

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.
2:08-cv-1345-LSC

Plaintiff's Reply Memorandum

The State of Alabama's memorandum (Doc. 30) spends much of its 27 pages on irrelevant matters and ignores the central question in the case.

The principal issue is whether the State has obtained Voting Rights Act preclearance of the statutory changes it made by stopping the certification of a February special election and calling a November special election. A subsidiary issue raised by the Court's Order (Doc.

21) is whether the Court is barred from taking any or all actions necessary to remedy the violation of the Voting Rights Act.

As Plaintiff's Memorandum (Doc. 32) demonstrates at pp. 1-4, Section 5 of the Voting Rights Act does apply. The State argues "that § 5 does not reach a return to the practice in place on the covered jurisdiction's coverage date." Doc. 30 at 18. The total number of cases supporting that proposition – whether cited in the State's memorandum to this Court, its Jurisdiction Statement in the Supreme Court, or its Brief in Opposition in the Supreme Court – is zero. This lack of citation is not because of a lack of diligence by the State's lawyers. Rather it is because there are no cases that uphold that argument. The Supreme Court stated the law in *Riley v. Kennedy*, 128 S.Ct. 1970, 1982 (2008) ("We have defined the baseline as the most recent practice that was both precleared and 'in force or effect'--or, absent any change since the jurisdiction's coverage date, the practice that was 'in force or effect' on that date.") Indeed, the whole case turned on the determination whether the Mobile law was "in force or effect." This Court is bound to enforce existing Supreme Court precedent.

The State also argues, "Analogizing from *Kennedy*, the February 2008 special election was never 'in force or effect' for § 5 purposes. Instead, it 'was challenged in state court at first opportunity' and 'ultimately invalidated by the Alabama Supreme Court.' *Kennedy*, 128 S.Ct. at 1984." The State's artful editing twists the meaning of the Supreme Court. The Court actually said,

The Act [i.e., the 1985 local act] was challenged in state court at first opportunity, the lone election was held in the shadow of that legal challenge, and the Act was ultimately invalidated by the Alabama Supreme Court.

128 S.Ct. at 1984. It is “the Act” not the special election which was challenged at first opportunity. In addition, it is hard to equate the 1985 Act with the February 2008 special election. In the *Kennedy* case, the plaintiffs were arguing that the 1985 Act was the baseline from which changes should be measured. In the present case, the plaintiff is arguing that Act 77-784 is the baseline and that the injunction blocking the certification of the vote in the February special election was the change.

The State further mangles the facts to force a congruity between the holding in *Kennedy* and the situation in this case. The State argues that this Court may not “effectively preclud[e] the State from reinstating gubernatorial appointment, the only practice consistent with the Alabama Constitution.” Doc. 31 at 23, quoting *Kennedy* at 1985-86. From this statement, the State spins a theory that since the Governor thought Act 77-784 was unconstitutional, and the Alabama Supreme Court did not rule on the Act’s constitutionality, Act 77-784 must be considered unconstitutional. Doc. 30 at 11, 15, 16 n.12, 22, 23.

The State ignores the Alabama Supreme Court’s description of Act 77-784 as “a preexisting local law.” *Working v. Jefferson County Election Comm’n*, 2008 WL 2569255 at *11 (Ala., June 30, 2008). If the Act was “pre-existing,” the Alabama Supreme Court was not declaring

it unconstitutional. And the State ignores that court's ruling that a local act does not violate § 105 of the Alabama Constitution until the Alabama Supreme Court says it does. *Working*, 2008 WL 2569255 at *5 n.8.

Submitted by,

/s/ James U. Blacksher
James U. Blacksher
P.O. Box 636
Birmingham AL 35201
phone 205-591-7238
fax 205-591-0709
email
jblacksher@ns.sympatico.ca

/s/ Edward Still
Edward Still
Edward Still Law Firm LLC
2112 11th Avenue South
Suite 201
Birmingham AL 35205-2844
phone: 205-320-2882
fax: 205-449-9752
email: Still@votelaw.com

Attorneys for the plaintiff

CERTIFICATE OF SERVICE

I certify that on 26 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:

Margaret L. Fleming, Esq.
James W. Davis, Esq.
Misty Fairbanks, Esq.
Assistant Attorney General
Office of the Attorney General
of Alabama
11 South Union Street
Montgomery, AL 36130-0152

Jeffrey M. Sewell, Esq.
Assistant County Attorney
Jefferson County
280 Jefferson County
Courthouse
716 Richard Arrington Jr. Blvd.
North
Birmingham, AL 35203

Michael K. K. Choy, Esq.
Robert M. Lichenstein, Jr., Esq.
Haskell Slaughter Young &
Rediker, LLC
1400 Park Place Tower
2001 Park Place N.
Birmingham, AL 35203-2735

Michael G. Kendrick, Esq.
Susan Walker, Esq.
Waldrep Stewart & Kendrick
LLC
2323 2nd Avenue North
Birmingham, AL 35203

/s/ Edward Still