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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Riley, Governor of Alabama, versus Kennedy.

Mr. Newsom.

ORAL ARGUMENT OF KEVIN C. NEWSOM

ON BEHALF OF THE APPELLANT

MR. NEWSOM: Mr. Chief Justice, and may it please the Court:

This appeal presents two issues, both a threshold jurisdictional question and a substantive question concerning scope of section 5. We have explained in some detail in our briefs why Governor Riley's appeal in this case is timely and why this Court has jurisdiction to resolve the merit. The Solicitor General has agreed with us on the jurisdictional question.

I certainly want to answer any questions that the Court may have concerning the jurisdictional issue, but with the Court's permission I would like to proceed in my affirmative presentation directly to the merits, and specifically the second of two independent bases that we have urged for reversal here. Our argument under this Court's decision in Young versus

1 Fordice is perhaps the simplest and most straightforward
2 way to resolve this case. In Young, this Court held
3 that a state voter registration plan, despite its
4 promulgation, preclearance and active implementation to
5 register 4,000 voters, was nonetheless in force or
6 effect within the meaning of section 5 and thus was not
7 a valid section 5 baseline for purposes of measuring
8 future changes, because the Court said it resulted only
9 from a temporary misapplication of State law and it was
10 immediately corrected upon acknowledgment that it was
11 unlawful in fact.

12 CHIEF JUSTICE ROBERTS: It's pretty hard to
13 argue something wasn't in force and effect when they
14 have an election under it, isn't it?

15 MR. NEWSOM: Your Honor, I don't think --
16 Your Honor is correct that the only possible distinction
17 between Young and this case is the holding of the 1987
18 election, but I don't think the election can make the
19 difference here, for this reason: It preceded solely by
20 virtue of the vagaries of the State litigation process.
21 The challenge preceded the election by two months. That
22 election was conducted under a cloud of litigation that
23 everyone certainly knew about and it went forward only
24 because, in the wake of Young, the trial court
25 temporarily misapplied State law.

1 If a trial court had gotten State law right
2 to begin with, Your Honor, and had enjoined the election
3 as we now all know it should have, then there never
4 would have been the election to point to as evidence
5 that 85-237 ever went into force or effect. And it
6 seems to me inconceivable, consistent with any
7 meaningful notion of federalism, that section 5 can
8 require a world in which a State trial court, as we say
9 in the reply brief, which exists at the bottom of the
10 state judicial hierarchy, can by getting State law wrong
11 in the first place lock into State law as a section 5
12 baseline an unconstitutional statute. I don't anybody,
13 on this side of the podium anyway, to be denying that
14 85-237 was, is now and was at its inception,
15 unconstitutional and thereby strip the Alabama Supreme
16 Court of its sovereign prerogative to correct the errors
17 of lower courts.

18 JUSTICE STEVENS: What if there had been no
19 challenge to that election, but two or three years later
20 somebody challenged the election and then the Supreme
21 Court said it was invalid.

22 MR. NEWSOM: Well, Justice Stevens --

23 JUSTICE STEVENS: Then there never would
24 have been a State statute.

25 MR. NEWSOM: I'm sorry?

1 JUSTICE STEVENS: Then there never would
2 have been a State statute, a valid State statute.

3 MR. NEWSOM: Right. There are -- we have
4 pitched two different arguments in this case, Your
5 Honor. And under the, I think it's fair, to say the
6 broader of the two arguments, contained in Roman II of
7 our brief, that, the later action, nonetheless would not
8 be a change under section 5. But under the argument
9 that I was talking about specifically under Young versus
10 Fordice, I think it does make a difference that the
11 Alabama Supreme Court stepped in at the earliest
12 possible opportunity to invalidate this statute, again
13 as part of litigation that preceded the first and only
14 implementation, attempted implementation, of the
15 statute.

16 And I think the question at bottom here in
17 this case is whether section 5 provides State courts
18 with any breathing space whatsoever in which to conduct
19 this exercise of judicial review, and our submission is
20 that at the very least that it ought to extend so far as
21 to allow State courts to step in, as they did here, at
22 the earliest possible opportunity.

23 JUSTICE KENNEDY: If the respondent prevails
24 in this case and you have a case similar to this one
25 that begins in the trial court, how do you think it

1 would work, that the plaintiffs in the trial court
2 action have to get preclearance either way? They have
3 to get preclearance in the event that they prevail? And
4 then the other side has to get preclearance in the event
5 that it doesn't. I mean, is that the way it would work
6 in your view?

7 MR. NEWSOM: I'm not frankly --

8 JUSTICE KENNEDY: If I'm in State trial
9 court, how can I make a ruling if -- assuming the
10 respondents win in this case, if I know there has to be
11 preclearance?

12 MR. NEWSOM: Well, I think, Your Honor,
13 that's certainly part of the point that we've emphasized
14 here as one of the key federalism issues in this case,
15 is that this case really does in a very functional way
16 strip State courts of their jurisdiction to exercise
17 judicial review, whether at the trial court stage or at
18 the supreme court stage because on Appellee's theory
19 once the statute is precleared it is effectively locked
20 in place and that the trial court or the supreme court
21 needs permission from the Executive Branch in Washington
22 to exercise the authority to --

23 JUSTICE KENNEDY: I suppose States get --
24 State courts get preclearance all the time with district
25 changes, don't they? Or how does it work? They just

1 hold the judgment in abeyance until there is
2 preclearance, and couldn't -- and if so, couldn't do you
3 that here?

4 MR. NEWSOM: Well, to be sure the Appellees
5 are correct that it is the administration of the change
6 itself that requires preclearance. So I don't want the
7 Court to think that our position here is that courts are
8 having to -- to render sort of provisional judgments
9 that are then subject to preclearance in Washington.
10 The point is that, so I think in the redistricting
11 example, Your Honor, it would be the implementation of
12 the redistricting that would require preclearance.

13 JUSTICE SCALIA: Are there any other
14 district cases that require preclearance except those
15 that redistrict the, the State?

16 MR. NEWSOM: No Your Honor, and the point is
17 that no one here denies, certainly the State does not
18 deny, that a State court order redistricting, redrawing
19 a map, in essence, and giving rise or exercising what is
20 functionally, as this Court has said, a legislative
21 power requires redistricting. No one doubts that. But
22 the question here is quite different: Whether if there
23 is a spectrum of State court decisions with
24 redistricting at one end, my case has to be at the other
25 end of the spectrum.

1 JUSTICE SOUTER: Are there district court --
2 there must be -- district court cases in which the State
3 trial court has invalidated on some State constitutional
4 ground legislation redistricting that has been passed by
5 the legislature? When that happens, have those opinions
6 been precleared?

7 MR. NEWSOM: Not to my knowledge, Your
8 Honor. And I will confess that I'm not aware of any
9 right off the top of my mind that fit that paradigm.
10 But not to my knowledge. The only --

11 JUSTICE SOUTER: But isn't the reason that
12 there would be no reason to preclear them? I mean, if
13 the State court invalidates legislative redistricting,
14 and does so before there has been a preclearance
15 request, in other words, if it gets into State court
16 right off the bat, then there's no State law
17 subsequently to ask the feds to preclear.

18 MR. NEWSOM: That might be right, Justice
19 Souter, but I'm not sure that I understand the
20 implications for this case. If you could --

21 JUSTICE SOUTER: Well, I guess what I'm
22 saying is your "No" answer does not prove much. In
23 other words, you're trying to make the case here that
24 there is something extremely unusual about this. And I
25 thought your answer to Justice Scalia in effect was one

1 reason that it's unusual is that we don't have any of
2 these cases in, in which a State court has knocked out a
3 State law that is then subject to some kind of
4 preclearance review. And my only point was, if I
5 understand the situation, as long as the preclearance
6 review had not preceded the State constitutionality
7 judgment, following the State constitutionality judgment
8 there would be no law to take to Washington, whether it
9 be to -- to the Justice Department or to -- or to the
10 Court, and ask to have precleared. So the fact that
11 there are no such cases doesn't prove anything.

12 MR. NEWSOM: Well, I think the point that I
13 was trying to make, Your Honor, is that this Court has
14 said in construing section 5 that it will not construe
15 it so as to exacerbate federalism costs. And one of the
16 reasons that the federalism costs are exacerbated here
17 is that this is -- this scenario is simply unlike any,
18 as we say in the brief, that this Court has --

19 JUSTICE SOUTER: Well, that may be --

20 JUSTICE KENNEDY: But you said in answer to
21 Justice Souter that this is your case. There is no law
22 that's precleared.

23 MR. NEWSOM: Well, it's certainly true, Your
24 Honor, that when a state Court, as any court -- as this
25 Court made clear only last month in Danforth, when a

1 court exercises judicial review to invalidate a practice
2 that's unconstitutional it is not changing or making new
3 law as it goes along, but declaring what the law has
4 always been.

5 JUSTICE SCALIA: There is a law to be
6 cleared if you -- if you assume that the existence of a
7 law to be cleared occurs before that law has been tested
8 in the courts. In the hypothetical we've been
9 discussing, just as in this case, there was a State law
10 and if you assume the State law is valid before it's
11 gone through the judicial clearance process, there is a
12 State law change when the clearance process results in
13 striking down the law. I don't -- it seems to me that
14 the two situations are pretty parallel.

15 MR. NEWSOM: Well, with respect, Justice
16 Scalia, my case is the latter situation, where there was
17 technically a law in place. 85-257 to be sure was in
18 place. Now, whether it was in force or effect within
19 the meaning of this Court's decision in Young is
20 different, but it was in place.

21 JUSTICE GINSBURG: And it was precleared at
22 what point? The 1985 law was precleared before the
23 litigation?

24 MR. NEWSOM: Yes, Your Honor, it was
25 precleared virtually immediately, so let's say in '85.

1 I don't remember the month specifically, but it was
2 precleared in '85.

3 JUSTICE GINSBURG: And it was submitted by?

4 MR. NEWSOM: Submitted by the State of
5 Alabama.

6 JUSTICE GINSBURG: Yes. And then the
7 litigation came.

8 MR. NEWSOM: Right. The litigation was
9 commenced in April of 1987.

10 JUSTICE GINSBURG: And so your point is that
11 if the circuit court -- there are only two levels of
12 court in this, the circuit court and the supreme court?

13 MR. NEWSOM: For purposes of this
14 litigation.

15 CHIEF JUSTICE ROBERTS: So if the circuit
16 court had gotten the State law right, then there never
17 would have been an election?

18 MR. NEWSOM: Well, that's right.

19 JUSTICE SOUTER: There never would have been
20 perhaps preclearance if it got it right soon enough.

21 MR. NEWSOM: Well, that's true, but of
22 course courts don't get to reach out and grab the
23 disputes and bring them into courts.

24 JUSTICE SOUTER: Well, but if the -- if the
25 challenging parties go into court at the first

1 opportunity and you don't have an election sort of
2 coming up next week, I would suppose that in cases like
3 that, the State would at least allow the State
4 litigation to proceed to some level. And if in point of
5 fact that State litigation resulted in a declaration
6 that the new statute was unconstitutional in some
7 fashion, one would not expect the State then to bull
8 ahead and ask for preclearance, as opposed to trying
9 either to appeal at the State level or to correct the
10 statute.

11 MR. NEWSOM: That's right, Your Honor, but
12 it -- but the challenge here would not have been ripe
13 until 1987. There was no vacancy on the horizon. And
14 so the challenge here was brought at the earliest
15 conceivable opportunity when the vacancy became a
16 reality.

17 JUSTICE SOUTER: I will assume that.

18 JUSTICE KENNEDY: Even in the hypothetical
19 Justice Souter proposes, I don't know the rules in
20 Alabama, but I can see a Federal court saying: Well,
21 this is premature; it hasn't been precleared; why should
22 I pass on the validity of something that might not be
23 precleared?

24 MR. NEWSOM: Well, I think that's entirely
25 possible, Your Honor, and --

1 JUSTICE SCALIA: On the other hand, I can
2 also see the attorney general saying: Why should I
3 preclear it? It hasn't even been determined to be law
4 in Alabama yet.

5 Does the Justice Department preclear stuff
6 that is -- that is in the midst of litigation?

7 MR. NEWSOM: The Justice Department's
8 regulations at 51.22, Your Honor, say that they will not
9 preclear things that are not final and that are subject,
10 it says, to revision by court -- by court judgment. But
11 that regulation is specific, the Federal Register
12 says --

13 JUSTICE KENNEDY: How does that apply to a
14 State statute which is fully enacted and then there's
15 going to be a challenge?

16 MR. NEWSOM: The truth is the regulations
17 don't speak specifically to that question, and the
18 reason is that the regulations are quite clear in the
19 Federal Register at 46 Federal Register 872 that they
20 don't deal with changes, so-called, brought about as a
21 result of court judgments. The regulation that I was
22 referring to, 51.22, refers specifically to State courts
23 having an administrative role to play in --

24 JUSTICE SCALIA: Where they are doing the
25 districting or --

1 MR. NEWSOM: That's right, redistricting,
2 reannexation.

3 JUSTICE SCALIA: Do you know of any cases
4 where -- where a piece of State legislation has been in
5 the middle of litigation where the Justice Department
6 has precleared it?

7 MR. NEWSOM: No, Your Honor, not right off
8 -- not as I'm standing here, I don't.

9 JUSTICE SCALIA: It seems like an exercise
10 in futility.

11 MR. NEWSOM: But the point -- Justice
12 Ginsburg, getting back to your point so you'll
13 appreciate the timeline, in April of 1987 the challenge
14 is brought. In June of 1987 the election goes forward.
15 So the challenge here preceded the election by two
16 months. And the point that I've been trying to make is
17 that the -- had the trial court gotten State law right
18 to begin with and enjoined the election, as we now know
19 it should have, there never would have been an election
20 to point to, to show within the meaning of Young that
21 the -- that the statute was ever put into force and
22 effect.

23 JUSTICE BREYER: What happened -- I have a
24 factual question. In around July, Mr. Sam Jones is
25 sworn in and now he is in office until sometime after, I

1 guess, September 1988, a little over a year, and then
2 the Governor appointed him. Well, he must have gotten
3 paid during that year.

4 MR. NEWSOM: Yes.

5 JUSTICE BREYER: And then when the Governor
6 appointed him, what does the appointment look like?
7 Does it say it's retroactive? No. I would be
8 surprised. I mean, you're not going to tell me it is.
9 So my guess is he's appointed as of -- let's say he's
10 appointed by the Governor. It must have said as of
11 when, and it probably said as of September '88.

12 MR. NEWSOM: The truth is, Your Honor, I do
13 not know what --

14 JUSTICE BREYER: Well, I think it's
15 important to me because, for this reason: I would guess
16 they don't make it retroactive or you'd know it, and
17 therefore we -- we have more. We have the facts, the
18 following facts, as to whether -- and this is what
19 Fordice says; it says this is a practical question.
20 It's not some theory about whether it's unconstitutional
21 or not unconstitutional. The question is as practical
22 matter was it in force and effect? And, as a practical
23 matter, one, there was an election under it; two,
24 somebody was elected; three, he took office; four, he
25 held that office for a year and was paid for it. All

1 right? Why, as a practical fact, as a practical matter,
2 we do not say that special election law was in force and
3 effect for about a year and two months?

4 MR. NEWSOM: Your Honor, the difference, or
5 what makes this case just like Young versus Fordice, is
6 that the relevant -- the relevant implementation in
7 Young was not election. The relevant implementation in
8 Young was registration. And this Court's opinion makes
9 clear that 4,000 real, live flesh-and-blood voters were
10 registered.

11 JUSTICE BREYER: Yes, their registering is a
12 precondition of voting. Not one person had ever voted.
13 Moreover, they all had to register again. So the net
14 practical effect of the election, of plan two in Young
15 v. Fordice, was null, zero, zilch. And the practical
16 effect here is that somebody is elected under the law,
17 holds office for a year and two months, and is paid. It
18 seems to me quite a big difference.

19 MR. NEWSOM: With respect, Your Honor --

20 JUSTICE BREYER: All right. I mean, that's
21 what I wanted to know. I mean, maybe it's different if
22 this was a retroactive something or other, but I --
23 you're not aware of that.

24 MR. NEWSOM: No, I can't --

25 JUSTICE BREYER: So I assume it wasn't.

1 MR. NEWSOM: -- tell you as I'm standing
2 here that the --

3 JUSTICE BREYER: Yes.

4 MR. NEWSOM: -- that the appointment was
5 retroactive, but I do think that, given the nature of
6 the implementation, the relevant implementation in Young
7 being registration, the fact that 4,000 people were
8 registered does bring this case pretty close to Young.
9 And the fact that --

10 JUSTICE BREYER: All right. Suppose I
11 reject that on the ground of what I said. I'm not
12 saying I would, but suppose I did. Isn't that the end
13 of this case? Because then, if I reject that, there is
14 a plan. The plan is called "the special election plan."
15 It is in effect for a year and two months. People hold
16 office in election and they're paid. And then a new
17 plan comes along, the governor's plan. Now that seems
18 to me a change, and the statute says that if you have a
19 change, which this would be, you've got to preclear it.
20 End of matter.

21 Now, what's your argument about that?

22 MR. NEWSOM: With respect to that, Your
23 Honor, it's that I don't think it is accurate to say
24 that this was the governor's plan. The Governor was not
25 --

1 JUSTICE BREYER: No, I'm just using that as
2 shorthand, the shorthand for a system under which the
3 officeholder is appointed by the government -- by the
4 governor.

5 MR. NEWSOM: Right. And --

6 JUSTICE BREYER: And I'm saying if we start
7 from the base that the plan is special election which
8 was in force and effect for a year and two months, then
9 for whatever set of reasons there is a change, and the
10 State has to preclear the change. Now, what's the
11 answer to that?

12 MR. NEWSOM: The answer to that, Your Honor,
13 is that the shorthand misses the fact here that what
14 we're talking about is that the change results here from
15 a State court exercising judicial review. And this is
16 -- that is different in kind from any sort of decision
17 that this Court has ever rendered about --

18 JUSTICE BREYER: All right. So you're
19 saying that if the cause of a change is a court
20 decision, then you do not have to preclear. So that if
21 in Mississippi in 1975, there had been a ruling of a
22 court which said segregationist plan number one here is
23 no good, so we're going to go back to the even worse
24 plan that was before, that that wouldn't have had to
25 have been precleared?

1 MR. NEWSOM: The point, Your Honor, is that
2 that --

3 JUSTICE BREYER: You see where I'm going,
4 and I'm not phrasing it correctly, but you can answer it
5 anyway.

6 MR. NEWSOM: So the point, Your Honor, is
7 that the result of that court decision would have been
8 immediately enjoined under the Fourteenth Amendment, the
9 Fifteenth Amendment, or section 2. The point about
10 section 5 --

11 JUSTICE SCALIA: It would have been able to
12 be brought up here if it was based on a discriminatory
13 intent, certainly.

14 MR. NEWSOM: Absolutely. This Court would
15 have cert jurisdiction if there were -- if you have the
16 --

17 JUSTICE BREYER: But what my question is, is
18 there any authority for the proposition that between
19 1964 and today, it mattered whether the cause of a
20 change in a State plan was a decision of let's say five
21 members of a court -- of a State court -- or whether it
22 was a legislative decision. Because that's what I think
23 you're arguing, and is there any authority that supports
24 you on that?

25 MR. NEWSOM: If I -- if I may, Justice

1 Breyer, as a preface it's important that I emphasize
2 simply as sort of a superstructure point here that as --
3 not only as the plaintiff in this case, but as the party
4 asking the Court to exacerbate federalism costs, within
5 the meaning of Bossier Parish, over what they have been
6 to this point, I think it's my opponents' burden to show
7 you that Congress clearly intended to include these
8 provisions, as opposed to my burden to show you that
9 Congress intended to exclude them. That's essentially
10 what this Court said in Gregory versus Ashcroft.

11 JUSTICE ALITO: Well, they argue in their
12 brief that there were instances in which State supreme
13 courts participated prior to the enactment of the Voting
14 Rights Act in changes in election requirements for the
15 purposes of disenfranchising African-Americans. Are
16 they wrong on that? And if they're right on that, what
17 reason is there to think that, without any text in
18 section 5 to making an exception for changes that are
19 made by State courts, what would be the reason for
20 reading that in?

21 MR. NEWSOM: Well, I think there are -- if I
22 can answer in two parts. First with respect to the
23 legislative history, to be sure the Appellees and their
24 amici have brought forward a number of examples of State
25 court judges, principally southern State court judges,

1 doing some pretty despicable stuff, and I'm not here to
2 defend that. But with respect to the specific question
3 at issue here, whether Congress was in enacting section
4 5, was clued into this question and it had reason to
5 think that State Court exercises of judicial review
6 would give rise to the sorts of problems that section 5
7 was designed to inhibit, there simply is nothing to
8 support that suggestion.

9 Section 5, of course, was intended to do
10 something very specific. It was designed to prevent or
11 to catch government conduct that the more traditional
12 remedies in place at the time under the '57, '60 and '64
13 Civil Rights Acts, what we would today I think call a
14 section 2 suit, couldn't get. And the point here, in
15 addition to the Danforth that at some deep
16 jurisprudential level courts don't change law, the more
17 important practical point is that courts exercising
18 judicial review are institutionally incapable of
19 changing the law specifically in the way that Congress
20 was concerned about when it enacted Section 5.

21 Congress --

22 CHIEF JUSTICE ROBERTS: Now, counsel, since
23 you mentioned section 5, perhaps you ought to look at
24 it. It says that you have to preclear standards,
25 practices, whatever, different from that in force or

1 effect on November 1st, 1964.

2 Now, the Respondents in their brief accused
3 you of making the argument that since this isn't
4 different from what was in effect in 1964 you don't have
5 to preclear it. And you said, no, that's not what we're
6 saying; we take no position on that.

7 Why in the world did you say that? It says
8 quite clearly the standard has to be different from that
9 in force or effect on November 1st, '64. At that point
10 these people were appointed.

11 MR. NEWSOM: That's right, Your Honor.
12 There are two sort of different things going on here.
13 One, as a matter again of the Appellees' burden to show
14 you that these decisions are clearly included within the
15 text, quite clearly they are not, because November 1,
16 1964, as Your Honor quite correctly points out --

17 CHIEF JUSTICE ROBERTS: Well, in your reply
18 brief on page 8 you say you take no position on that
19 question.

20 MR. NEWSOM: With respect, what I say at
21 page 8 of the reply is that there is no need for this
22 Court to determine specifically how the November 1,
23 1964, language ought to operate in the legislative and
24 administrative change scenario. This Court in Presley
25 and again in Young versus Fordice has suggested in dicta

1 that perhaps the baseline might float, notwithstanding
2 the November 1, 1964 --

3 CHIEF JUSTICE ROBERTS: Well, there wouldn't
4 be a different baseline for judicial changes than there
5 would be for legislative or executive changes, would
6 there?

7 MR. NEWSOM: No. You're -- I think you're
8 right, Your Honor, perhaps not. And this again goes to
9 the burden point that I was trying to make earlier. My
10 -- the sole purpose in citing the November 1, 1964,
11 language is to show that at the very least, to the
12 extent you're looking for some clear indication that
13 Congress intended to get these decisions, the text
14 cannot provide that clear indication.

15 JUSTICE KENNEDY: Well, I take it it's your
16 position -- and I noticed this in the question put to
17 you by Justice Breyer -- tell me if this is wrong, but
18 that it's not just the fact that the court makes a
19 decision, because the court may have discretion to
20 choose plan one, plan two, plan three, but it is if the
21 court makes a decision to show that the prior practice
22 was invalid, was void under State law.

23 MR. NEWSOM: That's right, Your Honor.

24 JUSTICE KENNEDY: That's the distinction, I
25 take it.

1 MR. NEWSOM: That's right, Your Honor.

2 JUSTICE KENNEDY: Not the fact that it's
3 just the court, but the kind of decision the court
4 makes.

5 MR. NEWSOM: That's right. There are
6 different lines the court might choose to draw. This
7 case at most presents a question where a court is
8 exercising the power of judicial review to invalidate a
9 previously precleared statute. It might decide the case
10 more narrowly, as I said, under Young versus Fordice, on
11 a more fact-specific basis. But at the very most, the
12 Court would need to decide in this case is that the
13 State court exercises a judicial review to invalidate
14 previously precleared practices as compliant with
15 section 5 do not give rise to section 5 changes.

16 And, Chief Justice Roberts, just to get back
17 to the textual piece of this, we have, pointed, in
18 addition to the "in force or effect" language, which we
19 think -- which we think requires judgment for the
20 Governor on Young versus Fordice grounds and the
21 November 1, 1964, language, we have also pointed to the
22 provision in section 5 that we have referred to as the
23 savings clause, which I think provides good reason at
24 the very least to think that Congress was thinking about
25 court decisions enjoining existing baselines differently

1 from the way it was thinking about the typical
2 legislative and administrative changes that have been
3 the grist of this Court's section 5 jurisprudence.

4 JUSTICE GINSBURG: Mr. Newsom, before you
5 finish I would like to ask you a question about what
6 action Governor Riley would take if you're right on the
7 law? That is, a mistake by the Alabama Circuit Court
8 can't invalidate a law that the Supreme Court says on
9 judicial review of -- on review of the circuit court,
10 that the circuit court got it wrong.

11 The first time around, when Jones was
12 elected and then the Governor mooted any controversy by
13 just appointing him. Now we have a similar situation.
14 We have somebody who has won an election overwhelmingly
15 against the person that the Governor appointed. There
16 are, what, five months left in the term? If your
17 position on the law is correct, would the Governor in
18 fact oust the person who was a four-to-one 1 winner in a
19 popular election and install the person who was a loser
20 in -- would that happen? Could we project based on what
21 happened the first time around that the Governor would
22 not so thwart the will of the people?

23 MR. NEWSOM: It would be the Governor's
24 option, Your Honor, whether to -- to do what was done in
25 1987 or '8, I suppose, and to install the winner of the

1 election or to reinstate Juan Chastang to his position.
2 I have not discussed with the Governor what his specific
3 intentions would be with respect to that. But it would
4 be his option to take one of those two courses under the
5 law.

6 I'd like to reserve the balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Newsom.

9 Ms. Karlan.

10 ORAL ARGUMENT OF PAMELA S. KARLAN

11 ON BEHALF OF THE APPELLEES

12 MS. KARLAN: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 I want to turn initially to two cases that
15 weren't mentioned yet by the Court that I think dispose
16 of the question of whether the law was in force or
17 effect. And I would like to direct the Court's
18 attention to page 101 of the joint appendix, because the
19 language I'm going to be talking about appears there in
20 the course of the Governor's request for reconsideration
21 of DOJ's objection. This is the language from this
22 Court's opinion in Young against Fordice. And it starts
23 midway down the page, where the Court says that: "The
24 simple fact that a voting practice is unlawful under
25 State law does not show entirely by itself that the

1 practice was never in force or effect." We agree.

2 And then the Court goes on to say: "A
3 State, after all, might maintain in effect for many
4 years a plan that technically or in one respect or
5 another violated some provision of State law," citing
6 Perkins against Matthews and City of Lockhart against
7 United States.

8 All that Young against Fordice does is
9 explain that that case is a sport that deviates from the
10 general rule that this Court has had that when a law is
11 in force or effect its constitutionality under State law
12 doesn't matter.

13 I'd also like to direct the Court's
14 attention to page 114 of the joint appendix, where Act
15 85-237's text appears, and direct you to the bottom of
16 the page in section 4, which says: "This Act shall
17 become effective immediately upon its passage and
18 approval by the Governor upon its otherwise becoming a
19 law," which it did in June of '85 when the State
20 obtained preclearance.

21 JUSTICE SCALIA: Do you agree that the
22 lawsuit to invalidate it was filed as soon as was
23 feasible?

24 MS. KARLAN: I don't honestly know the
25 answer to that question, Justice Scalia, because Alabama

1 law has different views, for example, on ripeness and
2 the like than Article III does. And this also goes to
3 the question that Justice Ginsburg asked at the very end
4 of the argument about the remedy in this case, because
5 Alabama law here is quite peculiar. And since we filed
6 our brief there have been two opinions by the Alabama
7 Supreme Court, in a case called Roper against Rhodes and
8 a case called Wood against Booth, that reiterated under
9 Alabama law once an election has been held, if no
10 contest litigation was timely brought, the fact that the
11 person is unentitled to remain in office does not allow
12 contest after the fact.

13 So we have a peculiar problem in this case,
14 which is, even if this Court were to reverse, there was
15 an election held here pursuant to Alabama Act 2006-342
16 that was conceivably valid under Alabama law. And the
17 question whether to replace Merceria Ludgood who won
18 that election, as you noted, by a four-to-one margin,
19 with either Juan Chastang or somebody else is quite up
20 in the air.

21 JUSTICE SCALIA: Why didn't the Alabama
22 Supreme Court say that in this very case?

23 MS. KARLAN: Well, in this case, the
24 election hadn't been held yet, Justice Scalia. That is,
25 the Alabama Supreme Court in the Riley decision here

1 ruled in the Governor's favor before we brought our
2 preclearance action, so there was no election on the
3 table.

4 JUSTICE GINSBURG: Then it was the district
5 judge that made Alabama go to the preclearance after the
6 second --

7 MS. KARLAN: Yes, that's correct.

8 JUSTICE GINSBURG: But still, if you take
9 this case at its essence, a circuit court got Alabama
10 law wrong and that's what you say counts as to make the
11 law operative.

12 The law becomes operative because an Alabama
13 intermediate court or trial court made a wrong decision
14 about Alabama law; and then when the supreme court
15 corrects it, that doesn't count. That's essentially
16 your position, that they're locked, Alabama is locked
17 into a mistake that was made about Alabama law by that
18 circuit court.

19 MS. KARLAN: No, Your Honor. We're not
20 saying that Alabama is locked in by the mistake of the
21 circuit court. What we're claiming here is that in
22 April of 1985, Alabama passed Act 85- 237. As a matter
23 of Alabama law, it went into effect. In 1985, Alabama
24 received preclearance. That law was on the books; an
25 election was held; a man served for three years. But

1 it's not just that, Justice Ginsburg.

2 JUSTICE SCALIA: Excuse me. I don't think
3 -- I don't think I follow you that, as a matter of
4 Alabama law, it went into effect. Just because the
5 statute said it went into effect does not prove that it
6 went into effect. I think the Alabama --

7 MS. KARLAN: Your Honor --

8 JUSTICE SCALIA: -- the Alabama Supreme
9 Court would say it never went into effect because it was
10 unconstitutional.

11 MS. KARLAN: No. No, Your Honor. If you
12 look at page 5 of the defendant's trial brief, which is
13 -- I think it's Docket No. 16 -- you'll see that there
14 in footnote 5 the State says: We asked for the Alabama
15 Supreme Court to hold Act 85-237 void ab initio. They
16 did not do that, but we think they ought to have.

17 And so even as a matter of Alabama law, I
18 don't think this is 100 percent clear. But if I can
19 turn to the 2004 Act, because we think --

20 JUSTICE KENNEDY: But suppose they didn't
21 have that footnote. Suppose they said: We hold it void
22 ab initio. Then, what's your answer to Justice Scalia's
23 question?

24 MS. KARLAN: My answer to his question is
25 Perkins against Matthews and City of Lockhart against

1 United States still compel the result of finding that
2 this law went into effect as a matter of Federal law,
3 because the question of whether a law is in force or
4 effect is a question of construing section 5 of the
5 Voting Rights Act, which is Federal law.

6 JUSTICE ALITO: Well, you're saying that if
7 a State passes a statute -- a State legislature passes a
8 statute that's flagrantly in violation of the State
9 constitution, it immediately is precleared, it's locked
10 into place?

11 MS. KARLAN: Yes, I am.

12 JUSTICE SCALIA: That rule of law renders
13 constitutional under State law an act that would
14 otherwise not be constitutional.

15 MS. KARLAN: No, it does not render it
16 constitutional.

17 JUSTICE SCALIA: Well, that's what you're
18 saying.

19 MS. KARLAN: No.

20 JUSTICE SCALIA: You're saying that's the
21 effect: It locks it in.

22 MS. KARLAN: It locks it in until the State
23 comes up with a constitutional cure, in the same way --

24 JUSTICE SCALIA: Oh, but it can't go back.

25 MS. KARLAN: No, it cannot go back.

1 JUSTICE SCOUTER: It locks it in.

2 MS. KARLAN: Well, it doesn't -- it doesn't
3 require that they stay with that law. It simply says
4 they cannot make a change without obtaining
5 preclearance, because that's what section 5 does. It's
6 a clear, bright-line rule.

7 JUSTICE SOUTER: May I ask: You're not --
8 correct me if I'm wrong. I didn't think you were
9 arguing that because of the preclearance followed by the
10 State determination of unconstitutionality, that the
11 State was required to follow that unconstitution law.

12 I thought your argument simply was that, in
13 effect, there was a stalemate at that point, and the
14 State was going to have to come up with some new law
15 that would be precleared. Am I correct?

16 MS. KARLAN: It's a little trickier than
17 that, Justice Souter, for the following reason. Let me
18 give you a hypothetical that will --

19 JUSTICE SCALIA: For the reason that, absent
20 their coming up with a new law, what law would be in
21 effect?

22 MS. KARLAN: That's what I was about to
23 explain.

24 JUSTICE SOUTER: And isn't the answer that
25 no law would be in effect? I mean, you're in the same

1 situation then that you would be in if there had been no
2 judicial litigation going on, the law had been brought
3 to the Justice Department or the D.C. court, had --
4 preclearance had been refused. The State at that point
5 didn't have the old law because it had been repealed.
6 It couldn't apply the new law because it wasn't
7 precleared, and somebody in Alabama would have to do
8 something.

9 Aren't we in essentially the same position
10 here?

11 MS. KARLAN: Well, we are, but as I
12 suggested, it's a little trickier than that. Because,
13 of course, the existing practice is for purposes of
14 section 5 the law that's in force or effect. So, for
15 example, suppose you had a State that --

16 JUSTICE SOUTER: Well, it was in force and
17 effect.

18 MS. KARLAN: Excuse me?

19 JUSTICE SOUTER: Does the theory require
20 that we assume it remains in force and effect by virtue
21 of the preclearance even when there is a subsequent
22 determination of unconstitutionality?

23 MS. KARLAN: I think the answer to that
24 question, candidly, is yes, and the State can cure that
25 quite quickly. But let me explain it with a

1 hypothetical that might make this clearer, which is:
2 Suppose you had a State in which people were voting in
3 an election, and then the State supreme court held that
4 that part of the county had never been properly annexed.
5 The State would be required to continue letting those
6 people vote in the election unless and until it received
7 preclearance from the Department of Justice. That's
8 what Perkins against Matthews and City of Lockhart
9 require.

10 So the State has to, once it adopts a
11 practice, continue using that practice unless and until
12 it receives preclearance for a new practice or -- and
13 this is somewhat --

14 JUSTICE KENNEDY: I'm not sure that in those
15 cases you had what you had here, which was a
16 declaration, let's assume, of invalidity ab initio.

17 Let me give you this hypothetical. A county
18 council goes to the board of commissioners or the board
19 of supervisors of the local county or legislative branch
20 and says: The legislature has just adjourned; it passed
21 a lot of laws, and one of the laws it passed is that
22 that you now have to set the qualifications locally for
23 certain officials, so we have to act on this right away.

24 They pass the legislation. Three weeks go
25 by. The county council says: You know, I made a

1 mistake; that law was never passed; it was never signed
2 by the governor. What rule? What result?

3 MS. KARLAN: Well, in your hypothetical
4 there would be no problem at all, and this goes back to
5 Justice Souter's hypothetical that he asked Mr. Newsom,
6 which is: That law hasn't been precleared. Therefore,
7 it's never in force or effect as a baseline.

8 JUSTICE KENNEDY: Well, suppose it had been
9 precleared?

10 MS. KARLAN: Then it would be Perkins
11 against Matthews.

12 JUSTICE BREYER: Well, is it? Because -- I
13 mean, what they're saying is let's use a little common
14 sense here. And you look at Fordice and there it was an
15 instance where it just didn't take effect at all as a
16 practical matter.

17 And then we cited those two cases you're
18 talking about, but I can't tell from the Fordice opinion
19 -- there was a ward system that was in fact in force or
20 effect. But I don't know how long that ward system was
21 in effect. It might have been for a long time, and
22 people might have taken action under it.

23 And the same thing is true in City of
24 Lockhart. I can't tell. You may know. But my point is
25 they are saying: Here we have a middle case, and what

1 we want is to use enough sense to say, look, it wasn't
2 really in effect. People challenged it the minute they
3 could. They -- everybody knew it was unconstitutional,
4 or a lot of people believed it. And the Governor then
5 did something to make up for it.

6 If you're going to say that that little bit
7 counts as putting it in force and effect, you know what
8 we're going to have? We're going to have every
9 municipality all over the country that doesn't always
10 know what the rules are, and they pass something, and
11 people challenge it immediately, it's obviously wrong,
12 and they're stuck with it as a matter of Federal law.
13 That's going to be a mess.

14 They're saying something like that, so I'd
15 like to hear your response.

16 MS. KARLAN: Well, there are two factual
17 points in response to your question, Justice Breyer.
18 The first is, with respect to Perkins against Matthews,
19 the Mississippi statute that required the use of
20 at-large rather than district elections was passed in
21 1962 and used precisely once before the preclearance, so
22 it was on all fours with this case. It was a three-year
23 lag between the unconstitutionality of the City of
24 Canton's practice and the preclearance. So if we were
25 to ask what does our case look most like that this Court

1 has already decided, it would be Perkins.

2 The second point which I want to direct the
3 Court to is we are not actually talking in this case --
4 and this goes as well to the Court's judicial function
5 -- about just Act 85-237. We are also talking in this
6 case about Act 2004-215, which was the attempt by the
7 Alabama Legislature to revise the constitutionality of
8 Act 85-237. Because the central problem in this case
9 was a provision of the Alabama Constitution, Section
10 105, that said you couldn't pass local legislation
11 unless the act -- unless the general act made that very
12 clear.

13 So in 2004 the Alabama legislature thought
14 it had solved the entire problem here by amending the
15 section of chapter 11 of the Alabama election law to say
16 unless a local law provides otherwise you can use
17 gubernatorial appointment. That law was intended to
18 revive Act 85-237. We know this because, among other
19 things, our clients were the sponsors of the act, among
20 the sponsors of the act.

21 Now, the Alabama legislature --

22 JUSTICE ALITO: If I could just ask you, in
23 making that argument, aren't you asking us to say that
24 the purpose of this act -- that the intent of the
25 Alabama legislature in passing that act is different

1 from the intent as determined by the Alabama Supreme
2 Court?

3 MS. KARLAN: Yes, but if I can explain why I
4 think this is important in a sense. It's because the
5 claim of the State is that this is a case about
6 fundamental constitutional provisions of Alabama law,
7 but in fact in its current guise, which is whether the
8 2004 Act revived the 1985 Act, this is purely a matter
9 of statutory construction and what the Alabama Supreme
10 Court said is: We don't think the legislature meant to
11 make this law retroactive; we think they meant to make
12 it only prospective. But that's not the same thing as
13 talking about fundamental Marbury against Madison
14 judicial review of the kind that the --

15 JUSTICE GINSBURG: It's a review of a lower
16 court by a higher court. That's what higher courts do.
17 They review for correctness, and the Alabama Supreme
18 Court said the circuit court got it wrong. It
19 misconstrued the law, and we are correcting that. And
20 that's -- that's correct.

21 MS. KARLAN: That is correct, Justice
22 Ginsburg, which leads to the second pair of cases that
23 we think this Court has already decided that provide you
24 absolutely clear guidance as to why preclearance was
25 required here. And that's this Court's decision in

1 Hathorn against Lovorn and this Court's decision in
2 Branch against Smith.

3 In both of those cases as well, you had the
4 question, quite acutely in Hathorn against Lovorn, of
5 whether or not the chancery court in Mississippi, which
6 is a trial-level court, got the law right or wrong on
7 whether elections should be conducted in a particular
8 way in Warren County. The Mississippi Supreme Court
9 said they got it wrong.

10 But this Court said that decision and the
11 implementation require preclearance because the presence
12 of a court decree doesn't exempt a contested change from
13 section 5.

14 So in this case, had Governor Riley decided
15 completely by himself that he, having taken an oath to
16 support the Alabama constitution, could not in good
17 conscience let a special election go forward here, it
18 would be no different from having the Alabama Supreme
19 Court decide that.

20 JUSTICE SCALIA: What does the Alabama
21 Supreme Court preclear? Where it was redistricting and
22 it had a redistricting plan, I can see it would send
23 over to the attorney general the new redistricting plan.
24 What -- what do the justices of the Alabama Supreme
25 Court have to come before the attorney general to get

1 his benediction upon?

2 MS. KARLAN: They have to --

3 JUSTICE SCALIA: Do they submit their
4 opinion and say, "Mr. Attorney General, please approve
5 our opinion"?

6 MS. KARLAN: No. No, Justice Scalia.

7 JUSTICE SCALIA: All right. What?

8 MS. KARLAN: They do not have to come before
9 this court at all. The chief election administrators of
10 Alabama or, in this case, the governor must come before
11 the court before he issues a certificate of office.

12 JUSTICE SCALIA: Before the attorney
13 general, you're talking about?

14 MS. KARLAN: He doesn't even have to come
15 before the attorney general. If you look at the
16 statutes, he could have come to the United States
17 District Court for the District of Columbia and gotten a
18 --

19 JUSTICE SCALIA: No, no. First of all,
20 you're trying to get -- the quick way is to get it from
21 the attorney general.

22 MS. KARLAN: Well, the attorney general
23 found that this was a retrogressive change.

24 JUSTICE SCALIA: I understand. What was
25 supposed -- what should have been submitted to the

1 attorney general? What is the Alabama Supreme Court's
2 --

3 MS. KARLAN: Exactly what was submitted
4 after the Federal court did, which is the -- the
5 decision to appoint rather than to elect someone to
6 District 1 of the Mobile County Commission. The Alabama
7 Supreme Court didn't have to submit anything, and the
8 Federal court could not have been clearer in this case.

9 JUSTICE GINSBURG: The Federal court told
10 the Alabama --

11 MS. KARLAN: No, it told --

12 JUSTICE GINSBURG: It told Alabama. I
13 thought -- I thought that one of the reasons was
14 adjudication wasn't complete when the district court
15 made its first ruling, so the district court said, now,
16 go off and get those two Alabama Supreme Court decisions
17 precleared.

18 MS. KARLAN: No, Your Honor. That's not
19 what they said.

20 JUSTICE GINSBURG: What did they say?

21 MS. KARLAN: If you turn to the August 18th
22 final judgment, which is on page 9a over to page 10a of
23 the jurisdictional statement, they said judgment is
24 entered in our favor -- that was the declaratory
25 judgment -- and then said the State of Alabama has 90

1 days to obtain preclearance.

2 The State was free to come to the DDC and
3 seek judicial preclearance if they wanted. The State
4 was free, as Justice Scalia suggested, to try and use
5 the quick way.

6 JUSTICE GINSBURG: But the State's position
7 was it shouldn't have to preclear a decision of the
8 State's highest court --

9 MS. KARLAN: But it -- it --

10 JUSTICE GINSBURG: -- saying that the State
11 lower court got it wrong.

12 MS. KARLAN: Justice Ginsburg, this does not
13 say the State has to preclear the decision of the
14 Alabama Supreme Court. It simply says -- and if you
15 look at page 8a, which is the end of the district
16 court's opinion -- you know, it's enjoining enforcement
17 of those decisions; it's not enjoining those decisions.
18 You don't have to spin the Alabama Supreme Court here.
19 But they literally sued only the governor in this case.

20 CHIEF JUSTICE ROBERTS: Why did Alabama have
21 to preclear anything? On November 1st, 1964, this was
22 an appointed position. This is not a change from what
23 was, quote, "in force or effect" on November 1st, 1964.

24 MS. KARLAN: Well, for one thing, this Court
25 would have to overrule its decisions --

1 CHIEF JUSTICE ROBERTS: Oh, no, no. Those
2 decisions are all dicta.

3 MS. KARLAN: But let me go then straight to
4 a factual point, which is this is not the same practice
5 as they were using on November 1st of 1964, because that
6 practice was a combination of two things. It was
7 gubernatorial appointment under Alabama Section 11-3-6,
8 and it was gubernatorial appointment in the context of
9 at-large elections, but --

10 CHIEF JUSTICE ROBERTS: So something else
11 changed --

12 MS. KARLAN: No, the --

13 CHIEF JUSTICE ROBERTS: -- whether they are
14 membership elections or at-large elections.

15 MS. KARLAN: It's a huge difference, Your
16 Honor.

17 CHIEF JUSTICE ROBERTS: The argument you
18 made in your brief was that this was already decided in
19 Reno versus Bossier Parish. I didn't see the --

20 MS. KARLAN: No, we didn't --

21 CHIEF JUSTICE ROBERTS: Is the argument that
22 this was not, in fact, a change in your brief?

23 MS. KARLAN: We didn't see that until their
24 reply brief, and we didn't think we needed to file a
25 surreply brief. This Court doesn't allow them.

1 CHIEF JUSTICE ROBERTS: No. They had the
2 argument -- you at least thought they did --

3 MS. KARLAN: No.

4 CHIEF JUSTICE ROBERTS: You quote in your
5 brief Reno versus Bossier Parish and one other case.
6 I'm thinking of one other.

7 MS. KARLAN: I think you're probably
8 thinking about Young against Fordice, itself.

9 CHIEF JUSTICE ROBERTS: Yes. And you raised
10 the argument -- you criticized them for raising this
11 argument; that this wasn't any different; but you did
12 not say that it wasn't any different.

13 MS. KARLAN: Well, their claim there was
14 that -- not that this wasn't any different, but part of
15 our explanation is that, in context, we think there is a
16 difference between what was going on in 1964.

17 They actually, I think, want to go back to
18 the 1977 to 1985 practice, which is the post -- the
19 post-election practice in Alabama once Brown against
20 Moore had been decided.

21 Now, the other thing is I will say that the
22 Department of Justice regulations on this, which are
23 quite clear, have been in effect since 1987. And in the
24 2006 -- in the 2006 re-enactment of the Voting Rights
25 Act, if you look at the House report, they talk about

1 Young against Fordice there. And they say
2 "Mississippi's attempt to revive and to resuscitate" --
3 and those are the House's words, "to revive or
4 resuscitate" -- the --

5 CHIEF JUSTICE ROBERTS: I think you're quite
6 right on the DOJ regulations and the House report, but I
7 just don't see how that squares with the statutory
8 language.

9 MS. KARLAN: Well, Your Honor, if I could
10 just make an observation about section 5 more generally
11 in Allen, and I'll start here. In Allen, itself, this
12 Court recognized that the text of section 5 doesn't
13 provide for private rights of action, and yet it found
14 them.

15 It recognized that the text of section 14 of
16 the Voting Rights Act suggests that the only place that
17 can be -- that the only place that can litigate section
18 5 --

19 CHIEF JUSTICE ROBERTS: So because we've
20 ignored the text in other areas, we should just forget
21 about it here?

22 MS. KARLAN: No, because that's -- that's
23 the -- those sets of decisions by this Court have been
24 ratified by Congress and have been the longstanding
25 practice under section 5. You should continue that.

1 CHIEF JUSTICE ROBERTS: I thought that --
2 they ratified -- these cases were ratified by Congress,
3 but Congress did not change the language in the statute.

4 MS. KARLAN: Because it thought that the
5 purpose of section 5 -- if I could spend just one
6 sentence on this -- the purpose of section 5's November
7 1st language was to prevent a sort of game of
8 Whac-A-Mole in which the States would keep changing the
9 practice. And the idea of that freeze was to hold it in
10 place so that it could be challenged as a constitutional
11 matter before the State switched again. It wasn't to
12 create a safe harbor against attacks on the November 1st
13 practice.

14 Thank you, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Thank you, Ms.
16 Karlan.

17 Mr. Shanmugan.

18 ORAL ARGUMENT OF KANNON K. SHANMUGAM,

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE,

21 SUPPORTING THE APPELLEES

22 MR. SHANMUGAM: Thank you, Mr. Chief

23 Justice, and may it please the Court:

24 As this Court has repeatedly recognized,
25 section 5 of the Voting Rights Act requires a cover

1 jurisdiction to seek preclearance whenever it seeks to
2 administer any change in its voting practices. And
3 there is no basis in either text or policy for carving
4 out an exception for all or some changes precipitated by
5 State-court decisions. The judgment of the district
6 court should, therefore, be affirmed.

7 JUSTICE SCALIA: Do you have any problem
8 with the republican form of government provision of the
9 Constitution?

10 MR. SHANMUGAM: Absolutely not.

11 JUSTICE SCALIA: As I understand what's
12 going on here, the -- the legislative process of the
13 people of Alabama, whereby something is invalid as a
14 law, suddenly becomes a law because the Federal attorney
15 general has given it preclearance. The people have
16 never voted for that properly under their Constitution.
17 Yet, it becomes law in Alabama. And that's a republican
18 form of government?

19 MR. SHANMUGAM: Well, I don't think, with
20 respect, Justice Scalia, that that's actually happened
21 here. What happened in this case was that the practice
22 of special elections actually went into effect while the
23 litigation was ongoing.

24 The Alabama Supreme Court then held that the
25 statute adopting that practice was invalid as a matter

1 of State law, to be sure, and, therefore, was void ab
2 initio as a matter of State law.

3 As a result of that decision, the remedy in
4 some sense was to revert to the practice of
5 gubernatorial appointments. And what happened then was
6 that it was then incumbent on the attorney general under
7 section 5, the Alabama attorney general, to seek
8 preclearance of that practice. And the Federal attorney
9 general made the determination that it would be
10 retrogressive to go back to that practice.

11 JUSTICE SCALIA: From an Alabama law that
12 had never been adopted by the people of Alabama?

13 MR. SHANMUGAM: It had been adopted by the
14 people of Alabama.

15 JUSTICE SCALIA: Not validated, so --

16 MR. SHANMUGAM: It was invalid, to be sure,
17 as a matter of State law. And then -- and then what
18 happens at that point is that the Alabama attorney
19 general is in very much the same position as he would be
20 if the Federal attorney general had held that some
21 statutory provision that had been enacted by the Alabama
22 legislature was improperly retrogressive. He would be
23 faced with a choice: He could either proceed under a
24 practice that was invalid under State law, or the State
25 could pass a new law providing a --

1 JUSTICE GINSBURG: That all depends on there
2 having been a change. What there was was gubernatorial
3 appointment. Then the legislature passes a law.
4 Suppose that the circuit court had said, sorry,
5 legislature, you got it wrong, general prevails, you
6 can't do it this way, the law is invalid. Suppose the
7 circuit court had said that. Then there would not have
8 been an election, right.

9 MR. SHANMUGAM: That's exactly right, and
10 under our view there would not have been a change,
11 because it was the fact that there was a special
12 election that was critical.

13 JUSTICE GINSBURG: So there becomes -- there
14 becomes a change only because the circuit court has made
15 the mistake about what the State law is. That's very
16 odd.

17 MR. SHANMUGAM: There becomes a change,
18 Justice Ginsburg, because the practice of special
19 elections actually went into effect by virtue, at a
20 minimum of the fact that an election was held. And to
21 be sure --

22 CHIEF JUSTICE ROBERTS: What if the district
23 court -- circuit court I guess it is in Alabama. This
24 action is filed before the election and the circuit
25 court says: You may have a successful claim here, but

1 I'm not going to disrupt the election, there isn't time;
2 so this election can go forward and during that period
3 I'll be considering the law. We do that all the time,
4 or three-judge district courts do, saying we're going to
5 look at this question, but we don't have time to stop
6 the election so it's going to go forward. In that case,
7 would that lead to the same result?

8 MR. SHANMUGAM: Well, with respect,
9 Mr. Chief Justice, I think what a State court might do
10 in that circumstance would be to enter a stay until it
11 could adjudicate the validity --

12 CHIEF JUSTICE ROBERTS: Well, sure, but not
13 always. You know, if it's a week before the election or
14 something, even if they think it's a serious claim, they
15 sometimes say: We're going to allow the election to go
16 forward because we're going to look at this and perhaps
17 the State Supreme Court has to look at it, and we don't
18 want to hold up the election.

19 MR. SHANMUGAM: Well, it is certainly the
20 implication of our position that if the law actually
21 goes into effect and an election is held and if
22 preclearance has already been granted for, in some
23 sense, the contrary position, then, yes, if the State
24 Supreme Court or the State trial court subsequently
25 gives State law a different interpretation, then that

1 change is going to require preclearance.

2 JUSTICE KENNEDY: That's not just an
3 implication. That's your whole theory.

4 MR. SHANMUGAM: Well, it is our theory as to
5 what the "in force or effect" requirement means. And we
6 believe that that follows from this Court's decision in
7 Young versus Fordice, which sets out the parameters for
8 determining --

9 JUSTICE BREYER: Well, Young versus Fordice,
10 that's Young versus -- I mean, if it never went into
11 force and effect, of course we don't reach questions
12 like republican form of government or 1964 safe harbors
13 and so forth. And so I think it's an important matter.
14 And as I read Fordice, we have over here an instance
15 where nothing happened. You know, some people
16 registered and then immediately they were told the
17 registration was no good. So it wasn't in force and
18 effect.

19 When I looked at Perkins v. Matthews, that
20 was not a case where the law was challenged immediately.
21 Rather, what Justice Brennan said is that this has been
22 in effect from 1962 to 1965 at least, and in 1965 they
23 had an election under the ward system. So even if it
24 might have been unconstitutional or it was, it was still
25 in effect for three years.

1 In the other case, City of Lockhart, Justice
2 Powell says this statute has been in effect, we assume,
3 from 1917 to 1973. That's not exactly a fleeting
4 matter. So -- so here we have a case where they
5 challenged it instantly, where it was litigated as fast
6 as it possibly could be, where in fact, as Justice
7 Ginsburg just said, a different decision of the circuit
8 court would have led to the opposite of it never would
9 have even had it. So what harm does it do to the
10 enforcement of the civil rights laws of the United
11 States if the holding of this Court were, well, under
12 these circumstances, where challenged immediately, et
13 cetera, it never took force and effect?

14 MR. SHANMUGAM: Justice Breyer, the harm is
15 that there would be actual retrogression. And I think
16 that there are two critical and distinct legal issues
17 that this Court needs to address. The first is whether
18 this practice was in effect for long enough for it to
19 have been in force or effect. The governing precedent
20 on that issue is Young versus Fordice.

21 And we believe that there is more here.
22 There is not simply the partial implementation of voter
23 registration procedures for a very brief period of time,
24 a matter of weeks. An election was actually held and if
25 that is not sufficient to satisfy the "in force or

1 effect" requirement, it's hard to see what would be.

2 The second question is whether a practice
3 can be said to be in force or effect when it was void ab
4 initio as a matter of State law. And we do respectfully
5 submit that the City of Lockhart and Perkins answer that
6 question because in both of those case the Court held
7 that the relevant question was whether the practice was
8 actually in effect.

9 CHIEF JUSTICE ROBERTS: Counsel, you talk
10 about force and effect. Of course, the statute says
11 "force or effect on November 1st, 1964." Do you have
12 anything to add to Ms. Karlan's response on my quaint
13 fixation on the language of the statute?

14 MR. SHANMUGAM: Well, it isn't quaint at
15 all. I would say that I do think that as a textual
16 matter one could perhaps make the argument that where a
17 covered jurisdiction changes its voting practice after
18 the statutory coverage date and then enacts basically a
19 new version of the pre-existing practice, that the new
20 practice could as a formal matter be said to be a new
21 practice.

22 But I want to make two additional points.
23 The first is that the question of whether the statute
24 covers reversion to coverage date practices is really
25 not properly before the Court. Appellant seemingly did

1 not raise it before the district court and it is not --

2 CHIEF JUSTICE ROBERTS: Well, that can't tie
3 our hands in properly interpreting the statute.

4 MR. SHANMUGAM: Well, it's not within the
5 scope of the question presented, either. The question
6 presented focuses solely on the question of whether
7 changes precipitated by State court decisions require
8 preclearance. And that's a question that this Court has
9 answered twice in Hathorn and Branch.

10 The only other thing that I would say is
11 that it has been not only the consistent interpretation
12 of the attorney general, but also the consistent
13 interpretation as far as we are aware of the lower
14 court, that the statute does reach reversions to
15 preexisting practices as well.

16 CHIEF JUSTICE ROBERTS: I don't see how --
17 regardless of how consistent the interpretation is, how
18 can you read "November 1st, 1964," to mean anything
19 other than that date?

20 MR. SHANMUGAM: Well, I do think that a
21 textual argument could be made, Mr. Chief Justice, that
22 the practice that was in effect as of the coverage date
23 in some sense ceases to exist when the jurisdiction
24 adopts an intervening distinct practice. And certainly
25 there is enough ambiguity, I believe, to get us into the

1 realm of deference, and this Court has repeatedly
2 recognized that the attorney general's interpretations
3 of section 5 are entitled to substantial deference.

4 JUSTICE SCALIA: Mr. Shanmugan, what does
5 the attorney general do when he gets -- I mean, does he
6 just preclear any old thing that somebody shoves under
7 his nose? Does he look to see whether there is
8 litigation pending on it? Was this litigation pending
9 when it was --

10 MR. SHANMUGAM: I think this bears --

11 JUSTICE SCALIA: -- the plan was
12 submitted --

13 MR. SHANMUGAM: This bears on a critical
14 point, Justice Scalia. And this Court has a line of
15 cases in the section 5 area that says that it is really
16 incumbent on covered jurisdictions when they seek
17 preclearance clearly to identify the relevant change in
18 their voting practices when they come to the attorney
19 general for preclearance. And when the 1985 act was
20 submitted for preclearance, there was nary a word in the
21 Alabama attorney general's submission that there was any
22 potential difficulty with the statute under State law.

23 And so, the attorney general precluded on
24 the understandable understanding that the statute simply
25 affected a shift to special elections. And I do think

1 that the great price of Appellant's interpretation is if
2 the court were to adopt it, it would suddenly shift the
3 burden to the Federal attorney general or the D.C.
4 District Court to when they receive a preclearance
5 submission, essentially assess the meaning and validity
6 of any State statute, lest the State statute be
7 construed differently by a State court, and thus, lock
8 in the preclearance court or attorney general. And we
9 believe that that problem along with this Court's
10 decision in Branch and Hawthorne support our
11 interpretation.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Newsom, four minutes.

15 JUSTICE STEVENS: Mr. Newsom, I hate to
16 intrude on your rebuttal time, but I would like to ask
17 you this question. Supposing a State after 1964 and
18 before 2000 made 35 different changes of all improved
19 voting rights, could they always go back to the practice
20 in effect of 1964 and not have to preclear?

21 REBUTTAL ARGUMENT OF KEVIN C. NEWSOM

22 ON BEHALF OF THE APPELLANT

23 MR. NEWSOM: Your Honor, if we are talking
24 about a legislative or administrative change, the answer
25 may well be no under this Court's dicta.

1 JUSTICE STEVENS: It could be any kind of
2 change, legislative, administrative, judicial, could
3 they always go back to 1964 and have a safe harbor?

4 MR. NEWSOM: I think that, Your Honor, if
5 you're going to treat all forms of changes together,
6 then they may well be able to. Although I would say
7 this, that that will very rarely, if ever, be the case.
8 This is sort of the odd ball case in which the reversion
9 happens to be --

10 JUSTICE STEVENS: I understand. I'm just
11 trying to understand how much teeth there is in the 1964
12 date. Is it safe harbor or isn't it?

13 MR. NEWSOM: Well, I think the explanation
14 for 19 -- for November 1, 1964 is section 5 was
15 implemented as a five-year stopgap measure. It's now
16 been extended through 2031 with no amendment of the
17 language. So it might have made some sense as a hard
18 requirement in 1964. It makes much less practical
19 sense, I recognize, today. But the language is what the
20 language is I'm sorry.

21 CHIEF JUSTICE ROBERTS: What about
22 Ms. Karlan's response that this is not the same practice
23 but it's different because the underlying method of
24 election has been changed.

25 MR. NEWSOM: With respect, Your Honor, I

1 think the plaqueities is gubernatorial appointment. It
2 doesn't strike me that the underlying method of how the
3 election might have operated if the rule were election
4 should matter, the rule was gubernatorial appointment.
5 The rule is by virtue of these decisions gubernatorial
6 appointment.

7 If I may, just a couple of housekeeping
8 items.

9 Justice Ginsburg, the question of what DOJ
10 was asked to preclear here is crystal clear from the
11 district court's opinion. On August 18, 2006, this
12 three-judge court held that two Alabama Supreme Court
13 decisions Stokes v. Noonan and Riley v. Kennedy must be
14 precleared before they can be -- so the notion that the
15 State was not asked to preclear judicial decisions is
16 simply incorrect.

17 The second thing I'd like to mention just
18 briefly is that the Federalism exacerbation here exists
19 in a very real way for this reason. The entire
20 legislative and litigation history of section 5 has been
21 about legislative and administrative change. Even with
22 respect to those sorts of changes, this Court has said
23 most recently and most forcefully in Presley that that
24 application of section 5 even there works an
25 extraordinary change of the traditional course of

1 relations between the states and the Federal Government.
2 So the -- to this point to be sure the Court has been
3 willing to accept that extraordinary departure. The
4 question in this case, however, is whether this
5 extraordinary departure ought to become this
6 extraordinary departure to account for this new
7 category, this new universe of changes.

8 JUSTICE SOUTER: Why as a matter of
9 Federalism is it more extraordinary to review a court
10 determination than the determination of a popularly
11 elected legislature?

12 MR. NEWSOM: Well, Your Honor, there are two
13 pieces of this, really. That's more extraordinary
14 simply in a quantitative sense. We are talking about a
15 lot more changes, so in sheer numbers we have got an
16 exacerbation.

17 But it's also in a qualitative sense the
18 sense that we are living in a post Marbury, post Cooper
19 versus Aaron, post Bernie world in which State courts
20 just like Federal courts are tasked with finally
21 deciding what State law means. And so, there is a very
22 real difference, I think, in upsetting the considered
23 judgment of a State court with respect to what State
24 court -- with respect to what State law means than there
25 is --

1 JUSTICE SOUTER: But they are not saying
2 State law is different from what it means. They are
3 saying that you cannot put a change in effect until you
4 get it precleared.

5 MR. NEWSOM: Right, Your Honor. But with
6 respect I think that that doesn't do justice to the
7 functional reality of what's going on here. In 1988 the
8 Alabama Supreme Court says, may I, says in Stokes versus
9 Noonan that 85-237 is and always was unconstitutional.
10 We have an issue of doctrine that's simply part of
11 Alabama law and, again, I don't think anybody here
12 seriously disputes that 85-237 was unconstitutional.

13 And 20 years later DOJ steps in and refuses
14 to bless that determination, and to be sure, is not
15 meddling around in the intricacies of state law but the
16 functional equivalent is the same. They set that
17 judgment aside, and notwithstanding the Stokes court
18 invalidation of that, DOJ says very clearly in its
19 objection letters that 85-237, despite its invalidation,
20 remains in full force and effect.

21 CHIEF JUSTICE ROBERTS: Thank you counsel.
22 The case is submitted.

23 (Whereupon, at 2:02 p.m., the case in the
24 above-entitled matter was submitted.)

25

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