

**ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2012
No. 11-5256**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SHELBY COUNTY, ALABAMA,
APPELLANT,

V.

ERIC H. HOLDER, JR.
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
APPELLEES.

**On Appeal from the United States District Court
for the District of Columbia**

**BRIEF OF THE STATE OF ALABAMA
AS AMICUS CURIAE IN SUPPORT OF APPELLANT SHELBY COUNTY**

John C. Neiman, Jr.
SOLICITOR GENERAL
(application pending)
Robert Tambling
ASS'T ATTORNEY GENERAL
OFFICE OF THE ATTORNEY
GENERAL OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130
TEL: (334) 353-2187
jneiman@ago.state.al.us

Dated: November 8, 2011

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amicus Curiae, the State of Alabama, certifies as follows:

(A) Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and this court and in this court are listed in the Brief for Appellant, Shelby County, Alabama:

The State of Alabama did not participate in the district court below, but will participate as Amicus Curiae for Appellant before this Court.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant, Shelby County, Alabama.

(C) Related Cases

A list of related cases appears in the Brief for Appellant, Shelby County, Alabama.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
TABLE OF CONTENTS	ii
GLOSSARY.....	1
INTEREST OF AMICUS CURIAE	2
STATUTES AND REGULATIONS	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. Alabama Has Progressed Significantly Since 1965 and 1975.....	5
A. Alabama: 1965	7
B. Alabama: 1975	9
C. Alabama: 2006 and Today	10
II. Section 5 Imposes Unwarranted Burdens on Alabama’s Democratic Process.....	12
A. How §5 Works in Alabama.....	13
B. Section 5 Impedes Enforcement of Necessary and Non- Discriminatory state Initiatives.	15
1. Rewriting Alabama’s Election Code.....	15
2. Modernizing Alabama’s County Commissions	17
C. Partisan Forces Use §5 as a Political Tool.....	18
D. Preclearance Leads to Taxing and Absurd Results.....	22
E. Section 5 Handicaps, and May Even Prevent, Alabama From Making the Same Non-Discriminatory Changes Made by Non- Covered states.....	25
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE	29
CERTIFICATE OF SERVICE.....	30

TABLE OF AUTHORITIES

CASES

<i>Beer v. United States</i> , 425 U.S. 130 (1976).....	7, 22
<i>Chapman v. Gooden</i> , 974 So. 2d 972 (Ala. 2007).....	24
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980).....	7, 10
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991).....	14
<i>Riley v. Kennedy</i> , 128 S. Ct. 1970 (2007).....	7
<i>United States v. Flowers</i> , 444 F. Supp. 2d 1192 (M.D. Ala. 2006)	6, 11
<i>United States v. Frazer</i> , 317 F. Supp. 1079 (M.D. Ala. 1970)	9
<i>United States v. Frazer</i> , No. 2709-N, 1976 WL 729 (M.D. Ala. 1976)	9, 11

OTHER AUTHORITIES

<i>Alabama Has Record-Breaking Presidential Primary</i> , Press Release, Ala. Sec. of State (Feb. 7, 2008), available at http://www.sos.alabama.gov/PR/PR.aspx?ID=274	26
Brett Blackledge, <i>Dozens of Legislators Paid by Two-Year Colleges</i> , THE BIRMINGHAM NEWS (Oct. 8, 2006).....	19
* Charles S. Bullock, III & Richard Keith Gaddie, <i>An Assessment of Voting Rights Progress in Alabama</i> , Tables 2-5 (2005), available at http://www.aei.org/docLib/20060505_VRAAlabamastudy.pdf	6, 8, 9, 10, 11, 12

* Authorities upon which we chiefly rely are marked with asterisks.

Dan Murtaugh, <i>Primary, Carnival on Track to Clash</i> , Mobile Press Register (Apr. 19, 2006)	25
<i>Interim Projections of the Population by Selected Age Groups for the United States and States</i> , U.S. Census Bureau, available at http://www.census.gov/population/	6
Lee Roop, <i>Schmitz Guilty of Fraud, Loses Seat</i> , THE HUNTSVILLE TIMES (Feb. 25, 2009)	19, 22
U.S. Census Bureau’s Quick Facts for Alabama, http://quickfacts.census.gov/qfd/states/01000.html	10

REGULATIONS

28 C.F.R. §51.1	13
28 C.F.R. §51.1 <i>et seq</i>	14
28 C.F.R. §51.10	14
28 C.F.R. §51.13	13
28 C.F.R. §51.22	21
28 C.F.R. §51.26	17
28 C.F.R. §51.27	14, 15, 16, 18, 21, 22, 23, 24
28 C.F.R. §51.37	14
28 C.F.R. §51.53	14, 21

LEGISLATIVE HISTORY

Ala. S. Journ. 2136-42 (1965)	9
Ala. S. Journ. 3753-65 (1975)	9
H.R. Rep. No. 89-439 (1965)	7, 8
S. Rep. No. 94-295 (1975)	8, 10

*Voting Rights Act: The Continuing Need for Section 5: Hearing
Before the Subcomm. on the Constitution of the H. Comm. on the
Judiciary, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie).....12*

CONSTITUTIONS AND STATUTES

42 U.S.C. §1548122
42 U.S.C. §15483(b)(4).....23
42 U.S.C. §15545(b)22
42 U.S.C. §1973c 13, 14
Ala. Act No. 2003-31322
Ala. Act No. 2006-570..... 15, 16, 17
Ala. Act No. 2006-63425
Ala. Act No. 2007-46125
Ala. Act No. 2007-488.....17
Ala. Code § 1-3-8(c)25

GLOSSARY

AG	Attorney General
DOJ	Department of Justice
HAVA	Help America Vote Act

INTEREST OF AMICUS CURIAE

Alabama and its political subdivisions have submitted thousands of voting-related changes for preclearance under §5 of the Voting Rights Act. Shelby County is one of the largest counties in Alabama, and Alabama has a vested interest in the issues raised by this litigation. The state has authority to file this amicus brief under Federal Rule of Appellate Procedure 29(a).

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellant.

SUMMARY OF THE ARGUMENT

Section 5 is unconstitutional, and this brief offers an on-the-ground perspective as to why.

Congress justifiably applied §5 to Alabama and its political subdivisions in 1965, and then again in 1975. But 2006 was a different story. For as necessary and proper as §5 was to correct the injustices of the past, it is no longer a congruent and proportional response to any problems that exist in the present. The changes in Alabama and other southern states are measurable, and the costs associated with §5's continued maintenance are substantial and real.

I. Make no mistake about it: Alabama more than earned its spot on §5's original coverage list in 1965. Through violence and willful defiance of federal law, Alabama shamefully maintained an all-white legislature and a 19% black voter registration rate in 1965. And when Congress justifiably renewed §5 in 1975, Alabama's progress had been minimal.

But that was 36 years ago. When Congress renewed §5 in 2006, Alabama had exceeded the national average in minority registration and voting for 16 straight years. Black and white Alabamians registered at virtually identical rates, and black Alabamians outvoted white Alabamians, on a percentage basis, in the 2004 general election. African-Americans composed a percentage of Alabama's legislature that squarely reflected Alabama's black population. And the number of black elected officials at all levels of Alabama government had increased nearly five-fold since 1975.

Just as important, by 2006 Alabama's governments had shed their systematic defiance of federal civil rights law. The Department of Justice had not objected to a statewide preclearance submission from Alabama in 12 years. In fact, in the decade leading up to §5's 2006 renewal, DOJ objected to only two of Alabama's 3,279 preclearance submissions from *all* levels of government—a scant 0.06%. When it came to honoring the Fifteenth Amendment, Alabama was no longer its grandfather's state.

II. Section 5 is not a proportionate response by the federal government to whatever problems Alabama may face today. During the past ten years, the state has experienced the burdensome effects of §5 in a variety of ways:

- The preclearance process has impeded implementation of necessary and clearly non-discriminatory voting-related changes;
- Political factions have used §5 to impede implementation of the popular will in the state legislative and judicial processes;
- Section 5 makes implementing federally-mandated voting changes unnecessarily taxing; and
- Section 5 handicaps, and may even prevent, Alabama from making the same non-discriminatory changes made by non-covered states.

Each of these burdens, while unique, shares a common thread: Its costs are borne by all Alabama citizens. While it was fair for Congress to impose those costs on Alabama in 1965 and 1975, it is not fair for Congress to impose those costs on Alabama and its subdivisions today.

ARGUMENT

Alabama agrees with Shelby County that §5 is no longer a congruent and proportional means of redressing Fifteenth Amendment violations. To be sure, §5 was constitutional in 1965 and 1975. And Alabama was, shamefully, a big reason why. But in part because of §5, Alabama has changed, and the statute is no longer a necessary and proper means of redressing constitutional injury. This brief gives the Court a real-world perspective on why this is so. It emphasizes two main points. The first is that whatever race-relations problems Alabama and other states are dealing with today, there are real, documented reasons—in terms of voter registration, election results, and the actions of Alabama’s state and local governments—to conclude that the acute concerns that justified §5’s drastic remedy are now thankfully a part of the past. The second is that §5’s remedy is truly drastic, and imposes substantial and unfair burdens that no state should have to bear at this late date.

I. Alabama Has Progressed Significantly Since 1965 and 1975.

When it comes to voting rights, Alabama is not its grandfather’s state. Today, black and white Alabamians register and vote at virtually identical rates, and Alabama’s minority-voter registration rate has exceeded the rates in states outside the South in every year since 1990. *See* Charles S. Bullock, III & Richard

Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* (hereinafter “Bullock & Gaddie”), Tables 2-5 (2005), available at http://www.aei.org/docLib/20060505_VRAAlabamastudy.pdf. While African-Americans make up approximately 25% of Alabama’s population, they also make up approximately 25% of its legislature and more than 30% of its government workforce. *Id.* at Table 5; *United States v. Flowers*, 444 F. Supp. 2d 1192, 1193 (M.D. Ala. 2006).¹

Alabama’s citizenry has similarly transformed. In 2010, 59% of Alabamians were under the age of 45, meaning that nearly two-thirds of Alabama’s population was either in daycare or yet to be born when Congress passed §5. *Interim Projections of the Population by Selected Age Groups for the United States and States*, U.S. Census Bureau, available at <http://www.census.gov/population/projections/SummaryTabB1.pdf> (last visited Oct. 26, 2011).

When the Supreme Court addressed §5’s constitutionality after the 1975 renewal, the Court agreed with Congress that §5 was still necessary, and thus constitutional, due to insufficient progress in the following three areas:

1. Racial disparities in registration and voting;
2. Minority participation in state government, especially in the state legislature; and,

¹ Since the Bullock-Gaddie report was compiled, the racial composition of the Alabama legislature changed slightly. There are currently 7 African-American senators and 27 African-American representatives. The percentages remain approximately the same.

3. The states' history of §5 preclearance submissions and objections.

See City of Rome v. United States, 446 U.S. 156, 180-81 (1980). Using the *City of Rome* factors as guides, the state chronicles Alabama's progress from 1965 and 1975, when the Supreme Court rightly deemed §5 a constitutional response to the problems of those times, to 2006, when Congress re-authorized §5 for a new generation and in so doing exceeded its powers under the Constitution.

A. Alabama: 1965

Section 5's preclearance requirement was the 1965 Congress's extraordinary response to an extraordinary problem. For nearly a decade, southern officials frustrated the Civil Rights Acts by treating federal litigation like, as Professor Karlan has put it, a "game of whac-a-mole," popping up new discriminatory devices each time the federal courts beat an old one down. Tr. of Oral Argument at 47, *Riley v. Kennedy*, 128 S. Ct. 1970 (2007). "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976) (internal quotation marks omitted).

Sadly, Alabama was one of the primary culprits on this front. *See* H.R. Rep. No. 89-439, at 5-6. For example, in 1961, only 156 of 15,000 voting-age African-

Americans in Dallas County, Alabama were registered to vote. *See Id.* at 5. To ameliorate the situation, the United States sued the county registrars for violating the Civil Rights Act. *Id.* But while the case was pending, Dallas County switched registrars, thereby forcing the district court to deny relief because the new registrars were untainted. *Id.* The court of appeals eventually reversed and issued an injunction, but the gamesmanship continued. *Id.* The new registrars soon defied the court's order by heightening the county's application standards. *Id.* This prompted the United States to file yet another lawsuit. *Id.* While this new case proceeded, Alabama one-upped the system again by implementing two new, statewide "literacy and knowledge-of-government tests." *Id.* at 6. In February 1965, the federal court issued an order banning the state's newest tests. *Id.* But after four years of litigation, minority registration in Dallas County rose only from 1% to 3%. *Id.* Dallas County officials were not the only ones in Alabama defying federal-court orders in this way.

Alabama's defiance denied African-Americans the franchise and proper representation within state government. In 1964, only 19.4% of eligible black Alabamians were registered to vote, H.R. Rep. No. 89-439, at 5 (1965), while 69.3% of white Alabamians were registered, S. Rep. No. 94-295, at 6 (1975). Not surprisingly, as of 1965, no African-Americans served in Alabama's legislature. Bullock & Gaddie, *supra*, at Table 5.

B. Alabama: 1975

While many things had changed in Alabama by 1975, the state's government was slow to follow suit. The same Governor—George Wallace—was in office, and 10 state legislators held the seats they had held in 1965. *Compare* Ala. S. Journ. 2136-42 (1965), *with* Ala. S. Journ. 3753-65 (1975). Only two African-Americans served in the state senate, and thirteen served in the house. Bullock & Gaddie, *supra*, at Table 5. The total number of elected black officials had climbed, but only to 161. *Id.* at Table 4.

Appointed positions were not any better. In 1968, the United States sued Alabama's State Personnel Board and the heads of several state agencies. The federal government sued the defendants for hiring and promotion practices that resulted in (1) 49 black applicants being passed over by "lower-ranking white applicants" and (2) only 94 of 3077 government jobs (3.1%) being held by African-Americans. *See United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970). This litigation resulted in a comprehensive injunction on state hiring practices. *See United States v. Frazer*, No. 2709-N, 1976 WL 729 (M.D. Ala. 1976).

Alabama's registration rates showed more promise at that time, but were still not where they needed to be. From 1965 to 1975, black voter registration rose from

19.3% to 57.1%. S. Rep. No. 94-295, at 6 (1975). But the gap between black and white voter registration languished at 23.6%. *Id.* at 6.

Based on this record, the 1975 Congress's assessment of §5's continued justification, at least with respect to Alabama, was correct: "[A] 7-year extension of the Act was necessary to preserve the „limited and fragile“ achievements of the [Act] and to promote further amelioration of voting discrimination." *City of Rome*, 446 U.S. at 182.

C. Alabama: 2006 and Today

To be clear: There are still race-relations problems in Alabama, just as there are race-relations problems in every state of our Union. But today's Alabama has come a long way from the past that justified §5 some 40 years ago.

Gone is Alabama's all-white legislature. African-Americans currently compose approximately 25% of Alabama's legislature, a figure in line with Alabama's 26.2% African-American population. *See* Bullock & Gaddie, *supra*, Table 5; U.S. Census Bureau's Quick Facts for Alabama, <http://quickfacts.census.gov/qfd/states/01000.html> (last visited Oct. 26, 2011). Similar advances have been made at the local level. Since 1975, the number of elected black officials increased nearly five-fold, from 161 to 756. Bullock & Gaddie, *supra*, Table 4.

Gone, too, is the thin representation of African-Americans in other areas of Alabama's government. For example, in May 2003, the United States and Alabama jointly sought the termination of the 1970 *Frazer* injunction described above because "the racial make-up of Alabama's government [was] dramatically different from what it was in 1970," *Flowers*, 444 F. Supp. 2d at 1193. The dramatic difference was that as of 2003, African-Americans constituted 39% of Alabama's government workforce, a figure approximately 15% *greater* than their representation in the general population. *Id.*

Alabama's modern governments have shown a great commitment to minority voting rights. DOJ has not objected to a state-wide preclearance submission from Alabama in more than 16 years. In fact, in the 10 years preceding the 2006 reauthorization, DOJ lodged objections to a scant 0.06% (2 out of 3279) of Alabama's preclearance submissions from *all* levels of government: state, county, and municipal. *See* http://www.justice.gov/crt/about/vot/sec_5/al_obj2.php. The only sustained objection during the past ten years occurred regarding a redistricting plan in the City of Calera in 2008. DOJ File No. 2008-1621.

As Alabama's leadership progressed, so did its minority voting record. In every year since 1990, black Alabamians have registered and voted in percentages greater than African-Americans outside the South. *See* Bullock & Gaddie, *supra*,

Tables 2 & 3; *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). By 2004, Alabama virtually eliminated the registration gap between black voters (72.9%) and white voters (73.8%), *see* S. Rep. No. 109-295, at 11, 94 (2006), and Alabama's black voters actually out-participated white Alabamians 63.9% to 62.2% in the 2004 general election, *id.* at 11; Bullock & Gaddie, *supra*, Table 3.

Alabama is by no means perfect. But Alabama also is not the same state that justified §5's creation in 1965 or its renewal in 1975. In 2006, Congress amassed no evidence suggesting that, without §5, Alabama's modern leadership and their successors through 2031 stood poised to systematically defy federal court orders and deny minority voting rights.

II. Section 5 Imposes Unwarranted Burdens on Alabama's Democratic Process.

Particularly in light of how the justification for §5 has eroded, the burdens §5 imposes are no longer necessary. To give the Court a sense of why §5 is as burdensome as it is, this section starts by sketching out the process that the state has put into place to comply with §5.

A. How §5 Works in Alabama.

Section 5 requires Alabama and its political subdivisions to obtain federal preclearance before they may enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. §1973c; 28 C.F.R. §51.1. Changes requiring preclearance include:

- “Any change in qualifications or eligibility for voting”;
- “Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting”; and
- “Any change in the boundaries of voting precincts or in the location of polling places.”

28 C.F.R. §51.13(a), (b), (d).

At the state level, the Attorney General (“AG”) monitors Acts of the legislature for “covered” changes, and state executive officials inform the AG when they make a voting-related change. If a voting-related change has statewide effect, the AG submits it for preclearance. If a change is local in nature, the AG informs the appropriate local official of his obligation to seek preclearance. If a change originates at the local level (a municipal annexation, for example), the local officials identify and submit the change.

Once a voting change is identified, Alabama and its political subdivisions bear the burden of proving to DOJ or a federal court that the change does not discriminate against minorities in purpose or effect. 42 U.S.C. §1973c; *see also* 28 C.F.R. §§51.1-51.67 (preclearance guidelines). To satisfy DOJ's submission requirements, Alabama must, at a minimum, compile and submit no fewer than 16 pieces of information. 28 C.F.R. §51.27. In a nutshell, Alabama must (1) detail the old and new practices and the difference between the two, (2) detail the preclearance and litigation history of the old practices, (3) explain why Alabama wants to make the change, and (4) explain how the change impacts minority voters. *Id.* DOJ may also request supplemental information, *see* 28 C.F.R. §51.37(a), ranging anywhere from transcripts and DVDs of the state's deliberative process to the name and race of every state legislator for the past 25 years. DOJ also considers outside comments and suggestions as part of its final consideration. 28 C.F.R. §51.53.

Submission times vary. The state can generate routine preclearance submissions, such as setting a special election date to fill a legislative vacancy, in hours. Other submissions may take days, weeks, or even months. Until DOJ preclears the new practice, the state cannot enforce it, no matter how beneficial or urgent it may be. *See Clark v. Roemer*, 500 U.S. 646, 652-53 (1991); 28 C.F.R. §51.10.

B. Section 5 Impedes Enforcement of Necessary and Non-Discriminatory state Initiatives.

Two recent stories demonstrate how §5's preclearance process may stall the enforcement of necessary, and racially benign, legislative Acts.

1. Rewriting Alabama's Election Code

Like many states, Alabama progressed from paper ballots, to machine voting booths, to electronic voting. Each new mechanism required specific state laws. Intervening developments such as new federal laws, Alabama AG Opinions, and regulations of the Alabama Secretary of State also changed Alabama's election-law landscape over the past few decades.

Beginning in August 2003, a bi-partisan committee of 25 legislators, attorneys, circuit clerks, probate judges, and the Alabama Secretary of State re-wrote Alabama's election code to embody the modern state of Alabama's election law. After more than two years of committee meetings, public comments, and legislative vetting, Alabama's governor signed the 370-page act into law. *See* Ala. Act No. 2006-570.

When the AG drafts a preclearance submission, the primary task is to identify each change within an Act. 28 C.F.R. §51.27(a)-(c). To accomplish this task for the new election code, the AG relied heavily on materials created by the

bi-partisan committee and Alabama Code Commissioner red-lining each change. But these materials were merely a starting point. Over the next few months, the AG analyzed the new Act to supplement the committee materials, producing a guide and commentary to the changes contained within the new law. DOJ File No. 2007-3488.

DOJ guidelines also required Alabama to compile the preclearance history of all the soon-to-be “changed” practices. 28 C.F.R. §51.27(p). To clear this hurdle, the AG researched the preclearance history of 59 different acts that the new election code affected. The AG discovered that Alabama had not precleared several of the affected acts. The entire process culminated in a 33-page preclearance history chart. DOJ File No. 2007-3488.

The submission process was further complicated because the legislature passed several other laws impacting the election code during the same legislative session—each of which had to be considered in conjunction with the on-going preclearance submission. In the end, the overall process of drafting the submission request consumed weeks, if not months, of attorney time.

Ultimately, the AG submitted Act 2006-570 for preclearance on July 13, 2007—15 months after the Governor signed it into law. DOJ File No. 2007-3488. The 44-page submission letter included the 30-page roadmap detailing the changes contained within the Act. *See* 28 C.F.R. §51.27(c). The letter was supplemented by

21 exhibits and a 33-page chart detailing the preclearance history of the predecessor Acts. *See* DOJ File No. 2007-3488.

DOJ determined that the July 13 submission failed to provide the requisite clarity for describing the changes. *See* 28 C.F.R. §51.26(d). So Alabama created and proffered a unified 193-page chart setting out the old and new statutes, side-by-side, with detailed comments on the changes. DOJ File No. 2007-3488. On October 29, 2007, DOJ precleared Act 2006-570 (save for one change, which was later withdrawn), thereby allowing the new election code to take effect 18 months after the Governor signed into law. *Id.*

2. Modernizing Alabama's County Commissions

A similar situation arose in 2007 when Alabama updated and unified the law governing its county commissions. The County Modernization Act served multiple non-discriminatory purposes, such as enabling local officials to update courthouse hours and pushing back the first meeting date of newly formed county commissions due to the advent of provisional balloting. *See* Ala. Act No. 2007-488. One non-discriminatory purpose is particularly relevant here: Act 2007-488 established a state-wide, one-year residency requirement for (1) all candidates seeking a county commission seat and (2) any person the Governor might appoint to a vacant county commission seat. *Id.*

While the Act was benign in purpose, preclearance proved daunting. Alabama has 67 counties. Preclearing the residency requirement entailed researching and charting the legislative, preclearance, and litigation histories of the requirements of the 67 counties. *See* 28 C.F.R. §51.27. In addition to researching local acts regarding residency requirements, the AG collected additional information through a multi-page questionnaire distributed to each county.

Alabama ultimately lodged three preclearance submissions concerning the Act. DOJ File Nos. 2008-427, 2008-1576, 2008-3861, 2008-5601. The final submission, which encompassed the work on the residency requirement, exceeded 1,700 pages. It included voluminous exhibits and a 103-page appendix summarizing the applicable local law, baseline practices, preclearance history, and litigation history for all 67 counties. *Id.* DOJ approved the last of the three submissions, allowing the Act to take full effect—but 18 months after it was signed into law. *See id.*

C. Partisan Forces Use §5 as a Political Tool.

Although submissions are taxing in any event, §5's financial and temporal costs skyrocket when politics are thrown into the mix. And this happens quite a bit, for partisan forces often use §5 as a political tool to block enforcement of democratically-approved initiatives.

One recent example involved attempts by partisan forces to prevent Alabama from rooting out one form of corruption in its legislature. “Double dipping” is the practice of simultaneously serving in the state legislature and another government agency. For decades, double-dipping tainted Alabama’s legislature and two-year college system because legislators often peddled their legislative influence for sham “educational” jobs, either for themselves or family members. Fully one-quarter of Alabama’s legislators or their family members double-dipped in Alabama’s two-year college system. Brett Blackledge, *Dozens of Legislators Paid by Two-Year Colleges*, THE BIRMINGHAM NEWS (Oct. 8, 2006). The aftermath has included federal convictions of about a dozen people. *See* Lee Roop, *Schmitz Guilty of Fraud, Loses Seat*, THE HUNTSVILLE TIMES (Feb. 25, 2009).

In April 2007, the Alabama Board of Education responded by implementing policies that would end double-dipping. These policies were met with vocal opposition from legislators. The first policy required legislators to take accrued leave from their educational jobs when serving in the legislature. The second banned active legislators from holding employment within the two-year college system after the 2010 election.

The Board promptly submitted both policies for §5 preclearance. DOJ File No. 2007-4397. Opposing legislators and special-interest groups immediately

shifted their political assault to a new front: the Justice Department. One group of Democrat legislators lobbied DOJ to interpose a §5 objection based on the theories that (1) banning double-dipping would cause many black Democrats to either resign or not seek re-election due to lost income and (2) “if *all* the Democrats were replaced by Republicans, the balance in the House” would shift political parties by one vote. DOJ File No. 2007-4397, Letter from Edward Still to John Tanner, Chief, Voting Section (Sept. 18, 2007) (emphasis added).

The legislators’ concerns were legally flawed because at the end of the day, any legislator’s resignation or decision not to seek reelection would not affect minority voters’ ability to select a replacement. Nevertheless, citing the Legislators’ “concerns,” DOJ requested the following supplementary information:

- “A comprehensive list of individuals affected by Policy 609.04;”
- “Any transcripts or DVDs” of the Board of Education meetings and legislative committee meetings in which the double-dipping policies were considered;
- The “total employment statistics” for the entire state of Alabama, “broken down by race;”
- A “breakdown,” by race, of employment in Alabama’s state agencies, its K-12 school system, and the two-year and four-year college systems; and

- The name and race of every state legislator for the past 25 years, plus a designation of which legislators had been employed in Alabama's educational systems.

DOJ File No. 2007-4397, Letter from John Tanner, Chief, Voting Section to Bradley Byrne, Chancellor (Nov. 2, 2007).

Over the next eight weeks, a team of state and private attorneys worked to compile the requested information. Alabama supplemented the original submission with the items listed above, the items required by 28 C.F.R. §51.27, and 22 exhibits, including a 29-page history of Alabama's double-dipping dilemma, which itself contained 59 exhibits. DOJ File No. 2007-4397, "Supplemental Submission Under Section 5, Voting Rights Act of 1965."

DOJ ultimately precleared the first policy and ruled that the second was not a voting change that required preclearance. DOJ File No. 2007-4397. But in the meantime, partisan forces had used §5 to turn the federal executive into a supplementary appeals court, in which they challenged unfavorable outcomes in the state legislative and judicial processes. *See* 28 C.F.R. §51.53 (allowing DOJ to consider information submitted by "individuals or groups"). Just as troubling, §5 vested DOJ with the authority to impede or block Alabama's attempt to eliminate legislative double-dipping while at the same time DOJ itself was prosecuting Alabama legislators for double-dipping in Alabama's two-year system. *See* Roop,

Schmitz Guilty of Fraud, Loses Seat, supra. In other words, when the two sovereigns reacted to the same situation with a common purpose, only the state did so with a federally-induced handicap.

D. Preclearance Leads to Taxing and Absurd Results.

Congress passed §5 to quash racist state initiatives, *see Beer*, 425 U.S. at 140, but the statute also requires covered states to submit their responses to *federally* mandated changes for preclearance. For example, the Help America Vote Act of 2002 (“HAVA”), mandated not only that Alabama change many of its voting practices, but also that Alabama preclear the federally-mandated changes. 42 U.S.C. §15545(b). Alabama responded to HAVA with Act 2003-313. DOJ granted the Act preclearance in November 2003.

But that preclearance effort provides two examples of how taxing, and in some cases absurd, preclearing particular federally-mandated changes can be.

1. HAVA contains detailed standards for the type of voting machinery a state may employ. *See* 42 U.S.C. §15481. In Alabama, the process of purchasing HAVA-compliant machines was handled at the county level. To help county officials, the AG spearheaded a unified preclearance submission, which included the necessary information under 28 C.F.R. §51.27 for each county. The process

culminated in the creation of a table embodying the equipment changes in 54 of Alabama's 67 counties, as well as a letter setting out the remaining information required by 28 C.F.R. §51.27. Two months later, DOJ precleared the changes for use in the June 2006 primary election. *See* DOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, and 2006-3583 through 2006-3594.

This, however, was not the end of the story. In Alabama, municipalities manage their own elections, but generally use the same voting machines as their corresponding counties. The preclearance submissions described above applied to federal, state, and county elections, but not to municipal elections. So when it came time for a vast majority of Alabama's approximately 450 municipalities to hold elections in 2008, §5 required preclearance *déjà vu* for each of those municipalities.

2. HAVA requires that states ask specific questions on their mail-in registration forms, such as "Are you a citizen of the United States of America?" 42 U.S.C. §15483(b)(4). Although compiling the information required by 28 C.F.R.

§51.27 for the linguistic changes was not difficult, submitting the altered forms for preclearance was nonetheless complicated by several factors.

For example, Alabama's mail-in registration form underwent several cosmetic changes over the years, such as changing the name of the Secretary of State and updating the contact information for the Board of Registrars. Because DOJ took the position that any change to the form required preclearance, the state had to retroactively seek preclearance for each of these changes, as well as preclearance of the new HAVA-mandated changes.

Furthermore, a plaintiffs' attorney urged DOJ not to preclear the revised form—thereby preventing Alabama from becoming HAVA-compliant—based on his on-going litigation against state officials regarding felon voting. *See* DOJ File No. 2006-4509; *Chapman v. Gooden*, 974 So. 2d 972, 980 (Ala. 2007) (describing a change to the registration form regarding felon voting and the reasons for it).

Alabama ultimately overcame these difficulties and achieved preclearance. *See* DOJ File No. 2006-4509. But an important fact remains: Alabama faced difficulties due to §5 that non-covered states did not face. Those states simply typed the newly-required language into their old forms and instantly became HAVA-compliant.

E. Section 5 Handicaps, and May Even Prevent, Alabama From Making the Same Non-Discriminatory Changes Made by Non-Covered states.

Along the same lines, being covered by §5 places jurisdictions at a severe disadvantage when attempting to make the same non-discriminatory changes that non-covered states are making to amplify their citizens' voices in the national electoral process. Consider Super Tuesday. Like many other states, Alabama decided to push forward its 2008 Presidential primary from the first Tuesday in June to the first Tuesday in February. As was the case with each of the 24 states that opted to become a part of Super Tuesday, Alabama's purpose was non-discriminatory: state lawmakers simply wanted to give Alabama a stronger voice in the primaries. But §5 made Alabama's switch more difficult.

On April 17, 2006, the legislature passed Act 2006-634, which moved the primary to the first Tuesday in February. While the Act was on the Governor's desk awaiting signature, a problem was reported: Fat Tuesday fell on February's first Tuesday in 2008. Dan Murtaugh, *Primary, Carnival on Track to Clash*, MOBILE PRESS REGISTER (Apr. 19, 2006). This created a dilemma in two of Alabama's counties because Fat Tuesday is an official holiday there. *See id.*; Ala. Code § 1-3-8(c). To remedy the problem, the legislature passed Act 2007-461, which required these counties to open polls both on Fat Tuesday and the preceding Wednesday.

Due to the Fat Tuesday fix, additional “changes” were made to the rules for absentee voting, poll workers, and voter registration deadlines. *Id.* These counties also had to open special election centers. *Id.* Each of these changes required preclearance. Later, language on the absentee registration forms had to be altered and submitted for preclearance. DOJ File No. 2007-5733.

An additional complication arose when the Alabama AG received a complaint that adding an additional primary was retrogressive under the theory that minorities tended to vote less as the number of elections in a year increased. (The remainder of Alabama’s federal, state, and county primaries remained on the first Tuesday in June.) *Id.* Alabama included this complaint in its 35-page submission letter to DOJ. *Id.* Alabama also included within its 27 exhibits a list of minority contacts and six charts of census data. DOJ File No. 2007-3347.

The story has a happy ending: DOJ precleared both Acts, *id.*, and Alabama bested its previous record turnout for a Presidential primary by 11%. *Alabama Has Record-Breaking Presidential Primary*, Press Release, Ala. Sec. of State (Feb. 7, 2008), *available at* <http://www.sos.alabama.gov/PR/PR.aspx?ID=274> (last visited Oct. 26, 2011). But the disparity remains. When approximately 20 non-covered states made the same decision to hold their elections on Super Tuesday, they did so without struggling through a four-month preclearance process. Furthermore, §5

granted the federal government the power to prevent Alabama from moving its primary date to Super Tuesday—a power it did not hold over non-covered states.

* * *

The stories above recount but a few examples of the burdens that Alabama still bears because of §5. On many days, officials who would otherwise be able to turn their attention to other pressing problems—in a state that has its fair share of them—must focus instead on doing something else. They are researching and gathering information, sometimes 45 years worth of it, and making efforts to persuade federal administrators to allow new state and local voting laws to go into effect. These burdens were justified in 1965 and 1975, when entrenched racism and defiance of federal law made it necessary for Congress to take this extraordinary step. But these burdens are counterproductive in the Alabama and United States of today. Section 5 is thus no longer a congruent and proportional exercise of Congress’s powers under the Reconstruction Amendments.

CONCLUSION

This Court should reverse the District Court’s judgment.

Respectfully submitted,

/s/ John C. Neiman, Jr.

John C. Neiman, Jr. (application for admission
pending)
Solicitor General

Robert Tambling
Assistant Attorney General

Office of the Alabama Attorney General
501 Washington Ave
Montgomery, AL 36130
(334) 242-7300

November 8, 2011

CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief is in compliance with the type-volume limitations of the Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 5,286 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, as counted using the word-count function on the 2007 version of Microsoft Word.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2007 version of Microsoft Word in 14 point Times New Roman.

Dated: November 8, 2011

/s/ John C. Neiman, Jr.

John C. Neiman, Jr.

Counsel for Amicus Curiae

(application for admission pending)

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2011, I electronically filed the original of the foregoing document with the Clerk of this Court by using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Email: robert.kopp@usdoj.gov

Linda Frances Thome
U.S. Department of Justice
(DOJ) Civil Rights Division, Appellate Section
PO Box 14403, Ben Franklin Station
Washington, DC 20044-4403
Email: linda.thome@usdoj.gov

Diana Katherine Flynn
U.S. Department of Justice
(DOJ) Civil Rights Division, Appellate Section
PO Box 14403, Ben Franklin Station
Washington, DC 20044-4403
Email: Diana.K.Flynn@usdoj.gov

Kristen Clarke
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
Email: kclarke@naacpldf.org

John Adolphus Payton
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
Email: jpayton@naacpldf.org

Arthur Barry Spitzer
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920
Email: artspitzer@aol.com

Jon Marshall Greenbaum
Lawyers Committee for Civil Rights
1401 New York Avenue, NW
Suite 400
Washington, DC 20005-0000
Email: jgreenbaum@lawyerscommittee.org

John Michael Nonna
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019-6092
Email: jnonna@dl.com

Steven J. Lechner
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, CO 80227-2705
Email: lechner@mountainstateslegal.com

Deborah Nicole Archer
New York Law School
185 West Broadway
New York, NY 10013
Email: darcher@nyls.edu

Bert W. Rein
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
TEL: (202) 719-7000
E-MAIL: brein@wileyrein.com

I further certify that within the next two business days eight copies of the foregoing document will be filed with the Clerk of this Court by Federal Express.

Dated: November 8, 2011

/s/ John C. Neiman, Jr.
John C. Neiman, Jr.
Counsel for Amicus Curiae
(application for admission pending)