

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

DORIS POWELL,

Plaintiff,

v.

THE STATE OF ALABAMA;
JEFFERSON COUNTY
ELECTION COMMISSION; ALAN
KING, MIKE HALE, and ANNE-
MARIE ADAMS, in their official
capacities as members of the
Jefferson County Election
Commission,

Defendants.

CIVIL ACTION NO.
08-H-1345-S

**Plaintiff's Memorandum
Complying with August 19, 2008, Order**

I. The issue in this case.

The State's highest court has held that Act 1977-784 (which required vacancies on the Jefferson County Commission to be filled by special election) was repealed by Act 2007-488 (which requires vacancies to be filled first by gubernatorial appointment then – in some instances – by special election). *Working v. Jefferson County Election Comm'n*, __ So.2d __, 2008 WL 2569255 (June 30, 2008) at *11. The relevant sections of Act 2007-488, codified at Ala. Code §§ 11-3-1(b) and

(f), have not been precleared under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Alabama Attorney General submitted these new statutory provisions for preclearance on July 29, 2008, but the U.S. Department of Justice has not acted on the submission.

Section 5 prohibits the defendants from “enact[ing] or seek[ing] to administer” the repeal of Act 1977-784 by Ala. Code § 11-3-1(f) and its replacement by Ala. Code § 11-3-1(b) before they have been precleared. Nevertheless, the state courts have ordered the defendant election commission to administer the repeal and to fill the District 1 vacancy during the November 4, 2008, general election, and the circuit court has refused to stay its order pending preclearance. Defendant Sheriff Mike Hale states in his answer (Doc. 20 at ¶ 26) that he will administer the election and will not comply with § 5 unless he is enjoined. The defendant Election Commission answers that it is complying with the orders of the state courts (Doc. 29) at ¶ 3. The defendant State argues that Act 1977-784 cannot be enforced, even if there is no preclearance (Doc. 17 at ¶ 24), but claims it has no part in administering the November special election (Doc. 17 at ¶ 15). Finally, the State contends this Court lacks subject matter jurisdiction to enforce § 5’s mandate until after the election has been held. In other words, unless enjoined by this Court, the defendants intend to ignore the prohibition of § 5.

By statute and by explicit Supreme Court ruling, plaintiff is entitled to an injunction prohibiting defendants from attempting to

administer the repeal of Act 2007-784 and from taking other action that attempts to administer Ala. Code §§ 11-3-1(b) and (f) until and unless they have been precleared.

In *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996), the Supreme Court held,

A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance. If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change. *Clark v. Roemer*, [500 U.S. 646,] 652-653, 111 S.Ct., at 2100-2102 [(1991)] (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969)). The District Court's order that the County conduct elections under the unprecleared, at-large judicial election plan conflicts with these principles and with our decision in *Clark v. Roemer*, *supra*.

The *Lopez* Court did not say, "A jurisdiction subject to § 5's requirements must obtain preclearance *either before or after* implementing a voting change." Similarly, the Court did not say, "Only if a voting change subject to § 5 has not been *submitted for preclearance*, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." And yet, the State would have this Court hold that no injunction may be entered because the State has *submitted* the change for preclearance and *might* get preclearance before the election is held (Doc. 18 at 7 n.4). This Court is bound to follow the mandate of

Congress and the Supreme Court. It should promptly enter a declaratory judgment that Ala. Code §§ 11-3-1(b) and (f) may not be administered or implemented until they have been precleared, and it should enter appropriate injunctive relief.

II. The effect on this case of *Riley v. Kennedy* and *Plump v. Riley*.

Plaintiff will respond to the questions in this Court's August 19, 2008, order (Doc. 21) in reverse order.

Riley v. Kennedy, 128 S.Ct. 1970 (2008), held that the 1985 local act prescribing special elections to fill vacancies on the Mobile County Commission, instead of gubernatorial appointment as prescribed by then-existing general law, was never in force and effect, so that Governor Riley's appointment of Juan Chastang to fill a vacancy in 2005 was not a change in voting practice that required preclearance under § 5. The Court based its narrow holding on the fact that the Alabama Supreme Court had declared the 1985 Mobile County local act to be in violation of § 105 of the Alabama Constitution and on the unique timing circumstances of that ruling by the state's highest court. 128 S.Ct. at 1986-87. For purposes of the instant action, it is important to note that the Supreme Court said in *Riley v. Kennedy* that "the presence of a judgment by Alabama's highest court declaring the 1985 Act invalid under the State Constitution is critical to our decision." 128 S.Ct. at 1986.

The U.S. Supreme Court’s opinion makes it clear, however, that § 5 preclearance would have been required if the 1985 local act had merely been repealed by the Legislature. 128 S.Ct. at 1986 (“Section 5 prohibits States from making retrogressive changes to their voting practices, and thus renders any such changes unenforceable. To be sure, this result constrains States’ legislative freedom.”). That is the situation presented in the instant case, the Alabama Supreme Court held in *Working*. In 2007 the Legislature repealed the 1977 Jefferson County local act and replaced it with the scheme in Ala. Code § 11-3-1(b). Because Act 1977-784 had been legislatively repealed, the Alabama Supreme Court declined to address Governor Riley’s contention that, like the 1985 Mobile County local act, the 1977 Jefferson County local act violated § 105 of the Alabama Constitution. *Working*, 2008 WL 2569255 at *8. And, the Alabama Supreme Court held, it had exclusive authority to decide disputes over compliance with § 105.¹ *Working*, 2008 WL 2569255 at *5 n.8. So, if the repeal of Act

¹ Under Alabama law, Act 1977-784 stood in a different relationship to Ala. Const. § 105 than did the Mobile County local act at issue in *Kennedy*. Act 1977-784, unlike the 1985 Mobile law, was enacted before the Alabama Supreme Court’s decision in *Peddycoart v. City of Birmingham*, 354 So. 2d 808 (Ala. 1978). *Peddycoart* interpreted § 105 to “prohibit[] the enactment of a local act when the subject is already subsumed by the general statute.” *Id.* at 813. Recognizing that *Peddycoart* marked an explicit change in its interpretation of § 105, the Alabama Supreme Court expressly declared that its new interpretation would apply only prospectively to laws enacted after the decision – that is, to post-1978 laws. As to all laws then on the books, the Alabama Supreme Court directed that they continue to be governed by pre-*Peddycoart* standards. *Id.* at 814-15. Under those standards, Act 1977-784 poses no constitutional difficulty. See, e.g., *Brandon v. Prince*, 74 So. 939 (Ala. 1917) (holding that a local act providing for a different manner of jury selection in Tuscaloosa County than provided by general law did not violate Ala. Const. § 105);

1977-784 is denied preclearance because it is retrogressive, § 5 would “effectively require[e] a State to administer a law it has repealed -- a routine consequence of § 5.” *Riley v. Kennedy*, 128 S.Ct. at 1986 (internal quotes and citation omitted).

Plump v. Riley, 2008 WL 192826 (M.D.Ala., Jan. 22, 2008) (3-judge court), was decided before the Alabama Supreme Court clarified the controlling state law in *Working*. In *Plump*, Governor Riley contended Act 1977-784 was never in force and effect because it allegedly violated § 105 of the Alabama Constitution. The Middle District court held that the Governor’s decision to appoint George Bowman nevertheless required § 5 preclearance, following the precedent of its earlier ruling in the Mobile County case that subsequently was reversed in *Riley v. Kennedy*. In doing so, the Middle District court expressly refused to address the validity of Act 1977-784 under state law:

The court emphasizes that whether Act No. 77-784 is, in fact, unconstitutional under state law, and whether positions on the Jefferson County Commission must be

Dunn v. Dean, 71 So. 709 (Ala. 1916) (holding that a local act providing for the Conecuh County Commission to be composed of more members elected in a different way than that provided by general law did not violate Ala. Const. § 105).

By contrast, the Mobile County local act providing for special elections, Act 1985-237, was enacted in 1985, seven years after the *Peddycoart* decision. Because this post-*Peddycoart* local act conflicted with the general state statute providing for gubernatorial appointments, the Alabama Supreme Court held in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), that it violated section 105 and was therefore unconstitutional. The *Stokes* decision did not revisit *Peddycoart*’s temporal bifurcation of section 105 judicial standards and therefore did not affect the validity of the many local acts enacted prior to *Peddycoart*.

filled by special election or gubernatorial appointment under state law, are questions we do not reach and this opinion should not be understood in any way as reaching. We conclude only that the authority of the Governor to appoint persons to fill vacancies on the Jefferson County Commission is a change in practice which must be precleared, and that the Plaintiff is entitled to declaratory relief to that effect.^{FN4}

FN4. In the Amended Complaint the Plaintiff also seeks a declaratory judgment that the Election Commission of Jefferson County has the authority to call a special election for District 1 of the Jefferson County Commission. That determination is outside of the province of this three-judge court. There is no claim before the court to determine the status of any authority pursuant to which such election might be held for purposes of the Voting Rights Act, and the validity of such an election under state law is not before this court.

2008 WL 192826 at *3. The State did make a § 5 submission of the Governor's appointment of George Bowman, but the Department of Justice refused to consider the submission until Ala. Code §§ 11-3-1(b) and (f) were also submitted.

So the questions presented in the instant action, whether the repeal of Act 1977-784 by Ala. Code § 11-3-1(f) and its replacement by Ala. Code § 11-3-1(b), may be implemented prior to preclearance, were not addressed by the Middle District in *Plump*. The *Plump* court's remedy set out a set of contingencies that required General Bowman's appointment to be vacated if the Governor's exercise of his appointment

power did not receive preclearance. When Governor Riley appealed, the U.S. Supreme Court stayed the *Plump* judgment pending appeal:

The application for stay of the judgment of the United States District Court for the Middle District of Alabama, case No. 2:07-cv-1014, entered January 22, 2008, and amended January 25, 2008, presented to Justice Thomas and by him referred to the Court is granted pending the timely docketing of the appeal in this Court. Should the jurisdictional statement be timely filed, this order shall remain in effect pending this Court's action on the appeal. If the appeal is dismissed, or judgment affirmed, this order shall terminate automatically. In the event jurisdiction is noted or postponed, this order will remain in effect pending the sending down of the judgment of this Court.

Order in *Riley v. Plump*, 553 U.S. ___, 128 S.Ct. 1930, 170 L.Ed.2d 788, 76 USLW 3567 (April 18, 2008).

The State has contended that this U.S. Supreme Court stay pending appeal in *Plump* requires that General Bowman remain in office until the stay is lifted (Doc. 18 at 7 n.3).² The State simply is wrong. The Middle District judgment it stays expressly does not tie the State of Alabama's hands to determine whether the special election held in February under Act 1977-784 was valid or whether and when General Bowman should be removed from office. Now that the Alabama Supreme Court has clarified the state law controlling these

² The State's argument ("If the results of the invalid [February] election were canvassed while the State awaits preclearance, there would be two persons claiming the office of Commissioner.") asserts once again the supremacy of State law over the Voting Rights Act.

questions, this Court must address the completely different issue of whether Ala. Code §§ 11-3-1(b) and (f) may be implemented under § 5 of the Voting Rights Act. If these new statutory provisions are precleared, General Bowman lawfully may remain in office until the winner of the November election for Jefferson County Commission District 1 is certified. If these provisions are not precleared, the winner of the election held in February under Act 1977-784 must be certified, and General Bowman's appointment must be vacated.

In addition, the issues in *Plump* and this case are different. Mr. Plump sought declaratory and injunctive relief against the Governor's unprecleared appointment of Gen. Bowman as commissioner for the remainder of a four-year term. The present case seeks declaratory and injunctive relief against a different unprecleared change – holding an election in November 2008 rather than February 2008. The *Plump* stay is not a general-purpose “Get Out of Jail Free” card for Governor Riley or General Bowman to avoid every constraint of federal law. *See DeNovellis v. Shalala*, 135 F.3d 58, 60 (1st Cir. 1998) (stay pending appeal from denial of preliminary injunction in first action did not “freez[e]” plaintiff in the job she complained about being removed from and did not prevent another district court from denying her second motion for preliminary injunction).

Plaintiff Powell wants to make clear her concern that, however events unfold in the future, they do not result in the District 1 seat on the Jefferson County Commission being vacant for any period of time,

particularly in light of the momentous decisions that must be made with respect to Jefferson County's highly publicized financial crisis. For example, absent action by this Court, if the U.S. Supreme Court returns from recess on October 6 and dismisses or affirms Governor Riley's appeal in *Plump*, General Bowman's appointment would be vacated, but the defendant Election Commission would still be subject to the state courts' orders not to certify the February special election winner to replace him. And, if Ala. Code §§ 11-3-1(b) and (f) have not been precleared, the November 4 election for District 1 may not lawfully be held nor its winner certified. Only this Court is in a position to sort out these and all the other future contingencies and thus to preserve an orderly transition that enforces § 5 and prevents threatened electoral confusion injurious to all citizens of Jefferson County.

III. How this Court should proceed.

Plaintiff requests that the Court proceed as follows:

1. Schedule a hearing at the earliest practicable time to receive any evidence the parties may seek to offer and to hear arguments on the issues presented in this action.
2. Immediately enter a declaratory judgment that Ala. Code §§ 11-3-1(b) and (f) may not be administered or implemented until and unless they receive preclearance under § 5 of the Voting Rights Act, and that, absent preclearance of Ala. Code §§ 11-3-1(b) and (f), Act 1977-784 remains in full force and effect.

3. Order defendants promptly to inform this Court of all developments relevant to this action and specifically, prior to printing ballots for a District 1 election in November 2008 to inform this Court of the status of the preclearance request regarding Ala. Code §§ 11-3-1(b) and (f).

Submitted by,

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CERTIFICATE OF SERVICE

I certify that on 22 August 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

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