecuted by disappointed office seekers routinely contain Section 5 counts alleging that some irregularity in the election represented a "change" for which preclearance had not been obtained. The courts that consider these challenges generally discount the Section 5 component of such challenges on the basis that such irregularities represent errors rather than chosen policy, *see generally, Miller v. Daniels,* 509 F.Supp. 400, 406-407 (S.D.N.Y. 1981) (actions of officials contrary to precleared law are not changes the jurisdiction "seeks to administer"); *Montgomery v. Leflore County Republican Executive Committee,* 776 F.Supp. 1142, 1145 (N.D. Miss. 1991) (illegal acts of officials do not implicate Section 5); *Citizens' Right To Vote v. Morgan,* 916 F.Supp. 601 (S.D.Miss. 1996) (election activities by officials in their individual capacities are not covered activities); *Beatty v. Esposito,* 439 F.Supp. 830, 832 (E.D.N.Y. 1977) (episodic removal of election inspector by county official is not an "enactment" covered by Section 5).

Errors can never be anticipated and submitted for preclearance, but if benchmark status is accorded Ms. Slaughter-Harvey's actions, covered jurisdictions will be forced to make after-the-fact submissions of such errors and irregularities in an effort to defend against ordinary election challenges. Routine elections will be plagued with disruptions, uncertainty, and unnecessary costs. There is no justification for extending Section 5 beyond its intended scope. As explained in *Saint Landry Parish,* section 5 does not apply to "every artifact of political manipulation. Section 5 has its own political cosmos, but

it does not possess a universality with respect to every electoral aberration." *Saint Landry Parish*, at 865.

C. Implementing The NVRA As Written Does Not Amount To A "Choice" Requiring Preclearance.

In its brief the United States begins with a dramatically incorrect and unsupported proposition. The United States recognizes, as it must, that the NVRA applies to federal elections only and the Act does not require the States to reconcile their State requirements with the NVRA. Accordingly, a State could fulfill its NVRA responsibilities simply by having its agencies make proper registration forms available under proper circumstances and carrying NVRA registrants on voter rolls as registrants eligible to vote in federal elections. This, along with purging requirements peculiar to those registrants, is all that the federal law requires. The United States contends, however, that simply doing what federal law requires amounts to a "choice" that requires preclearance. The United States asserts that by doing the things required by the NVRA the State has "chosen" not to do more. Specifically, the State has "chosen" not to reconcile State requirements with the NVRA. The United States contends that this "choice" is one which must be approved by federal authority before it can be effective if the jurisdiction is covered by Section 5.

In the first place, it is changes, not choices, that are within the scope of Section 5 and need to be precleared. Choices may amount to a decision to make a change, but choices may also amount to a decision to make no

change. If implemented, the plaintiffs' theory of Section 5 coverage would enable the Department of Justice to require any existing voting practice to be submitted for preclearance on the proposition that the "choice" to maintain the practice without change amounts to a Section 5 violation. The Constitutional guarantee that States have the power to establish voting requirements different from those set by the federal government, as explained in *Oregon v. Mitchell, supra,* would cease to exist for States covered by Section 5. The legality of *existing* laws or practices relating to voting can be tested by Section 2 of the Voting Rights Act, or by other challenges based on other State or federal authority. It is not the office of Section 5 to serve as a mechanism to challenge existing practices which have not been changed. This appeal does not present a challenge based on Section 2 or any authority other than Section 5. The plaintiffs have set forth no principled reason, or authority, to expand Section 5 coverage in the manner sought.

Assuming, safely, that the United States would consider that Mississippi's "choice" not to amend State voter requirements amounts to a State implemented retrogressive dual registration system,[4] it is a virtual certainty that

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[4] Implementation of the NVRA as a federal-only system does not, of course, amount to retrogression. The effect of the implementation will be to cause a net increase in the total number of people registered to vote. The number registered to vote in federal elections will increase. The number of people registered to vote in State elections will not be decreased. This is not a condition of retrogression under any definition. *cf., Miller v. Johnson,* 515 U.S. ___, 132 L.Ed.2d 762, 784 (1995) (ameliorative change, even if less than optimum, cannot constitute

a covered jurisdiction such as Mississippi could never "choose" to do less than conform its State laws to the NVRA. The effect of this would be, of course, to cede complete authority over State registration laws to the federal government. Covered jurisdictions could not "opt out" and decouple State registration requirements from NVRA requirements without getting preclearance. Succeeding Congresses could amend and enlarge covered jurisdictions' NVRA requirements without regard to local concerns or needs. The United States offers no hint of authority contained in the NVRA, the Voting Rights Act, or elsewhere to support this extreme position.

This approach of bootstrapping Section 5 and the NVRA in order to advance a policy of forcing changes to State registration was implicitly rejected recently in *Miller v. Johnson*, 515 U.S. ___, 132 L.Ed.2d 762 (1995). In *Miller* this Court held squarely that the office of Section 5 is only to prevent retrogression in Black voting strength. The Court held that the United States' policy of using Section 5 to advance a Black-maximization agenda with regard to redistricting was contrary to the true office of Section 5 which is only to prevent retrogression, *id.*, at 786. The ruling in *Miller* casts considerable additional doubt on the legitimacy of the United States' effort here. Implementation of the NVRA as a separate method of registration, to exist side by side with existing State methods of registration, is contemplated by the NVRA, *see, Association of Community Organizations For Reform Now (ACORN) v. Edgar*, 880 F.Supp. 1215 (N.D. Il. 1995) (States free to

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retrogression); *Beer v. United States*, 425 U.S. 130, 141 (1976) (same).

implement NVRA on federal-only basis). Section 5, as construed in *Miller*, cannot be used to expand, or maximize, the dictates of the NVRA so as to force States covered by Section 5 to amend their registration statutes to conform to the requirements of the NVRA.

Both the United States and the appellants assert that the Attorney General was somehow misled regarding what was or was not being submitted for preclearance. This assertion borders on bad faith, and is totally unsupported in the record. The United States simply cannot make a good faith assertion that it did not understand that changes in State laws regarding State registration were dependent on passage of the proposed legislative package. The material submitted by the Assistant Secretary of State included a July 1994 Status Report which pointed out that the proposed "new legislation was to establish a unitary system 'to avoid a dual registration system.' " J.A. 72.

Accordingly, the appellants' contention that the Attorney General was never expressly put on notice that proposed changes in State registration procedures were dependent on passage of the proposed legislation is demonstrably incorrect. If the Attorney General truly needed a picture drawn, it was drawn by this language and the inclusion of the proposed legislation itself.[5] The Attorney General made a knowing choice to preclear

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[5] The comprehensive changes in the proposed legislation, and the necessity of legislative passage, were prominent elements in the material sent to the Justice Department. The appellants' characterization of these matters as a "buried nugget", Brief, at p. 32, is strained.

administrative changes after she knew the proposed legislation had been defeated. That choice was made in order to construct the argument advanced in this litigation that a benchmark was established by virtue of the action of the Department of Justice.

The appellants also contend that the failure of the proposed legislation rendered the submission inadequate since the submission did not indicate what would happen should the legislation be defeated. The appellants argue that the submission was ambiguous on the question, and that such ambiguity should be resolved against the State. The appellants cite *Clark v. Roemer*, 500 U.S. 646 (1991) for this general proposition. In reality there is nothing ambiguous about what happens when proposed legislation designed to make statutory changes fails. The changes simply, and unambiguously, do not occur. Here the Attorney General made a conscious decision to participate in the creation of a pretended ambiguity and now attempts to use this pretended ambiguity as a tool to help implement her misguided policy choice. Nothing in *Clark* supports the notion that such "ambiguity" should be resolved against the State. The reality is that the Justice Department liked what it saw in the amalgamated mass of materials proffered to it as a submission. The Attorney General seized what she considered to be an opportunity to force a change in the State's registration laws and issued her preclearance letter. Her decision was clearly calculated. She should not be allowed to disavow that decision now.

The appellants also argue that the district court erroneously ruled that the Attorney General "implicitly precleared" a federal-only NVRA implementation plan. The

appellants cite *McCain v. Lybrand*, 465 U.S. 236, 249 (1984) and *Clark v. Roemer*, 500 U.S. 646 (1991) for the proposition that preclearance by implication is disallowed. In the first place, *McCain* and *Clark* deal with changes made but not identified, not changes imagined but not made. In any event, the district court did not rule that anything happened by reason of any implication. It merely noted that the Attorney General would have had to have violated her own regulation, 28 C.F.R. §51.22, to preclear legislative changes that had not yet occurred. J.S. App. 7a-8a. The district court concluded that the Attorney General did not violate this regulation, and did not mean to preclear legislative changes, but that, instead, the only changes she meant to preclear were the administrative changes that were properly before her. By contrast, it is the United States which now argues that the preclearance was granted on the basis of an implication. U.S. Brief, at p. 26. It argues that it perceived the implication that State statutes were somehow going to be overcome solely by reason of the submission and the act of preclearance. If anything here is contrary to *McCain* and *Clark*, it is the United States' theory, not the district court's ruling.

In her eagerness to attempt to establish a benchmark by issuing the preclearance letter the Attorney General disregarded almost every regulation governing the content of Section 5 submissions. The Attorney General simply read inferences that suited her into the material sent her. 28 C.F.R. §51.27 lists certain requirements for the contents of proper submissions. None of these requirements was enforced. Some of the requirements such as subparts (c) and (h) respectively require specific statements regarding changes between the prior law and the

newly enacted law, and statements regarding the jurisdictional basis and procedures for the change. 28 C.F.R. §51.37 provides that the Attorney General may request additional information regarding the actual effect of any submitted change. If there was truly any doubt, the Attorney General should simply have asked Ms. Slaughter-Harvey what the effect of the defeat of the legislative package would have been. If the Justice Department had required a proper submission restricted only to *completed* changes as required by 28 C.F.R. §51.22, it could not today pretend that ambiguities existed.

D. The District Court Correctly Determined That The Existence Of A Separate, Federal-Only, Registration System Does Not Require Preclearance.

The appellants and *amici* misconstrue the district court's ruling regarding the necessity of seeking Section 5 preclearance for changes caused by federal law. The appellants and *amici* contend that the district court ruled that changes in State law are excused the necessity of preclearance so long as those changes are part of a plan to implement a federal directive. Brief, at p. 41; U.S. Brief at p. 22. This is simply not what the court ruled. The district court ruled, correctly, that no changes in State registration requirements had occurred. The court, having ruled that no changes to State requirements occurred, never so much as addressed the issue stated by the appellants.

What the court did rule was simply that the fact that a separate system for registering federal voters now exists is not, itself, a condition that needs preclearance.

This condition is brought about by federal law. The State of Mississippi is the covered jurisdiction, not the United States. Changes made by the United States are not subject to preclearance. If the State had adopted changes in its State voting requirements, those changes would have been subject to preclearance even though any such changes would have been designed as part of an overall package to implement federal legislation. The district court did not hold otherwise and the defendants do not contend otherwise. Nothing changes the fact, however, that, with an exception relating to changing the mail-in registration deadline from 60 to 30 days before an election, the State requirements exist today precisely as they existed before the Congress adopted the NVRA.[6]

CONCLUSION

The District Court was correct in its ruling that the administrative changes made by the State have been precleared, and that no change in State statutory requirements has occurred. Accordingly, the district court was correct in ruling that all covered changes had been precleared and that no further preclearance is necessary to the enforcement of the State's implementation of the NVRA. The sum total of all that has transpired is that no changes have occurred in State law and the NVRA has been implemented precisely as contemplated by the Congress. The simple fact that the poor judgment of a mid-

[6] That deadline was changed in the 1994 legislative session and was precleared by the Attorney General well before the events leading to this action occurred.

level State employee caused some confusion in the process is meaningless. The principles of federalism are tested severely enough by the requirement that changes which a State genuinely wants to implement must be submitted to federal authority for approval. The notion that the device of preclearance can be utilized to impose on a State changes it does not want should be emphatically rejected by this Court. The judgment of the District Court should be affirmed in its entirety.

Respectfully submitted,

MIKE MOORE, Attorney General
*ROBERT E. SANDERS, Assistant Attorney General

**Counsel of Record* *Counsel For Appellees*

Office Of The Attorney General
P.O. Box 220
Jackson, Mississippi 39211
(601) 359-3815