

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

DORIS POWELL,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NUMBER
v.	)	
	)	2:08-cv-01345-LSC
THE STATE OF ALABAMA,	)	
et al.,	)	
	)	
Defendants.	)	

**THE STATE’S RESPONSE TO PLAINTIFF’S MEMORANDUM  
COMPLYING WITH AUGUST 19, 2008, ORDER (doc. 32)**

Consistent with this Court’s August 19, 2008 Order, doc. 21, the State responds to Plaintiff’s Memorandum Complying with August 19, 2008, Order, doc. 32, as follows:

**I. This Court lacks subject matter jurisdiction.**

In its motion to dismiss, the State argued that there was no case or controversy, and, in the alternative, Powell’s claims are not ripe. Doc. 18. In what appears to be the response to these arguments, Powell points out that “Section 5 prohibits the defendants from ‘enact[ing] or seek[ing] to administer’ the repeal of Act No. 77-784 by Ala. Code § 11-3-1(f) and its replacement by Ala. Code § 11-3-1(b) before they have been precleared,”

and goes on to say that certain defendants are preparing to hold the election. Doc. 32 at 2 quoting § 5 (alterations by Powell). Of course, those defendants are also aware that preclearance has been sought and that elections take preparation. If officials did not take these steps now—steps such as allowing parties to choose candidates, independent candidates to gather signatures, and the printing of ballots—it would not be possible to hold the election should USDOJ grant preclearance.<sup>1</sup>

Powell seems to imply that the defendants are “seek[ing] to administer” the changes and that brings them within the prohibition of § 5

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<sup>1</sup> Powell mischaracterizes Sheriff Hale’s Answer in the course of this discussion. Compare doc. 32 at 2 (“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.”) with Doc. 20 at ¶ 26 (“Defendant Hale submits that he is bound to comply with the requirements of the Alabama Supreme Court stated in *Working v. Jefferson County Commission*, [Ms. 1070850, June 30, 2008] \_\_\_ So. 2d \_\_\_, 2008 WL 2569255 (Ala. 2008), and the July 25, 2008 order of the Circuit Court of Jefferson County unless enjoined from complying with such orders. Defendant Hale submits that he is not willfully or intentionally violating §5 of the Voting Rights Act.”). On this matter, see also the later filed doc. 31 at 1 (“Defendant Hale submits that he will comply with any orders issued by the Panel in this action.”).

Powell’s characterization of the State’s position on Act No. 77-784 is likewise misleading. Compare doc. 32 at 2 (“The defendant State argued that Act 1977-784 cannot be enforced, even if there is no preclearance (Doc. 17 at ¶ 24) . . . .”) with doc. 17 at ¶ 24 (“The State admits that it took the position that it cannot be forced to enforce Act No. 77-784, which it believes to be both unconstitutional and repealed, since the only authority for requiring said enforcement—namely, the *Plump v. Riley* district court’s order—has been stayed by the United States Supreme Court, and certain statements in the preclearance submission reflect that position.”).

The point is simply that this Court is not dealing with intransigent defendants bent on violating federal law, as Powell seems to suggest.

and before this Court. While Congress no doubt sought a broad reading of § 5 and chose the “seek to administer” language to achieve that goal, the statute must read in a way that complies with Article III of the United States Constitution. Until such time, if any, as the defendants are “seek[ing] to administer” the change—that is, actually holding the election—in the face of an objection, it is pure speculation that the election will actually be held without preclearance.<sup>2</sup> Indeed, it is at this point pure speculation that preclearance will not be granted. Thus, unless and until the election is actually administered without preclearance, Article III constrains the jurisdiction of this Court. *See* doc. 18 at 5-10.

In any event, this is not the sort of election that this Court should even consider prematurely enjoining. There will be an election for county, State, and federal offices on November 4, 2008. There is no dispute about voter qualifications, candidate qualifications, district lines, or polling place locations before this Court. In short, there is no allegation before this Court of anything offensive or discriminatory about the manner in which the election will be held, and no allegation that it should be held in a different manner. The sole concern of this litigation is whether one particular race

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<sup>2</sup> This point is sufficient to rebut Powell’s *Lopez v. Monterey County* discussion at page 3 of her response, *see* doc. 32 at 3. The defendants’ actions at this time are better

will be included on the ballot. Should it be determined that the District One seat should not have been on the ballot, the choice of the voters can easily be undone by this Court at the Plaintiff's behest.

On the other hand, if the appropriate defendants are enjoined from printing the District 1 race on the ballot and preclearance is later granted, the County could be put to the expense of holding a new election—one that would not comply with State law, but would be a best effort to correct the harm done by the injunction. *See* doc. 18 at 7 n.4. The United States Supreme Court has recognized that elections are sometimes permitted “to proceed despite pending legal challenges.” *Riley v. Kennedy*, 128 S.Ct. 1970, 1985 (2008). This is one of those elections.

In sum, local election officials are preparing to hold an election in the event preclearance is granted. If officials did not take these steps now, it would not be possible to hold the election should USDOJ grant preclearance. Surely Section 5 allows the parties to take steps in anticipation of preclearance, particularly where, as here, those steps may be nullified if preclearance is not granted.

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characterized as preparing to implement a change, not actually implementing the change. Accordingly, *Lopez* does not require an injunction.

**II. The *Working* circuit court’s “refus[al] to stay its order pending preclearance”, doc. 32 at 2, was proper under the circumstances.**

Powell noted in passing that “the circuit court has refused to stay its order pending preclearance.” Doc. 32 at 2. While the State does not contend that any court *should* have stayed the election, Powell’s suggestion that it should have been the *circuit* court to do so is mistaken. Because Powell asserts that the circuit court’s refusal to do so is a justification for her turning to this Court, and because the State has raised important jurisdictional arguments in its motion to dismiss, it is a point that should be answered.

The Alabama Supreme Court “instructed” the circuit court “to enter an appropriate order declaring that the required election is to be placed on the November 2008 general election ballot,” and remanded the case for the circuit court to carry out its command. *Working v. Jefferson County Election Comm’n*, \_\_\_\_ So.2d \_\_\_\_, 2008 WL 2569255, \*11 (Ala. June 30, 2008). After the circuit court entered its Order on Remand, Coach Plump filed a motion to amend that essentially requested the circuit court to enjoin compliance with the Alabama Supreme Court’s decision. Such a motion could have only been presented to the Alabama Supreme Court itself. *Riley v. Kennedy*, 128 S.Ct. 1970, 1985-86 (2008), makes clear that § 5 does not

require—or authorize—the turning upside down of the Alabama judicial branch of government.

Thus, while the State does not agree that it is necessary for any Court to enjoin enforcement of the Alabama Supreme Court’s decision (certainly not at this stage, while preclearance is pending), if any court were to do so, it should be the Alabama Supreme Court. If preclearance is not granted, there is plenty of time for Powell, Plump, the State, or local election officials to turn to the Alabama Supreme Court. That approach would be consistent with Section 5 and would not exacerbate the federalism costs already presented by Section 5.<sup>3</sup>

### **III. The litigation in *Plump* and the decision in *Riley* impact the case at bar.**

The State’s original response to the Court’s Order, doc. 30, set out several reasons why the litigation in *Plump v. Riley*, Case No. 2:07-cv-1014, 2008 WL 192826 (M.D. Ala. Jan. 22, 2008) *on appeal as Riley v. Plump*, No. 07-1460 (U.S. Supreme Court, pending), and the decision in *Riley v.*

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<sup>3</sup> Cf. *Miller v. Johnson*, 515 U.S. 900, 926-927 (1995) (“In *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), we upheld § 5 as a necessary and constitutional response to some States’ ‘extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.’ *Id.*, at 335, 86 S.Ct., at 822 (footnote omitted); see also *City of Rome v. United States*, 446 U.S., at 173-183, 100 S.Ct., at 1559-1564. But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this litigation.”).

*Kennedy*, 553 U.S. \_\_\_\_, 128 S.Ct. 1970 (2008), impact the case at bar. Nothing that Powell has said in her response to this Court’s Order alters the State’s position on these matters.

The *Working* decision provides an alternative basis for the Governor’s appointment of Commissioner Bowman, but does not take the Jefferson County appointment out of reach of the *Kennedy* decision.<sup>4</sup> See doc. 30 at 15-16, 22. This further means that Powell is wrong to conclude, as she does, doc. 32 at 9, that preclearance of Ala. Code § 11-3-1(f) is necessary to prevent Commissioner Bowman’s appointment from being vacated.

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<sup>4</sup> As previously noted, the *Working* Court did not reject the Governor’s argument that Act No. 77-784 was unconstitutional; the Court did not reach the argument. *Working v. Jefferson County Election Comm’n*, \_\_\_\_, So.2d \_\_\_\_, 2008 WL 2569255, \*8 (Ala. June 30, 2008). Powell, like Plump on appeal, M.D.A. at 28 n.11, has persisted in presenting the State constitutional arguments to the federal court. Doc. 32 at 5-6 n.1; see also doc. 33 at 3-4. The Governor made his argument in State Court, and the State sees no point in bringing that issue to this Court at this time. It is not within the power of the federal courts to definitively determine a matter of State law. *McMahan v. Toto*, 311 F.3d 1077, 1079 (11<sup>th</sup> Cir. 2002) (“Recent events in this case illustrate that ‘when we write to a state law issue, we write in faint and disappearing ink.’ *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11<sup>th</sup> Cir.1994) (en banc) (Carnes, J., dissenting).”). See also *Kennedy*, 128 S.Ct. at 1975 (“A State’s highest court is unquestionably ‘the ultimate exposito[r] of state law.’ *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508.”).

Similarly, the Alabama Supreme Court did not hold, as Powell says it does, “that a local act does not violate § 105 of the Alabama Constitution until the Alabama Supreme Court says it does.” See doc. 33 at 4. The Alabama Supreme Court’s notation of § 105’s “direct[ion that] the judicial branch . . . decide disputes under that provision” was made in the course of the Court’s conclusion that the voter plaintiffs before it had standing. The Court was explaining that this provision undercuts any suggestion that its resolving the dispute would be contrary to the Separation of Powers concerns that animate the standing doctrine. The Court was not suggesting that the Governor is barred from interpreting the law, as is required, in the performance of his function of implementing the law.

Preclearance of the original *Plump* submission—or a holding by the United States Supreme Court that preclearance of the Governor’s appointment is not required—would also avoid the unfortunate vacatur of a second gubernatorial appointment.<sup>5</sup> *See* doc. 30 at 14-17. Such a decision from the United States Supreme Court upholding the Governor’s appointment would, as the State previously argued, ultimately encompass the Ala. Code § 11-3-1(f) and special election issues in this case.<sup>6</sup> *See* doc. 30 at 14-17.

If the holding in *Plump* does not fully resolve this case, the analysis applied therein may still be important here. The Governor has argued that preclearance does not reach a coverage date practice, doc. 30 at 18-21, and that the back-to-back 1982 special elections do not distinguish this case from

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<sup>5</sup> The State does not take the position that Commissioner Bowman cannot be removed from office until *Plump* is resolved, as Powell insists, doc. 32 at 8. The State takes the position that Commissioner Bowman cannot be removed from office *as a result of the Plump litigation* until that appeal is resolved. The State fully appreciates the *Working* Court’s authority to remove Commissioner Bowman from office, and has made the preclearance submission necessary to achieve that end. The State also understands that another court, with jurisdiction, might order the seat be vacated.

<sup>6</sup> It should be noted that a non-final order, like the Alabama Supreme Court’s February 14, 2008 Order, is not appropriate for submission for preclearance. *See* 28 C.F.R. § 51.22. It was not final that the February 2008 special election was void and not to be certified until the *Working* decision issued. After the change became final, it was submitted for preclearance. The Complaint in this case, nonetheless, focuses on the Alabama Supreme Court’s February injunction. *See* doc. 1 at ¶ 15 & Prayer for Relief at 8; *see also* doc. 18 at 7 n.3.

*Kennedy*, doc. 30 at 22-23.<sup>7</sup> Each of these arguments can be applied to the present litigation as well. Moreover, the *Kennedy* decision also limits any potential relief available to Powell. Doc. 30 at 23-24.

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<sup>7</sup> Powell notes that the State has no authority for the proposition that § 5 does not reach a coverage date practice. Doc. 33 at 2. The statute itself speaks of requiring a change from the practice or procedure in place on the coverage date. *See* 42 U.S.C. § 1973c. Congress' own words should be strong authority for the meaning of § 5, even in the face of contrary USDOJ regulations and *dicta* in certain case law.

Moreover, Powell's tone suggests that the argument is patently frivolous, when, in fact, the Governor and the State have adopted the argument in light of the comments of Chief Justice Roberts at the *Kenendy* oral argument. The transcript is available on line at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-77.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-77.pdf) and the relevant discussion is found at pages 22-24, 43-47, 54-56, 57-59.

Moreover, the *Kennedy* discussion which Powell cites includes a footnote that she has ignored:

By its terms, § 5 requires preclearance of any election practice that is “different from that in force or effect on” the relevant coverage date—in this case, November 1, 1964. 42 U.S.C.A. § 1973c(a) (Supp.2007). Governor Riley's opening brief suggested that this text could be read to mean that no preclearance is required if a covered jurisdiction seeks to adopt the *same* practice that was in force or effect on its coverage date—even if, because of intervening changes, that practice is different from the jurisdiction's baseline. *See* Brief for Appellant 26-27. In response, *Kennedy* and the United States noted that the DOJ, *see* 28 CFR § 51.12 (2007), and the lower courts to consider the question, *see, e.g., NAACP, DeKalb Cty. Chapter v. Georgia*, 494 F.Supp. 668, 677 (N.D.Ga.1980) (three-judge court), have rejected this interpretation. *See* Brief for Appellees 47-49; Brief for United States as *Amicus Curiae* 17-18. *We need not resolve this dispute because the result in this case is the same under either view. But see post, at 2-3 (taking the issue up, although it is academic here).*

*Kennedy*, 128 S.Ct. at 1982 n.7 (emphasis added).

#### **IV. Conclusion.**

For the reasons set out in the State's motion to dismiss, this Court should dismiss this cause for lack of subject matter jurisdiction. *See* doc. 18. If this Court determines that it has jurisdiction over some part of a claim, it should act with restraint, allowing time for the United States Supreme Court to act on the *Plump* appeal and for USDOJ to make a preclearance determination.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the **26<sup>th</sup> day of 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:

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