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SUPREME COURT OF THE UNITED STATES

No. 07–77

BOB RILEY, GOVERNOR OF ALABAMA, APPELLANT
v. YVONNE KENNEDY ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA

[May 27, 2008]

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents a novel question concerning §5 of the Voting Rights Act of 1965. The setting, in a nutshell: A covered State passed a law adopting a new election practice, obtained the preclearance required by §5, and held an election. Soon thereafter, the law under which the election took place was invalidated by the State’s highest court on the ground that it violated a controlling provision of the State’s Constitution. The question presented: Must the State obtain fresh preclearance in order to reinstate the election practice prevailing before enactment of the law struck down by the State’s Supreme Court? We hold that, for §5 purposes, the invalidated law never gained “force or effect.” Therefore, the State’s reversion to its prior practice did not rank as a “change” requiring preclearance.

I

The Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 42 U. S. C. §1973 *et seq.*, “was designed by Congress to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts

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of our country for nearly a century.” *South Carolina v. Katzenbach*, 383 U. S. 301, 308 (1966). In three earlier statutes, passed in 1957, 1960, and 1964, Congress had empowered the Department of Justice (DOJ or Department) to combat voting discrimination through “case-by-case litigation.” *Id.*, at 313. These lawsuits, however, made little headway. Voting-rights suits were “unusually onerous to prepare” and the progress of litigation was “exceedingly slow,” in no small part due to the obstructionist tactics of state officials. *Id.*, at 314. Moreover, some States “resorted to the extraordinary stratagem 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.

The VRA reflected Congress’ determination that “sterner and more elaborate measures” were needed to counteract these formidable hindrances. *Id.*, at 309. Sections 4 and 5 impose the most stringent of the Act’s remedies. Under §4(b), as amended, a State or political subdivision is a so-called “covered jurisdiction” if, on one of three specified coverage dates: (1) it maintained a literacy requirement or other “test or device” as a prerequisite to voting, and (2) fewer than 50% of its voting-age citizens were registered to vote or voted in that year’s Presidential election. 42 U. S. C. A. §1973b(b) (Supp. 2007). Section 4(a) suspends the operation of all such “test[s] or device[s]” in covered jurisdictions. §1973b(a) (main ed. and Supp. 2007). Section 5 requires covered jurisdictions to obtain what has come to be known as “preclearance” from the District Court for the District of Columbia or the DOJ before “enact[ing] or seek[ing] to administer” any alteration of their practices or procedures affecting voting. §1973c(a) (Supp. 2007).

A change will be precleared only if it “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [because of

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membership in a language minority group].” *Ibid.* An election practice has the “effect” of “denying or abridging the right to vote” if it “lead[s] to a retrogression in the position of racial [or language] minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U. S. 130, 141 (1976). See also *Young v. Fordice*, 520 U. S. 273, 276 (1997); 28 CFR §51.54 (2007). As amended in 2006, the statute defines “purpose” to include “any discriminatory purpose.” 120 Stat. 581, codified at 42 U. S. C. A. §1973c(c) (Supp. 2007).

Congress took the extraordinary step of requiring covered jurisdictions to preclear all changes in their voting practices because it “feared that the mere suspension of existing tests [in §4(a)] would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect.” *Allen v. State Bd. of Elections*, 393 U. S. 544, 548 (1969). By putting the burden on covered jurisdictions to demonstrate that future changes would not be discriminatory, §5 served to “shift the advantage of time and inertia from the perpetrators of the evil to its victims.” *Katzenbach*, 383 U. S., at 328.

Sections 4 and 5 were originally scheduled to lapse once a covered jurisdiction complied with §4(a)’s ban on the use of tests and devices for five years. See 79 Stat. 438. Finding continuing discrimination in access to the ballot, however, Congress renewed and expanded §§4 and 5 on four occasions, most recently in 2006.¹ Sections 4 and 5 are now set to expire in 2021, see 42 U. S. C. A. §1973b(a)(8) (Supp. 2007), but a covered jurisdiction may “bail out” at any time if it satisfies certain requirements, see

¹See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577; Voting Rights Act Amendments of 1982, 96 Stat. 131; Voting Rights Act Amendments of 1975, 89 Stat. 400; Voting Rights Act Amendments of 1970, 84 Stat. 314.

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§1973b(a)(1) (main ed. and Supp. 2007).

II

The voting practice at issue in this litigation is the method used to fill midterm vacancies on the Mobile County Commission, the governing body of Mobile County, Alabama. Composed of three members elected by separate districts to four-year terms, the Commission has the power to levy taxes, make appropriations, and exercise other county-wide executive and administrative functions. See Ala. Code §11–3–11 (1975).

We set out first, as pivotal to our resolution of this case, a full account of two disputes over the means of filling midterm vacancies on the Commission. The first occurred between 1985 and 1988; the second began in 2004 and culminates in the appeal now before us.

A

Alabama is a covered jurisdiction with a coverage date of November 1, 1964. See 30 Fed. Reg. 9897 (1965). As of that date, Alabama law provided that midterm vacancies on all county commissions were to be filled by gubernatorial appointment. See Ala. Code §12–6 (1959). The relevant provision was later recodified without substantive change as Ala. Code §11–3–6 (1975), which stated:

“In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.”

In 1985, however, the state legislature passed a “local law” providing that any vacancy on the Mobile County Commission occurring “with twelve months or more remaining on the term of the vacant seat” would be filled by special election rather than gubernatorial appointment. 1985

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Ala. Acts no. 85–237 (1985 Act).² The DOJ precleared this new law in June 1985.

The first midterm opening on the Commission postpassage of the 1985 Act occurred in 1987, when the seat for District One—a majority African-American district—became vacant. In accord with the 1985 Act, the Governor called a special election. A Mobile County voter, Willie Stokes, promptly filed suit in state court seeking to enjoin the election. The 1985 Act, he alleged, violated Art. IV, §105, of the Alabama Constitution, which provides that no “local law . . . shall be enacted in any case which is provided for by a general law.” On Stokes’s reading, the 1985 Act conflicted with §105 because the Act addressed a matter already governed by Ala. Code §11–3–6.

The state trial court rejected Stokes’s argument and entered judgment for the state defendants. Stokes immediately appealed to the Alabama Supreme Court and sought an order staying the election pending that court’s decision. The requested stay was denied and the special election went forward in June 1987. The winner, Samuel Jones, took office as District One’s Commissioner in July 1987. Approximately 14 months later, however, in September 1988, the Alabama Supreme Court reversed the trial court’s judgment. Finding that the 1985 Act “clearly offend[ed] §105 of the [Alabama] Constitution,” the court declared the Act unconstitutional. *Stokes v. Noonan*, 534 So. 2d 237, 238–239 (1988).

The Alabama Supreme Court’s decree cast grave doubt

²Under the Alabama Constitution, a “general” law is “a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class.” Art. IV, §110. A “special or private” law is a law that “applies to an individual, association or corporation.” *Ibid.* A “local” law is “a law which is not a general law or a special or private law.” *Ibid.* The 1985 Act was a local law because it applied only to Mobile County; the remainder of the State continued to be governed by Ala. Code §11–3–6 (1975).

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on the legitimacy of Jones’s election and, consequently, on his continued tenure in office. The Governor, however, defused any potential controversy by immediately invoking his authority under Ala. Code §11–3–6 and appointing Jones to the Commission.

B

The next midterm vacancy on the Commission did not occur until October 2005, when Jones—who had been reelected every four years since 1988—was elected mayor of the city of Mobile. Once again, the method of filling the vacancy became the subject of litigation. In 2004, the state legislature had passed (and the DOJ had precleared) an amendment to Ala. Code §11–3–6 providing that vacancies on county commissions were to be filled by gubernatorial appointment “[u]nless a local law authorizes a special election.” 2004 Ala. Acts no. 2004–455 (2004 Act). When the 2005 vacancy arose, three Mobile County voters and Alabama state legislators—appellees Yvonne Kennedy, James Buskey, and William Clark (hereinafter Kennedy)—filed suit against Alabama’s Governor, Bob Riley, in state court. The 2004 Act’s authorization of local laws providing for special elections, they urged, had revived the 1985 Act and cured its infirmity under §105 of the Alabama Constitution. Adopting Kennedy’s view, the state trial court ordered Governor Riley to call a special election.

While the Governor’s appeal to the Alabama Supreme Court was pending, Mobile County’s election officials obtained preclearance of procedures for a special election, scheduled to take place in January 2006. In November 2005, however, the Alabama Supreme Court reversed the trial court’s order. Holding that the 2004 Act “provide[d] for prospective application only” and thus did not resurrect the 1985 Act, Alabama’s highest court ruled that “Governor Riley [wa]s authorized to fill the vacancy on the

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Mobile County Commission by appointment.” *Riley v. Kennedy*, 928 So. 2d 1013, 1017 (2005). Governor Riley promptly exercised that authority by appointing Juan Chastang.

The day after the Alabama Supreme Court denied rehearing, Kennedy commenced the instant suit in Federal District Court. Invoking §5, she sought declaratory relief and an injunction barring Governor Riley from filling the Commission vacancy by appointment unless and until Alabama gained preclearance of the decisions in *Stokes* and *Kennedy*. As required by §5, a three-judge District Court convened to hear the suit. See 42 U. S. C. A. §1973c(a) (Supp. 2007); *Allen*, 393 U. S., at 563.

In August 2006, the three-judge court, after a hearing, granted the requested declaration. The court observed first that for purposes of §5’s preclearance requirement, “[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect.” 445 F. Supp. 2d 1333, 1336 (MD Ala.). It then determined that the 1985 Act’s provision requiring special elections had been both precleared and put into “force or effect” with the special election of Jones in 1987. It followed, the District Court reasoned, that the gubernatorial appointment called for by *Stokes* and *Kennedy* ranked as a change from the baseline practice; consequently “the two [Alabama Supreme Court] decisions . . . should have been precleared before they were implemented.” 445 F. Supp. 2d, at 1336.

Deferring affirmative relief, the District Court gave the State 90 days to obtain preclearance of *Stokes* and *Kennedy*. 445 F. Supp. 2d, at 1336. Without conceding that preclearance was required, the State submitted the decisions to the DOJ. Finding that the State had failed to prove that the reinstatement of gubernatorial appointment would not be retrogressive, the Department denied preclearance. See App. to Motion to Dismiss or Affirm 2a–

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8a. “The African-American voters of District 1,” the DOJ explained, “enjoy the opportunity to elect minority candidates of their choice” under the 1985 Act. *Id.*, at 6a. A change to gubernatorial appointment would be retrogressive because it “would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters of District 1.” *Ibid.*

After the State unsuccessfully sought DOJ reconsideration, Kennedy returned to the District Court and filed a motion for further relief. On May 1, 2007, the District Court ruled that “Governor Bob Riley’s appointment of Juan Chastang to the Mobile County Commission . . . was unlawful under federal law” and vacated the appointment. App. to Juris. Statement 1a–2a. Governor Riley filed a notice of appeal in the District Court on May 18, 2007, and a Jurisdictional Statement in this Court on July 17, 2007. In November 2007, we postponed a determination of jurisdiction until our consideration of the case on the merits. 552 U. S. ____.

In the meantime, a special election was held in Mobile County in October 2007 to fill the vacancy resulting from the District Court’s order vacating Chastang’s appointment.³ Chastang ran in the election but was defeated by Merceria Ludgood, who garnered nearly 80% of the vote. See Certification of Results, Special Election, Mobile County (Oct. 16, 2007), <http://records.mobile-county.net/ViewImagesPDFAll.aspx?ID=2007081288> (as visited May 22, 2008, and available in Clerk of Court’s case file). Ludgood continues to occupy the District One seat on the Commission. Her term will expire in November 2008.⁴

³The District Court denied the Governor’s motion to stay its judgment pending this appeal. See App. 7.

⁴Regardless of the outcome of this litigation, the method for filling future midterm vacancies on the Commission appears to have been settled. In 2006, the Alabama Legislature enacted a new measure

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III

Before reaching the merits of Governor Riley’s appeal, we first take up Kennedy’s threshold objection. The appeal, Kennedy urges, must be dismissed as untimely.

Section 5 provides that “any appeal” from the decision of a three-judge district court “shall lie to the Supreme Court.” 42 U. S. C. §1973c(a). Such an appeal must be filed within 60 days of the District Court’s entry of a final judgment. See 28 U. S. C. §2101(b). Kennedy maintains that Governor Riley’s May 18, 2007 notice of appeal came too late because the District Court’s August 2006 order qualified as a final judgment. If Kennedy’s characterization is correct, then Governor Riley’s time to file an appeal expired in October 2006 and his appeal must be dismissed. But if, as Governor Riley maintains, the District Court did not issue a final judgment until the order vacating Chastang’s appointment on May 1, 2007, then the Governor filed his appeal well within the required time.

A final judgment is “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U. S. 229, 233 (1945).⁵ The District Court’s August 2006 order declared that the Alabama Supreme Court’s decisions in *Stokes* and *Kennedy* required preclearance, but that order left unre-

providing that, on a going-forward basis, vacancies on the Commission will be filled by special election. See 2006 Ala. Acts no. 2006–342. The DOJ precleared the statute in July 2007. The passage of this law does not render this case moot: If the Governor prevails in his appeal, Chastang may seek reinstatement to the Commission to serve out the remainder of the term ending in November 2008. See Brief for United States as *Amicus Curiae* 5, n. 1.

⁵*Catlin* and the other authorities cited in this Part interpret the meaning of “final decisions” in 28 U. S. C. §1291, the statute governing appeals from district courts to the courts of appeals. We find them instructive in interpreting the parallel term “final” judgment in §2101(b).

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solved Kennedy's demand for injunctive relief. We have long held that an order resolving liability without addressing a plaintiff's requests for relief is not final. See *Liberty Mut. Ins. Co. v. Wetzel*, 424 U. S. 737, 742–743 (1976). See also 15B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §3915.2, p. 271 (2d ed. 1992).

Resisting the conclusion these authorities indicate, Kennedy maintains that the August 2006 order ranked as a final decision for two reasons. First, she contends, that order conclusively settled the key remedial issue, for it directed Governor Riley to seek preclearance of the Alabama Supreme Court's decisions in *Stokes* and *Kennedy*. See Brief for Appellees 26–27. This argument misapprehends the District Court's order: Far from requiring the Governor to seek preclearance, the District Court expressly allowed for the possibility that he would elect not to do so. See 445 F. Supp. 2d, at 1337 (“Defendant Riley is to keep the court informed of what action, *if any*, the State decides to take . . .” (emphasis added)). Second, Kennedy notes that the District Court directed entry of its August 2006 order “as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure,” *ibid.* See Brief for Appellees 27. “The label used by the District Court,” however, “cannot control [an] order’s appealability.” *Sullivan v. Finkelstein*, 496 U. S. 617, 628, n. 7 (1990). See also *Wetzel*, 424 U. S., at 741–743.

Because the District Court did not render its final judgment until May 1, 2007, Governor Riley’s May 18 notice of appeal was timely. We therefore proceed to the merits.

IV

Prior to 1985, Alabama filled midterm vacancies on the Mobile County Commission by gubernatorial appointment. The 1985 Act adopted a different practice—special elections. That new practice was used in one election only, held in 1987. The next year, the Alabama Supreme Court

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determined, in *Stokes v. Noonan*, that the Act authorizing special elections was invalid under the State's Constitution. Properly framed, the issue before us is whether §5 required Alabama to obtain preclearance before reinstating the practice of gubernatorial appointment in the wake of the decision by its highest court invalidating the special-election law.⁶

It is undisputed that a “change” from election to appointment is a change “with respect to voting” and thus covered by §5. See *Allen*, 393 U. S., at 569–570; *Presley v. Etowah County Comm’n*, 502 U. S. 491, 502–503 (1992). We have also stated that the preclearance requirement encompasses “voting changes mandated by order of a state court.” *Branch v. Smith*, 538 U. S. 254, 262 (2003). See also *Hathorn v. Lovorn*, 457 U. S. 255, 265–266, and n. 16 (1982). The question is whether, given the circumstances here presented, any “change” within the meaning of §5 occurred in this case.

In order to determine whether an election practice constitutes a “change” as that term is defined in our §5 precedents, we compare the practice with the covered

⁶As framed by the District Court, the issue was whether the Alabama Supreme Court's decisions in *Stokes v. Noonan* and *Riley v. Kennedy* should have been precleared. See 445 F. Supp. 2d, at 1336. This formulation, we conclude, misstates the issue in two technical respects. First, §5 requires a covered jurisdiction to seek preclearance of any changed “practice . . . with respect to voting.” 42 U. S. C. A. §1973c(a) (Supp. 2007). The “practice” at issue here is gubernatorial appointment. That practice, and not the Alabama Supreme Court's interpretation of state law in *Stokes* and *Kennedy*, is the proper subject of the §5 inquiry. Second, as Governor Riley noted, see Brief for Appellant 25, if there was a change requiring preclearance, it came about as a result of *Stokes*, not *Kennedy*. *Stokes* held that the 1985 Act violated the Alabama Constitution, and the State accordingly reinstated the practice of gubernatorial appointment with the Governor's 1988 appointment of Jones. *Kennedy* simply determined that the 2004 Act did not resurrect the 1985 Act; that decision itself prompted no change in the State's election practices.

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jurisdiction’s “baseline.” 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. See *Young*, 520 U. S., at 282–283. See also *Presley*, 502 U. S., at 495. The question is “whether a State has ‘enact[ed]’ or is ‘seek[ing] to administer’ a ‘practice or procedure’ that is ‘different’ enough” from the baseline to qualify as a change. *Young*, 520 U. S., at 281 (quoting 42 U. S. C. §1973c).⁷

For the reasons that follow, we conclude that the 1985 Act was never “in force or effect” within the meaning of §5. At all relevant times, therefore, the baseline practice for filling midterm vacancies on the Commission was the pre-1985 practice of gubernatorial appointment. The State’s reinstatement of that practice thus did not constitute a change requiring preclearance.

A

We have directly addressed the §5 term of art “in force or effect” on three prior occasions. As will become clear, these precedents do not control this case because they

⁷ 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 (ND 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).

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differ in a critical respect. They do, however, provide the starting point for our inquiry.

In *Perkins v. Matthews*, 400 U. S. 379 (1971), the question was what practice had been “in force or effect” in the city of Canton, Mississippi, on that State’s §5 coverage date, November 1, 1964. A 1962 state law required selection of city aldermen by at-large elections rather than by ward. Canton, however, “ignored the mandate [of the statute] in the conduct of the 1965 municipal elections and, as in 1961, elected aldermen by wards.” *Id.*, at 394. In the 1969 election, the city sought to switch to at-large elections. We held that this move was a change requiring preclearance because election by ward was “the procedure *in fact* ‘in force or effect’ in Canton on November 1, 1964.” *Id.*, at 395.

We endeavored to determine in *Perkins* the voting procedure that would have been followed on the coverage date, November 1, 1964. Two choices were apparent: the state law on the books since 1962 calling for at-large elections, or the practice Canton actually used, *without challenge*, in 1965—election by wards. We picked the 1965 practice as the more likely indicator of the practice Canton would have employed had it held an election on the coverage date, just seven months earlier. See *id.*, at 394–395.

Similarly, in *City of Lockhart v. United States*, 460 U. S. 125 (1983), the question was what practice had been “in force or effect” in Lockhart, Texas, on the relevant §5 coverage date, November 1, 1972. For more than 50 years, without challenge, the city had used a “numbered-post” system to elect its city council. See *id.*, at 132, n. 6.⁸ A

⁸Under the “numbered post” system, “the two commissioner posts were designated by number, and each candidate for commissioner specified the post for which he or she sought election.” *City of Lockhart v. United States*, 460 U. S. 125, 127 (1983) (internal quotation marks omitted). It contrasted with an alternative system “in which all of the candidates . . . run in a single election, and the two receiving the

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group of plaintiffs nonetheless contended that the numbered-post system was never “in force or effect” because it lacked state-law authorization. We noted that the validity of the numbered-post system under state law was “not entirely clear.” *Id.*, at 132.⁹ Relying on *Perkins*, we considered the uncertain state of Texas law “irrelevant,” for “[t]he proper comparison [wa]s between the new system and the system actually in effect on November 1, 1972, regardless of what state law might have required.” 460 U. S., at 132 (footnote omitted).

Finally, in *Young v. Fordice*, decided in 1997, the question was whether a provisional voter registration plan implemented by Mississippi election officials had been “in force or effect.” Believing that the state legislature was about to amend the relevant law, the officials had prepared and obtained preclearance for a new voter registration scheme. See 520 U. S., at 279. Roughly one-third of the State’s election officials implemented the plan, registering around 4,000 voters. See *id.*, at 278, 283. As it turned out, however, the state legislature failed to pass the amendment, and the voters who had registered under the provisional plan were required to reregister. See *id.*, at 278. When the case reached us, we rejected the argument that “the [p]rovisional [p]lan, because it was precleared by the Attorney General, became part of the baseline against which to judge whether a future change must be precleared.” *Id.*, at 282. Regarding the provisional plan as a “temporary misapplication of state law,” we held that, for §5 purposes, the plan was “never ‘in force or effect.’” *Ibid.* We emphasized that the officials who implemented the provisional plan “did not intend to adminis-

greatest number of votes are elected.” *Id.*, at 127, n. 1.

⁹We commented in this regard that the longevity of the numbered-post system “suggest[ed] a presumption of legality under state law.” *Id.*, at 132, n. 6.

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ter an unlawful plan” and that they abandoned it “as soon as its unlawfulness became apparent.” *Id.*, at 283. We also noted that the provisional plan had been used for only 41 days and that the State “held no elections” during that period. *Ibid.*

B

Perkins and *Lockhart* established that an election practice may be “in force or effect” for §5 purposes despite its illegality under state law if, as a practical matter, it was “actually in effect.” *Lockhart*, 460 U. S., at 132. Our more recent decision in *Young*, however, qualified that general rule: A practice best characterized as nothing more than a “temporary misapplication of state law,” we held, is *not* in “force or effect,” even if actually implemented by state election officials. 520 U. S., at 282.

If the only relevant factors were the length of time a practice was in use and the extent to which it was implemented, this would be a close case falling somewhere between the two poles established by our prior decisions. On one hand, as in *Young*, the 1985 Act was a “temporary misapplication” of state law: It was on the books for just over three years and applied as a voting practice only once. In *Lockhart*, by contrast, the city had used the numbered-post system “for over 50 years without challenge.” 460 U. S., at 132, n. 6. (*Perkins* is a less clear case: The city failed to alter its practice in response to changed state law for roughly seven years, but only a single election was held during that period. See 400 U. S., at 394.) On the other hand, in *Young* no election occurred during the time the provisional registration plan was in use, while in this case one election *was* held under the later-invalidated 1985 Act.

We are convinced, however, that an extraordinary circumstance not present in any past case is operative here, impelling the conclusion that the 1985 Act was never “in

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force or effect”: The 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.

These characteristics plainly distinguish the present case from *Perkins* and *Lockhart*. The state judiciary had no involvement in either of those cases, as the practices at issue were administered without legal challenge of any kind. And in *Lockhart*, we justified our unwillingness to incorporate a practice’s legality under state law into the §5 “force or effect” inquiry in part on this ground: “We doubt[ed] that Congress intended” to require “the Attorney General and the District Court for the District of Columbia” to engage in “speculation as to state law.” 460 U. S., at 133, n. 8. Here, in contrast, the 1985 Act’s invalidity under the Alabama Constitution has been definitively established by the Alabama Supreme Court.

The prompt legal challenge and the Alabama Supreme Court’s decision not only distinguish this case from *Perkins* and *Lockhart*; they also provide strong cause to conclude that, in the context of §5, the 1985 Act was never “in force or effect.” A State’s highest court is unquestionably “the ultimate exposito[r] of state law.” *Mullaney v. Wilbur*, 421 U. S. 684, 691 (1975). And because the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums,¹⁰ a law challenged at first opportunity and invalidated by Alabama’s highest court is properly regarded as null and void *ab initio*, incapable of effecting any change in Alabama law or establishing a voting practice for §5 purposes. Indeed, Kennedy and the United States appear to concede

¹⁰The dissent observes that the Alabama Supreme Court’s decision in *Stokes* was not unanimous. See *post*, at 8–9. Like this Court, the Alabama Supreme Court does not shy away from revealing dissenting opinions. Of course, it is the majority opinion that declares what state law is.

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that the 1985 Act would not have been “in force or effect” had the Alabama Supreme Court stayed the 1987 election pending its decision in *Stokes* (or simply issued its decision sooner). See Brief for Appellees 51; Brief for United States as *Amicus Curiae* 23–24.

There is no good reason to hold otherwise simply because Alabama’s highest court, proceeding at a pace hardly uncommon in litigated controversies, did not render its decision until after an election was held. In this regard, we have recognized that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges. Cf. *Purcell v. Gonzalez*, 549 U. S. 1, 5–6 (2006) (*per curiam*) (“Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the [challenged] rules.”).

Ruling as Kennedy and the United States urge, moreover, would have the anomalous effect of binding Alabama to an unconstitutional practice because of a state trial court’s error. If the trial court had gotten the law of Alabama right, all agree, there would have been no special election and no tenable argument that the 1985 Act had ever gained “force or effect.” But the trial court misconstrued the State’s law and, due to that court’s error, an election took place. That sequence of events, the District Court held, made the Act part of Alabama’s §5 baseline. No precedent of this Court calls for such a holding.

The District Court took care to note that its decision “d[id] not in any way undermine [*Stokes* and *Kennedy*] under state law.” 445 F. Supp. 2d, at 1337. In some theoretical sense, that may be true. Practically, however, the District Court’s decision gave controlling effect to the erroneous trial court decision and rendered the Alabama Supreme Court’s corrections inoperative. Alabama’s Constitution, that State’s Supreme Court determined,

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required that, in the years here involved, vacancies on the Mobile County Commission be filled by appointment rather than special election. Nothing inherent in the practice of appointment violates the Fifteenth Amendment or the VRA. The DOJ, however, found that a *change* from special elections to appointment had occurred in District One, and further found that the change was retrogressive, hence barred by §5. The District Court’s final decision, tied to the DOJ determination, thus effectively precluded the State from reinstating gubernatorial appointment, the only practice consistent with the Alabama Constitution pre-2006.¹¹ Indeed, Kennedy’s counsel forthrightly acknowledged that the position she defends would “loc[k] into place” an unconstitutional practice. Tr. of Oral Arg. 32.

The dissent, too, appears to concede that its reading of §5 would bind Alabama to an unconstitutional practice because of an error by the state trial court. See *post*, at 7. But it contends that this imposition is no more “offensive to state sovereignty” than “effectively requiring a State to administer a law it has repealed,” *post*, at 8—a routine consequence of §5. The result described by the dissent, however, follows directly from the Constitution’s instruction that a state law may not be enforced if it conflicts with federal law. See Art. VI, cl. 2. 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. But the rule advocated by the dissent would effectively preclude Alabama’s highest court from applying to a state law a provision of the State Constitution entirely harmonious with federal law. That sort of interference

¹¹As earlier noted, see *supra*, at 8–9, n. 4, the Alabama Legislature modified the relevant state law in 2006 by adopting special elections on a going-forward basis.

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with a state supreme court's ability to determine the content of state law, we think it plain, is a burden of a different order.

This burden is more than a hypothetical concern. The realities of election litigation are such that lower state courts often allow elections to proceed based on erroneous interpretations of state law later corrected on appeal. See, e.g., *Akins v. Secretary of State*, 154 N. H. 67, 67–68, 74, 904 A. 2d 702, 703, 708 (2006) (preelection challenge rejected by a state trial court but eventually sustained in a postelection decision by the State Supreme Court); *Cobb v. State Canvassing Bd.*, 2006–NMSC–034, ¶¶1–17, 140 N. M. 77, 79–83 (2006) (same); *Maryland Green Party v. Maryland Bd. of Elections*, 377 Md. 127, 137–139, 832 A. 2d 214, 220–221 (2003) (same); *O'Callaghan v. State*, 914 P. 2d 1250, 1263–1264 (Alaska 1996) (same); *Peloza v. Freas*, 871 P. 2d 687, 688, 692 (Alaska 1994) (same). We decline to adopt a rigid interpretation of “in force or effect” that would deny state supreme courts the opportunity to correct similar errors in the future.

C

Although our reasoning and the particular facts of this case should make the narrow scope of our holding apparent, we conclude with some cautionary observations. First, the presence of a judgment by Alabama's highest court declaring the 1985 Act invalid under the State Constitution is critical to our decision.¹² We do not suggest the outcome would be the same if a potentially unlawful practice had simply been abandoned by state officials after initial use in an election. Cf. *Perkins*, 400 U. S., at 395. Second, the 1985 Act was challenged the first time it was invoked and struck down shortly thereafter. The same

¹²There is no indication in the record that the Alabama Supreme Court's decisions in *Stokes* and *Kennedy* were anything other than reasonable and impartial interpretations of controlling Alabama law.

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result would not necessarily follow if a practice were invalidated only after enforcement without challenge in several previous elections. Cf. *Young*, 520 U. S., at 283 (“[T]he simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never ‘in force or effect.’ . . . A State, after all, might maintain in effect for many years a plan that technically . . . violated some provision of state law.”). Finally, the consequence of the Alabama Supreme Court’s decision in *Stokes* was to reinstate a practice—gubernatorial appointment—identical to the State’s §5 baseline. Preclearance might well have been required had the court instead ordered the State to adopt a novel practice.¹³

* * *

For the reasons stated, the judgment of the United States District Court for the Middle District of Alabama is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

¹³In view of these limitations, the concern expressed in Part IV of the dissent, see *post*, at 9–13, is misplaced. The Alabama Supreme Court’s historical role in administering the State’s discriminatory literacy test, the dissent contends, “indicates that state courts must be treated on the same terms as state legislatures for §5 purposes,” *post*, at 9. But it is common ground that a “change” made pursuant to a state-court order is subject to §5 scrutiny; the only question is whether the Alabama Supreme Court’s ruling in *Stokes* triggered a “change” within the meaning of our decisions. See *supra*, at 11; *post*, at 8. More importantly, none of the past discriminatory actions by the state court identified in the dissent would have been sheltered from §5 review by our tightly bounded decision in this case.