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Young v. Fordice: Challenging Dual Registration under Section 5 of the Voting Rights Act

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Young v. Fordice: CHALLENGING DUAL REGISTRATION UNDER SECTION 5 OF THE VOTING RIGHTS ACT

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I. INTRODUCTION

In 1890, as Reconstruction ended and the federal government withdrew from protecting the civil rights of blacks in the South, Mississippi held a constitutional convention that became a model for southern states seeking to disfranchise their black citizens. The most notorious disfranchising provisions adopted by the 1890 Constitutional Convention were literacy tests and poll taxes,[1] but the ingenuity of those seeking to foreclose the exercise of black political power extended further. Among the inventions of the 1890 Convention was a provision fostering racial discrimination in local elections, the "dual registration" requirement.[2] Under this provision, registration with the circuit clerk of the county alone was insufficient to qualify a citizen to vote in municipal elections. Instead, to vote in municipal elections, a citizen first had to register with the circuit clerk and then register again with the municipal clerk.[3]

Like other facially neutral registration barriers adopted by Mississippi, this dual registration requirement suppressed voting by black Mississippians in municipal elections to a far greater degree than that of whites,[4] and it continued to do so long after more overt barriers such as the literacy test and poll taxes were outlawed by the Voting Rights Act of 1965.[5] In 1987, when a federal court struck down the final vestiges of this dual registration requirement as a violation of section 2 of the Voting Rights Act,[6] and the Fifth Circuit affirmed the holding in 1991,[7] voting rights advocates believed they had seen the last of this holdover from an earlier, shameful era in Mississippi history. They were wrong.

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1. *See* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 27 (1990).

2. *Id.* at 205. *See also* Mississippi Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1252 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

3. PARKER, *supra* note 1, at 205.

4. "Substantial numbers of black voters apparently were not informed of the dual registration requirement when they registered to vote with the circuit clerks or were otherwise unaware of the requirement . . . ." PARKER, *supra* note 1, at 206. As recounted in *PUSH v. Allain*:

> In the March 10, 1987 municipal Democratic primary election in the City of Marks, Mississippi, 56 voters who had registered to vote with the Quitman County Circuit Clerk prior to August 3, 1984, but who had not registered with the Marks Municipal Clerk, were required to cast affidavit ballots by election officials. These affidavit ballots were later rejected and not counted by the Marks Municipal Democratic Committee. All 56 of these voters were black. In that election, two black candidates for the board of aldermen lost by voter margins less than the number of affidavit ballots that were rejected.

PUSH, 674 F. Supp. at 1255. *See also Extension of the Voting Rights Act: Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Comm. On the Judiciary*, 97th Cong. 2643 (1981) (testimony of Robert M. Walker, Mississippi Field Director, NAACP, describing similar practices in numerous Mississippi localities).

5. 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994).

6. 42 U.S.C. § 1973 (1982).

7. *PUSH*, 674 F. Supp. at 1245.

Starting in 1995, only four years after the Fifth Circuit's decision confirming the illegality of Mississippi's earlier dual registration requirement, Mississippi again had a dual registration system. The occasion for resurrecting dual registration presented itself when Congress enacted the National Voter Registration Act of 1993, or "NVRA" (more popularly known as the "Motor-Voter" law), which requires states to make voter registration available at agencies that serve the public, such as drivers' license offices, public assistance offices, military recruiting offices, and other public agencies.[8] Congress made the requirements of the NVRA applicable only to registration for federal elections, leaving states the option of melding the NVRA's registration procedures with those governing registration for state and local elections.[9] However, Congress was also careful to provide that "[n]othing in this subchapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965."[10] This meant, among other things, that states such as Mississippi with a history of racial discrimination in voting would be required to seek preclearance from the United States Justice Department or the United States District Court for the District of Columbia for any procedures they adopted in implementing the NVRA—a process known as "Section 5 preclearance."[11]

Because the reforms required by the NVRA are generally popular with the public and maintaining dual registration systems for federal and state elections is cumbersome, inefficient, and potentially suspect under the Voting Rights Act, it was widely anticipated that most states would permit NVRA registrants to vote in all elections. In forty-nine of the fifty states, that is precisely what has happened: voters who register at drivers' license offices and other public agencies under the provisions of the NVRA are also permitted to vote in state and local elections.[12] Mississippi, however, not only insisted that NVRA registrants would have to register again to vote in state and local elections, but it also refused to seek section 5 preclearance from the United States Department of Justice when it instituted this dual registration system for NVRA registrants.[13]

As has so often happened in Mississippi, a lawsuit was necessary to compel the State's compliance with the Voting Rights Act. Lawsuits can be marvelous vehicles for accomplishing, after long and costly struggle, things that never should have been in doubt in the first place. In the case of *Young v. Fordice*,[14] the sur-

8. 42 U.S.C. § 1973gg-1973gg-10 (1994 & Supp. 1997).

9. Young v. Fordice, No. 95-CV-197, slip op. at 2 (S.D. Miss. July 24, 1995) (noting that states have discretion "to meld the NVRA requirements into the existing state system for registration of voters").

10. 42 U.S.C. § 1973gg-9(d)(2).

11. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1994).

12. Illinois attempted to implement a dual system as well, with NVRA registrants restricted to voting in federal elections, but the requirement of dual registration was subsequently invalidated on state constitutional and statutory grounds. Orr v. Edgar, 670 N.E.2d 1243 (Ill. App. 1 Dist. 1996).

13. Throughout the litigation over Mississippi's implementation of the NVRA, the State insisted that there was no "dual registration" requirement because it was still possible for citizens to become registered for all purposes as long as they used the state forms. That semantic dodge ignores the fact that all persons who register to vote at drivers' license agencies and other NVRA sites, as permitted by the NVRA, must, indeed, register again under separate procedures to be eligible for all elections. On election day, these NVRA registrants appear on a separate poll list and receive separate (and restricted) ballots. To call this anything other than a dual registration system is to blink at reality.

14. 117 S. Ct. 1228 (1997).

prising thing is not so much that Mississippi citizens won a unanimous Supreme Court decision declaring that the State needed section 5 preclearance before implementing dual NVRA registration procedures, but that this result required two years of litigation and an appeal to the Supreme Court at all. *Young v. Fordice* is nevertheless significant because it presented the Supreme Court's first opportunity to examine and interpret the NVRA, and because, in an era when the Supreme Court is otherwise cutting back on protections for minority voting rights, it affirmed an expansive interpretation of the preclearance requirement of section 5 of the Voting Rights Act.

II. VOTER REGISTRATION IN MISSISSIPPI PRIOR TO THE NVRA

The history of Mississippi's voting laws is a history of racial discrimination against the state's black citizens that has gradually, and with painful delay, been curbed by stringent application of the guarantees of the Voting Rights Act of 1965. Mississippi has employed nearly every disfranchising stratagem ever devised to deprive black citizens of the right to vote: poll taxes, literacy tests, lengthy residency requirements, tests of "good moral character," white primaries, publication of registrants' names to facilitate retaliation, prohibitions on registration outside of a county clerk's office, re-registration programs, and dual registration requirements.[15]

Mississippi's history of discrimination in voting was a primary impetus for Congress' enactment of the Voting Rights Act of 1965.[16] Because of this history, Mississippi was one of the seven states originally designated in their entirety as jurisdictions covered by section 5 of the Voting Rights Act,[17] which requires covered jurisdictions to obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes in voting practices or procedures.[18] Mississippi's continued resistance to the Act's guarantees also has been an important consideration in Congress' several extensions of the Act since 1965.[19]

As already noted, from 1892 to 1987, Mississippi maintained, in one form or another, a requirement of "dual registration"—separate registration with both the circuit clerk and municipal clerk—that had the purpose and effect of disproportionately denying black citizens the full opportunity to vote in Mississippi municipal elections.[20] By 1984, Mississippi was the only state in the nation still requiring dual registration.[21]

After a federal court struck down the dual registration requirement as racially discriminatory in 1987, the Mississippi Legislature enacted remedial legislation which the district court approved in 1989.[22] Thus, at the time the NVRA was

15. *See PUSH*, 674 F. Supp. 1245, 1250-52 (N.D. Miss. 1987); PARKER, *supra* note 1 at 26-29, 185, 205-06.
16. South Carolina v. Katzenbach, 383 U.S. 301, 310-13, 315 (1966).
17. *See id.* at 318.
18. 42 U.S.C. § 1973c (1994).
19. *See* PARKER, *supra* note 1, at 180-81.
20. *PUSH*, 674 F. Supp. at 1252, 1255, 1268.
21. *Id.* at 1252.
22. Mississippi State Chapter, Operation PUSH v. Mabus, 717 F. Supp. 1189, 1193 (N.D. Miss. 1989), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

enacted in 1993, Mississippi's statutes provided for a unified system of voter registration, such that when qualified persons completed a single registration in their county of residence, they were eligible to vote in all local, county, state, and federal elections.[23]

III. MISSISSIPPI'S RESPONSE TO THE NVRA

Mississippi, like most other states, had to make changes in some of its registration and record-keeping procedures in order to comply with the NVRA. The NVRA, unlike Mississippi law, requires that citizens be given the opportunity to register at drivers' license offices, public assistance agencies, and other agencies serving the public.[24] There are other differences as well.[25] Congress delayed the effective date of the NVRA until January 1, 1995, for most states,[26] so that states would have a full opportunity to prepare for proper implementation of the law.

As the January 1, 1995, implementation date approached, several states led by Republican governors brought suit challenging the constitutionality of the NVRA, claiming that the imposition of an unfunded federal mandate violated principles of federalism guaranteed by the Tenth Amendment to the United States Constitution.[27] Mississippi, to the surprise of some, did not follow that course. Instead, in the period leading up to January 1995, Mississippi took elaborate steps preparing to implement the NVRA for all elections—federal, state, and local.

First, Governor Kirk Fordice issued an executive order that named Secretary of State Dick Molpus as "the chief state election officer for the purposes of compliance with the National Voter Registration Act of 1993" and created a National Voter Registration Act Implementation Committee, which had the responsibility of ensuring Mississippi's compliance with the Act. The Implementation Committee included the chairs of the Mississippi House and Senate election committees, representatives of the Mississippi Attorney General's office, the Governor's office, the Secretary of State's office, and representatives of several other state agencies and organizations.

Starting in February 1994, the Secretary of State's office, in conjunction with the Governor's Implementation Committee, developed written materials and registration forms to be used by circuit clerks and other local officials in implement-

23. MISS. CODE ANN. § 23-15-11(1990).

24. *Compare* MISS. CODE ANN. § 23-15-47(4)(b) (1990 & Supp. 1996) *with* 42 U.S.C. § 1973gg-3 (1994) *and* 42 U.S.C. § 1973gg-5 (1994).

25. For example, the Mississippi mail-in registration form requires the signature of an attesting witness who is already registered to vote in the applicant's county and requires more information than is necessary for determining voter eligibility and maintaining registration rolls, *See* MISS. CODE ANN. § 23-15-47 (3) (1990 & Supp. 1996), all of which are prohibited by the NVRA. 42 U.S.C. § 1973gg-7(b)(1), (b)(3) (1994). In addition, Mississippi law permits the purging of voters who have not voted in four years at the discretion of local election officials and permits purges based on local officials' determination, without notice to the voter, that the voter is no longer qualified under state law. MISS. CODE ANN §§ 23-15-153 (1990 & Supp. 1996), 23-15-159 (1990). The NVRA prohibits purges for non-voting and requires written confirmation of information before it is used to purge a voter from the rolls. *See* 42 U.S.C. § 1973gg-6(d) (1994).

26. 42 U.S.C. § 1973gg note (1994)

27. To date, none of the lawsuits challenging the constitutionality of the NVRA have been successful. *See, e.g.*, Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996); Association of Community Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995).

ing the revised registration and purging procedures prompted by the NVRA.[28] None of these new procedures and registration forms, which were to be implemented as of January 1, 1995, made any distinction between registration for federal elections and registration for other elections, nor suggested that the new procedures would result in eligibility only for federal elections.[29]

The Governor's Implementation Committee also developed legislation to conform Mississippi's practices to the NVRA generally, and influential legislators stated their support for the legislation. The legislation, however, was not introduced until the January 1995 legislative session, which was scheduled to run through the end of March, even though the NVRA was required to be implemented starting on January 1, 1995. Although the State, throughout the subsequent litigation, attempted to blame the Justice Department and an official in the Secretary of State's office for causing "confusion" in the State's implementation of the NVRA, the real problem was the State's failure to finalize its NVRA legislation in advance of the deadline for implementation and failure to seek preclearance under section 5 in a timely manner. The Justice Department was not responsible for either of those problems, and, as we shall see, the Secretary of State's office was the only state agency that correctly recognized the necessity of obtaining section 5 preclearance for the State's implementation plan.

IV. THE IMPACT OF THE SECTION 5 PRECLEARANCE REQUIREMENT

In the latter part of 1994, the United States Department of Justice learned that Mississippi planned to implement administratively its new NVRA registration procedures starting January 1, 1995, although none of the State's implementation plans, revised forms, or training materials, which described substantial changes in voter registration procedures, had been submitted for section 5 preclearance. This created a serious problem because the Supreme Court has repeatedly held that any changes in the voting practices of a covered state, whether implemented by legislation or administratively, are unlawful unless they have first received the required section 5 preclearance.[30] The purpose of section 5 is to require an advance determination that any proposed changes in voting practices are free of any racially discriminatory effect or purpose. If section 5 review is not secured

28. The materials included a manual to guide the registration activities of these public officials and employees and a set of instructions to be used by personnel at the drivers' license bureaus, public assistance agencies, and other offices designated to conduct registrations. They also included new voter registration forms to be used at agencies and a redesigned mail-in registration form that conformed to NVRA requirements and eliminated the requirement of an attesting witness. Joint App. at 26-66, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

29. To the contrary, the new registration form for use at the drivers' license agency stated: *"[Y]ou may apply to register to vote in Mississippi* while renewing your driver license. If you would like to apply to register to vote, complete Sections 1 and 2 of this form . . . ." *Id.* at 45 (emphasis added). Similarly, the new form to be used at public assistance agencies asked: "If you are not registered to vote where you now live, would you like to register to vote here today?" *Id.* at 46. The revised mail-in form contained similar language, stating: "If you are not registered to vote where you now live, you can use this form to register to vote or report that your name or address have changed." *Id.* at 50. Nothing in these forms advised the applicants that their registrations would be invalid for state and local elections.

30. Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969); Clark v. Roemer, 500 U.S. 646, 653 (1991).

in advance of implementing the change, the prophylactic purposes of section 5 are defeated.[31]

Although the Secretary of State had initially planned to submit the new procedures to the Justice Department for preclearance only after the Legislature had enacted the proposed NVRA legislation, that would have resulted in a violation of section 5 because the state clearly planned to implement the new procedures starting January 1, 1995, without awaiting legislative action. The Department of Justice therefore wrote to the Mississippi Secretary of State in December 1994 explaining that preclearance of the new procedures and forms was necessary prior to their implementation.[32]

The Secretary of State's office complied with the Justice Department's request by submitting to the Department of Justice materials setting forth the NVRA practices that were to be implemented "prior to the passage of the state legislation"[33] and formally requesting preclearance for the implementation plan as set forth in the Secretary of State's November 1994 manual.[34] The November 1994 manual described a set of registration and record-keeping procedures to be used generally by circuit clerks and other election officials, with no provisions indicating that a separate set of registration requirements and procedures would be maintained for state and local elections.[35] On February 1, 1995, the United States Attorney General, acting through the Department of Justice, granted preclearance to the NVRA implementation plan submitted by the Secretary of State.[36]

In the first few weeks of 1995, several thousand new voters were added to the rolls through registration under the new NVRA procedures.[37] These voters all

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31. As the legislative history of section 5 explains: "Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law." S. REP. No. 417, 97th Cong., 1st Sess., at 47 (1982), *quoted in* NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 175 n.19 (1985).

32. Joint App. at 105, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

33. *Id.* at 108 (Letter dated December 14, 1994, from Constance Slaughter-Harvey, Assistant Secretary of State, Elections, and General Counsel, to Deval L. Patrick, Assistant Attorney General, Civil Rights Division, United States Department of Justice).

34. The submission letter stated:

> [C]onsider this letter as a request for preclearance under Section 5 of the Voting Rights Act of Mississippi's plan to administratively implement the provisions of NVRA, in accordance with the package of materials which were submitted to your office on December 5 and December 14, 1994. In particular, please regard the publication dated November 1994 and entitled "The National Voter Registration Act" as Mississippi's plan to administratively implement NVRA on January 1, 1995.

Id. at 109-14 (Letter dated December 20, 1994, from Constance Slaughter-Harvey, General Counsel to the Secretary of State and Assistant Secretary of State, Elections, to Dave Hunter, Voting Section, United States Department of Justice).

35. As noted above, the new voter registration forms that were included in the section 5 submission and that were to be used beginning January 1, 1995, made no distinction between eligibility for state and federal elections. Further, among items under the heading "Current methods that will change," the manual included the following statements: "'[T]he optional 4-year purge is prohibited,' [and] 'a registrant's name cannot be removed solely for not voting.'" *Id.* at 35. Again, these instructions did not suggest that the new limitations on voter purges would apply only to federal elections.

36. Juris. Statement at 15a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031) (Letter dated February 1, 1995, from John Tanner, Department of Justice, to Constance Slaughter-Harvey).

37. *See* Joint App. at 114, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031) (February 25, 1995, Memorandum from Constance Slaughter-Harvey, Assistant Secretary of State, Elections, and General Counsel, to Agency Representatives) (estimating that 4,000 citizens registered under NVRA since January 1, 1995).

registered under the assumption that they were registering for all elections, and none were informed that their registration might be invalid for state and local elections.[38]

V. MISSISSIPPI'S CHANGE TO A DUAL REGISTRATION SYSTEM

Unfortunately, on January 25, 1995, the NVRA legislation developed by the Governor's Implementation Committee, which had been widely expected to pass, was blocked by the action of State Senator Kay Cobb, the chair of the Mississippi Senate Elections Committee. Senator Cobb, a member of the Governor's Implementation Committee, had stated she would support the legislation,[39] but on January 25, 1995, she tabled the bill, refusing to allow a committee vote.[40] She later explained her position in part by focusing upon the registration opportunities offered to welfare recipients under the NVRA, saying that people "who 'care enough to go get their welfare and their food stamps, but not walk across the street to the circuit clerk,' should not be accommodated."[41] She also cited the election of a Republican Congress in November 1994 and concerns about "unfunded mandates," as reasons for opposing full implementation of the NVRA.[42] The Governor later announced that he, too, opposed implementation of the NVRA for state and local elections, saying that the legislation "should be called 'Welfare Voter'" rather than "Motor-Voter"[43] and contending that the federal government should not dictate Mississippi's registration procedures.[44]

The State's belated decision to implement the NVRA for federal elections only, rather than for all elections, changed the entire nature of its NVRA implementation plan. No one had anticipated that NVRA registration would be valid for federal elections only, and the State certainly had never sought section 5 preclearance for a dual registration system. To initiate this federal-election-only NVRA plan, officials in the Mississippi Attorney General's and Secretary of State's offices issued a memorandum on February 10, 1995, with instructions to

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38. Young v. Fordice, No. 95-CV-197, slip op. at 10 (S.D. Miss. July 24, 1995) ("A few thousand . . . citizens were registered under NVRA procedures between January 1 and February 10 under the assumption of eligibility for all elections.").

39. Grace Simmons, *'Motor Voter' No Good in State Races,* CLARION LEDGER (Jackson), March 6, 1995, at A5.

40. This was the last day that bills could be voted out of committee in the regular session. It was still possible, however, for the legislature to vote to suspend the rules and bring the bill to the floor. Thus, tabling the bill in committee did not necessarily mean that the legislature could not act on the bill later in the session. *See* Joint App. at 115, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031). Although the legislature would remain in session for almost three more months, no vote to suspend the rules and bring the bill to the floor was taken.

41. *Trouble Looms on Horizon for State's Motor Voter Law,* DEMOCRAT (Natchez, Miss.), May 8, 1995.

42. Simmons, *supra* note 39.

43. *See Fordice Stoops to Picking on Poor,* COMMONWEALTH (Greenwood), May 6, 1997.

44. Editorial writers throughout the state criticized this attack on the so-called "welfare voter" law as a thinly veiled appeal to racial prejudice. As noted by a Mississippi columnist, "since the 1960's and the evolution of Lyndon Johnson's 'Great Society,' Mississippi and the South have become fertile ground for the myth of the 'Welfare Queen' and the popular notion that the word 'welfare' is interchangeable with the word 'black' in political discourse." Sid Salter, *Fordice Shouldn't Throw Rocks At the Poor,* TIMES (DeSoto, Miss.), May 15, 1997. *See also, e.g., It's Hard for Fordice to Go Forward with Foot in Mouth,* SUN-HERALD (Biloxi-Gulfport), *reprinted in* DAILY LEADER (Brookhaven, Miss.), May 7, 1997 (noting similarities between "racist rhetoric" of invoking "welfare queens" and Fordice's use of "a similar slur to maintain a dual system of registration that keeps voters segregated at the polls in Mississippi"); *Fordice Stoops to Picking on Poor, supra* note 43 (criticizing Fordice for "trying to feed on prejudice to make his case" against unified registration).

election officials for implementing the NVRA on a restricted basis. The memorandum directed circuit clerks to "prepare two separate sets of voter registration books and pollbooks, or [to] . . . 'flag' voters registered under NVRA on the voter registration books and pollbooks to denote that they are . . . not presently authorized to vote in state elections."[45] It also acknowledged that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections," and asked circuit clerks to notify NVRA registrants of their limited eligibility to vote and to provide "the opportunity to register for state elections."[46]

The result of these new procedures was the division of the electorate into two classes of voters for the first time since the resolution of the *PUSH v. Allain*[47] litigation. One group, who took advantage of registration opportunities at drivers' license and other offices designated under the NVRA, were eligible only for federal elections; the other group, who registered with the circuit clerk under preexisting Mississippi procedures, were eligible to vote in all elections. There was no difference between these two groups in terms of meeting the voter qualification requirements of Mississippi law. NVRA registrants, just like other Mississippi registrants, were required to be citizens of the United States, eighteen years of age or older, mentally competent, residents for thirty days in the state, county, supervisor's district, and municipality (if any) in which they wished to vote, and free of convictions for a list of disqualifying crimes.[48] NVRA registrants differed from other Mississippi voters only in what forms they filled out and at what site they obtained a registration form.

Once the State made its belated decision to implement the NVRA only for federal elections, its next step should have been to submit this new NVRA plan to the United States Attorney General for preclearance under section 5 of the Voting Rights Act. Unfortunately, that did not happen. Even after the Department of Justice formally advised the State that the voting practices described in the State's February 10, 1995, memorandum were subject to the section 5 preclearance requirement,[49] the State refused to submit its new federal-election-only NVRA procedures for preclearance.

VI. THE LAWSUIT

Community groups and voting rights advocates in Mississippi had been monitoring very closely the State's plans for implementing the NVRA. Although they hoped and expected that the State would implement a unified NVRA plan, they were also relying on the section 5 preclearance requirement as an important safe-

45. Juris. Statement at 22a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031) (Memorandum dated February 10, 1995, from Phil Carter, Assistant Attorney General, and Reese Partridge, Staff Attorney, Secretary of State's Office, to Mississippi Circuit Clerks and Chairman, Mississippi County Elections Commission).

46. *Id.* at 21a.

47. 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

48. *Compare* MISS. CODE ANN. § 23-15-11(1990) *with*, Apps. 44, 45, 46, 50, 63, 64, 65, 66 (oath set forth in NVRA registration forms).

49. Juris. Statement at 24a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031) (Letter dated February 16, 1995, from Elizabeth Johnson, Acting Chief, Voting Section, U.S. Department of Justice, to Sandra Murphy Shelson, Special Assistant Attorney General, State of Mississippi).

guard that would assure close scrutiny by the Justice Department if the State attempted to go back to a discriminatory dual registration system in the course of implementing the NVRA. What they did not initially expect was that the State would simply defy the preclearance requirement altogether once it decided to adopt a federal-election-only NVRA plan. That was a very disappointing development, especially when one considers that not a single Supreme Court Justice ultimately agreed that the State could properly forgo section 5 review of its NVRA plan.[50]

Mississippi citizens have learned from long experience that they might as well get over such disappointments fairly quickly and proceed at once to federal court. On April 20, 1995, four citizens filed suit against the State, alleging that the State had implemented changes in voting procedures in violation of section 5 of the Voting Rights Act.[51] This type of section 5 enforcement action is heard before a three-judge federal district court, with a right of direct appeal to the United States Supreme Court.[52] In a section 5 enforcement proceeding, the jurisdiction of the three-judge district court is severely limited. The local three-judge district court does not have jurisdiction to determine "whether the changes at issue . . . in fact resulted in impairment of the right to vote, or whether they were intended to have that effect."[53] Those questions as to the merits of the proposed changes are reserved for the United States Attorney General or the District Court for the District of Columbia. The only questions for the court in a section 5 enforcement action are: "(1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."[54]

To establish that Mississippi's federal-election-only NVRA plan was subject to section 5, the complaint carefully alleged two ways in which the State's new dual registration requirements constituted a change from prior practices. First, the plaintiffs alleged that the procedures instituted in the State's February 10, 1995, memorandum,[55] which established a federal-election-only NVRA system, constituted changes in the State's registration procedures as compared to the unitary voter registration system that was in effect in Mississippi prior to January 1, 1995.[56] Second, they alleged that the dual registration procedures initiated

50. Young v. Fordice, 117 S. Ct. 1228 (1997).

51. The named plaintiffs were Thomas Young, Reverend Rims Barber, and Richard L. Gardner who conduct voter registration activities on behalf of the NAACP or minority voters generally, and Eleanor Faye Smith was an unregistered public assistance recipient. Because the Lawyers' Committee for Civil Rights Under Law had represented Mississippi voters in the lawsuit that struck down the State's prior dual registration requirement for municipal elections, the Lawyers' Committee was one of the organizations that again agreed to represent the plaintiffs in this new round of litigation. In addition to the author, the counsel for plaintiffs included Samuel L. Walters of the Lawyers' Committee; A. Spencer Gilbert and William Manual of the Jackson, Mississippi firm of Wise Carter Child & Caraway; Margaret Carey of the Center for Constitutional Rights in Greenville, Mississippi; and Laughlin McDonald and Neil Bradley of the American Civil Liberties Union Foundation, Inc., in Atlanta, Georgia.

52. 28 U.S.C.§ 1253 (1993).

53. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 181 (1985).

54. McCain v. Lybrand, 465 U.S. 236, 250 n.17 (1984). *See also* Lopez v. Monterey County, 117 S. Ct. 340, 349 (1996), City of Lockhart v. United States, 460 U.S. 125, 129 n.3 (1983).

55. *See supra* text accompanying note 45.

56. Complaint at ¶ 68, Young v. Fordice, No. 95-CV-197, slip op. (S.D. Miss. July 24, 1995) (No. 95-2031).

through the State's February 10, 1995, memorandum constituted changes in the State's voting procedures as compared to the unitary NVRA system that had received preclearance from the Justice Department on February 1, 1995.[57] If either of these propositions was correct, the State was in violation of section 5 of the Voting Rights Act by implementing changes in its voting practices without the required review and preclearance by the Justice Department or District of Columbia District Court.

Throughout the litigation, the State largely ignored the former allegation and aimed its arguments primarily at the latter. The State argued that no unitary NVRA registration system was ever authorized by the state legislature, that the Secretary of State had acted beyond his authority—or at least made a mistake—in submitting any such unitary NVRA plan to the Justice Department for preclearance, and that the Justice Department's February 1, 1995, preclearance of this unitary plan therefore could not serve to make a unitary NVRA plan the benchmark against which to measure the State's later adoption of a federal-election-only NVRA plan. Although the plaintiffs strongly believed that the State's implementation of a unitary NVRA system in early 1995 was highly significant and did serve to establish a benchmark for section 5 purposes under Supreme Court precedent,[58] they also recognized that the State's dual NVRA registration plan would be in violation of section 5 even if the unitary NVRA system implemented in early 1995 were totally disregarded. The State was required to obtain preclearance for its federal-election-only NVRA plan at some point, and the only section 5 submission that the State could point to was the Secretary of State's submission of the unitary NVRA plan. If that submission was to be treated as a nullity, the State was left with nothing demonstrating its compliance with the section 5 preclearance requirement.

Thus, the more the Mississippi Attorney General criticized the Secretary of State for taking "unauthorized" action in making a section 5 submission to the Justice Department, the more the State undercut its own legal defense. The State then had to argue either that section 5 preclearance was completely unnecessary for any of the practices adopted in implementing the NVRA, or alternatively, that the Justice Department's February 1, 1995, preclearance letter could somehow be construed as granting preclearance to a federal-election-only NVRA plan that was not announced by the State until February 10, 1995. Both of these arguments were foreclosed by longstanding Supreme Court precedent.

In making the first argument, the State contended that section 5 preclearance was unnecessary because the state legislature had not made any changes in Mississippi's own registration laws, but had merely taken administrative action to

57. *Id.* ¶ 69. The complaint also alleged, initially, that the State was violating the NVRA by refusing to offer any voter registration opportunities at public assistance offices, even for federal elections. Before this count was litigated, the State began offering registration opportunities at public assistance offices, and the plaintiffs therefore eventually agreed to a voluntary dismissal of the NVRA claim.

58. *See* Perkins v. Matthews, 400 U.S. 379 (1971) (holding that city's use of single-member districts for municipal elections established a benchmark requiring city to seek preclearance for change to at-large elections, even though single-member district elections were unauthorized under state law and city had changed to at-large elections solely for purpose of complying with state law).

implement the NVRA in compliance with federal law.[59] The section 5 preclearance requirement, however, is not limited to state legislative enactments. The express language of section 5 is broad and encompasses not only enacted laws but any "standard, practice or procedure" with respect to voting, and any changes that covered jurisdictions "shall enact *or seek to administer*."[60] If it were otherwise, states could evade the requirements of section 5 at will simply by allowing administrative agencies to issue directives requiring voting changes rather than involving the legislature. Thus, in 1994, when the Secretary of State developed a set of procedures for implementing the NVRA's requirements in Mississippi and when the State Attorney General's and Secretary of State's offices issued their memorandum on February 10, 1995, giving further directions for creating a federal-election-only NVRA system, all of the new practices and procedures that were thereby implemented in Mississippi were subject to the preclearance requirements of section 5. The new registration system was not exempt simply because it was implemented administratively rather than through legislation.

The State's related argument, that preclearance was not required under section 5 because the changes made by the State were merely those required by the federal government under the NVRA, also was squarely inconsistent with governing precedent. In *Allen v. State Board of Elections*, the Supreme Court held that voting changes made by covered states are not exempt from preclearance even when implemented in an effort to comply with the Voting Rights Act itself.[61] In *Allen*, the Virginia Board of Elections had issued a bulletin providing that illiterate persons could receive assistance in casting write-in votes.[62] The State argued that section 5 did not apply to the bulletin because it "was issued in an attempt to comply with the provisions of the Voting Rights Act."[63] The Court rejected Virginia's argument, explaining that "[t]o hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from § 5 coverage—even though it would have the effect of racial discrimination. It is precisely this situation [that] Congress sought to avoid in passing § 5."[64] Similarly, in *McDaniel v. Sanchez*, the Court ruled that even when a covered jurisdiction adopts a redistricting plan to comply with the order of a federal court in the course of voting rights litigation, the jurisdiction must obtain section 5 preclearance before implementing the plan.[65] These rulings are simply an outgrowth

59. As the State argued in a March 9, 1995, letter to the Justice Department, the State had "not initiated, nor implemented any change affecting voting within the State, other than [the] implementation of the NVRA . . . . The changes affecting voter registration most recently implemented by the State are those mandated by NVRA, not any change initiated or instituted by the State. . . ." Juris. Statement at 117-18, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

60. 42 U.S.C. § 1973c (1994) (emphasis added). *See* Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 1223-1224 (1996) (Thomas, J., dissenting) ("When the legislature passes a law, *or an administrative agency issues a policy directive*, official action has unquestionably been taken in the name of the State. Accordingly, voting changes administered by such entities have been governed consistently by § 5") (emphasis added); *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992) ("[T]he scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting. . . .").

61. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

62. *Id.*

63. *Id.* at 565 n.29.

64. *Id.*

65. McDaniel v. Sanchez, 452 U.S. 130, 145-53 (1981).

of the central principle that a local three-judge court does not have jurisdiction to determine the true motivation for a proposed voting change because Congress deliberately reserved that question for the Justice Department or District of Columbia District Court to determine in the first instance.[66]

On this point, the State's arguments also were inaccurate as a factual matter. In implementing the NVRA, the State exercised a great deal of discretion and made numerous changes not directly required by the NVRA. For example, nothing in the NVRA required the State to use misleading voter registration forms which suggested that the voter would be registering for all purposes when in fact the registration would be valid only for federal elections. Indeed, the State's basic decision to abandon its previous unitary registration scheme and require dual registration for NVRA registrants was not compelled by the NVRA because states were perfectly free to allow NVRA registrants to vote in all elections. Such discretionary choices, even if exercised within limits established by federal law, require section 5 preclearance.[67]

The State's second major argument was that the Justice Department's February 1, 1995 preclearance letter could somehow be construed as granting preclearance to a federal-election-only NVRA plan that was not announced by the State until February 10, 1995. The Supreme Court, however, has consistently held that a Justice Department preclearance determination is strictly limited to voting changes that are identified clearly and unambiguously by the covered jurisdiction in the submission it makes to the Justice Department.[68] Any ambiguity in the scope of the preclearance request is construed against the submitting jurisdiction.[69] As the Court explained in *Clark v. Roemer*, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5."[70] The Justice Department reviews thousands of submissions every year from jurisdictions covered by section 5 and must make its determination on each submission within sixty days of the date when the submission is complete.[71] This expedited administrative review would be impossible if a preclearance letter were subject to broad interpretation covering matters not specifically identified in the submission.

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66. As the Court explained in *Lopez v. Monterey County*, 117 S. Ct. 340, 349 (1996):
> Congress designed the preclearance procedure "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." Congress chose to accomplish this purpose by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia. As we explained in *McDaniel*, "[b]ecause a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way."

Id. at 348 (citations omitted) (quoting McDaniel v. Sanchez, 452 U.S. 130,149 (1981)).

67. *See McDaniel*, 452 U.S. at 153 (noting that the Voting Rights Act "requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable").

68. McCain v. Lybrand, 465 U.S. 236 (1984); Clark v. Roemer, 500 U.S. 646 (1991).

69. *Clark*, 500 U.S. at 659.

70. *Id.* at 658.

71. 42 U.S.C. § 1973c (1994). *See Clark*, 500 U.S. at 658.

The only section 5 submission reviewed by the Justice Department was the Secretary of State's December 1994 submission of the unitary plan that the State had originally developed to implement the NVRA. That request for preclearance failed to identify at all, much less "with specificity,"[72] the many procedures that were required to implement the dual NVRA registration system set forth in the State's February 10, 1995, memorandum. Unlike the February 10, 1995, memorandum, the December 1994 submission included no procedures establishing a two-tier system of voter registration and record-keeping, no provisions for separate sets of voter purge procedures distinguishing NVRA registrants from state registrants and no procedures for notifying NVRA registrants that they would be eligible to vote only in federal elections. The Justice Department's February 1, 1995, preclearance letter did not, and could not, provide preclearance for changes that were not part of the submission.

The State attempted to shift the burden of clarifying the submission to the Justice Department, arguing that the Justice Department should have known that Mississippi would wish to implement a federal-election-only NVRA plan once the State's NVRA legislation was tabled in committee on January 25, 1995. According to this argument, the Justice Department should not have considered the State's section 5 submission of the unitary NVRA plan before the Legislature enacted the plan. These arguments ignored the fact that state officials in Mississippi had already begun implementing the NVRA on a unitary basis as of January 1, 1995, without waiting for the Legislature to act. It was hardly unreasonable for the Justice Department to review and preclear procedures that the State itself had already started implementing. Indeed, the State's actions in early 1995 were clearly illegal until the preclearance letter was issued. Furthermore, the State took no action to withdraw or revise its submission after the legislation was tabled.[73] If the Justice Department had refused to act on the pending section 5 submission, and the Legislature then had revived and enacted the NVRA legislation later in its 1995 session, the State would have faced an entirely different set of problems because of the lengthy period during which registration had gone forward without preclearance. Had that scenario materialized, the State no doubt would have complained indignantly about the Justice Department's delay in granting preclearance to the unified plan.[74]

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72. *Clark*, 500 U.S. at 658.

73. In fact, before the Justice Department issued its preclearance determination, the Department contacted the Mississippi Attorney General concerning the submission, and confirmed that the Mississippi Attorney General had no objection to the Justice Department's consideration of the Secretary of State's submission. *See* Transcript of Hearing Before Three-Judge District Court at 87, Young v. Fordice, No. 95-CV-197 (S.D. Miss. July 24, 1997) (No. 95-2031).

74. Furthermore, the Justice Department did not violate its own regulations in considering the section 5 submission prior to enactment of state legislation, as the State contended. The regulation in question provides that the Attorney General "will not consider on the merits . . . [a]ny proposal for a change affecting voting submitted prior to final enactment *or administrative decision*." 28 C.F.R. § 51.22 (1994) (emphasis added). The Secretary of State's submission clearly advised the United States Attorney General that state election officials were planning to implement the procedures set forth in the November 1994 NVRA manual as of January 1, 1995, without awaiting legislative action. Thus, in addressing the State's section 5 submission, the Attorney General was addressing a "final . . . administrative decision" regarding the practices the State intended to follow beginning January 1, 1995. 28 C.F.R. § 51.22 (1994). Indeed, Texas, like Mississippi, administratively implemented the NVRA on a unitary basis through action of the Secretary of State, prior to action by the state legislature. *See* U.S. Mot. For Prelim. Inj. and Summ. Judg., Attachment R (section 5 submission letter from Texas Secretary of State, dated October 7, 1994).

In any event, the State contradicted settled authority by arguing that the United States Attorney General had the burden to inquire about the effect of the legislative committee's action and to "require[ ] a proper submission restricted only to *completed* changes."[75] Section 5 places on the covered jurisdiction, not the U.S. Attorney General, the burden of removing ambiguities and making a proper section 5 submission.[76] That principle prevented the State from successfully twisting the February 1, 1995, preclearance of the unitary NVRA plan into a grant of preclearance for the dual registration system that was established through the State's February 10, 1995, memorandum.

As mentioned above, the State's arguments also devoted a great deal of attention to whether the Justice Department's preclearance of the unitary NVRA plan submitted by the Secretary of State could override state law by preventing the State from maintaining its own separate system of registration for state and local elections. These arguments, the plaintiffs believed, tended to mischaracterize the issue. No one ever alleged that the preclearance determination alone served to change existing Mississippi law. A preclearance determination by the Justice Department does not create or change state law but merely makes the precleared practice, whether instituted administratively or by state statute, legally enforceable under section 5. The plaintiffs did argue, however, that because the State itself had decided to implement a unified NVRA plan administratively without awaiting action by the state legislature, and because thousands of citizens actually registered during early 1995 under the clear assumption that they would be eligible for all elections, the State had to seek section 5 preclearance before abandoning this practice and removing all these voters from the registration rolls. Plaintiffs relied upon a line of Supreme Court cases holding that the need for section 5 preclearance of a new voting practice does not depend upon the legality or illegality under state law of the practices previously in effect in the jurisdiction.[77]

In the leading case, *Perkins v. Matthews*, black voters sued to enjoin the City of Canton, Mississippi, from implementing a change from a ward system to a system of at-large aldermanic elections.[78] The City argued that section 5 did not apply because Canton's previous ward elections had been conducted contrary to a 1962 Mississippi statute requiring at-large aldermanic elections, and the change to at-large elections was therefore necessary to conform Canton's procedures to state law.[79] The Supreme Court disagreed and held that the City's previous use of ward elections was "the procedure *in fact* 'in force or effect' in Canton" for purposes of section 5.[80] A change from that procedure was therefore a change requiring preclearance under section 5, regardless of the illegality of ward elections under Mississippi law.

Similarly, in *City of Lockhart v. United States*, the Supreme Court held that "Section 5 was intended to halt actual retrogression in minority voting strength

75. Brief for Appellees at 32, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
76. *Clark*, 500 U.S. at 658-59; McCain v. Lybrand, 465 U.S. 236 (1984).
77. *See* Perkins v. Matthews, 400 U.S. 379 (1971); City of Lockhart v. United States, 460 U.S. 125 (1983).
78. Perkins v. Matthews, 400 U.S. 379 (1971).
79. *See* MISS. CODE ANN. § 3374-36 (1942 & Supp. 1968).
80. *Perkins*, 400 U.S. at 395 (quoting section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1970)).

without regard for the legality under state law of the practices already in effect."[81] Plaintiffs argued that, under these precedents, the unified NVRA plan had been "in force or effect"[82] in Mississippi starting January 1, 1995, and that the dual NVRA registration system implemented through the February 10, 1995, memorandum therefore constituted a change as compared to the unified NVRA plan.[83] As noted above, however, this argument was not dispositive because the dual NVRA plan constituted a change in voting procedures as compared to the registration system in place in Mississippi prior to January 1, 1995, as well.

The parties presented their arguments to the three-judge district court through cross-motions for summary judgment. The plaintiffs were completely unsuccessful in persuading the district court that the State's actions had violated section 5, and, on that issue, the district court unanimously granted summary judgment in favor of the State.[84] The district court started from the proposition that no unitary NVRA plan had ever been authorized under state law. It concluded that the instructions in the State's February 10, 1995, memorandum therefore should not be considered changes but, instead, were merely corrections of previously unauthorized practices:

> We hold that the February 10 letter did not effect a change subject to § 5 preclearance. We hold that the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General. Practically speaking, any other conclusion would be absurd.[85]

The district court also held that "the contents of the [submission] package regarding only administrative decisions of the state have been precleared,"[86] meaning that the Justice Department's February 1, 1995, preclearance letter should be read as granting preclearance to NVRA procedures only for federal elections. Finally, the court accepted the State's argument that adoption of a dual registration system in response to an enactment of Congress did not reflect a change covered by section 5 because Mississippi was merely complying with federal law:

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General.[87]

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81. City of Lockhart v. United States, 460 U.S. 125 (1983).
82. 42 U.S.C. § 1973c (1994).
83. Young v. Fordice, 117 S. Ct. 1228, 1235 (1997).
84. Young v. Fordice, No. 95-CV-197, slip op. at 13 (S.D. Miss. July 24, 1995).
85. *Id.* at 11.
86. *Id.*
87. *Id.* at 12.

The decision was a resounding rejection of the plaintiffs' claims. The district court's opinion, however, had not discussed any of the Supreme Court precedents on which the plaintiffs relied in support of their section 5 claim, and the plaintiffs hoped that they could successfully appeal.

VII. THE SUPREME COURT APPEAL

Because section 5 enforcement actions are in the small category of cases still brought before three-judge district courts, any appeal lies directly to the United States Supreme Court, with no intermediate stop at the Court of Appeals for the Fifth Circuit. In such cases, parties file what is known as a jurisdictional statement seeking review and argument in the Supreme Court, rather than a petition for writ of certiorari. Technically, an appeal differs from a petition for certiorari in that the Supreme Court's ruling on a jurisdictional statement constitutes a decision on the merits, whether or not the Court sets the case for full briefing and argument, whereas the Court's denial of a petition for writ of certiorari does not constitute a decision on the merits of the lower court's decision.[88] In practice, however, the Court exercises discretion over its appellate docket in a manner roughly similar to its management of the certiorari docket: it accepts only a limited percentage of direct appeals for full briefing and argument before the Court, disposing of the remainder through summary affirmance or dismissal "for want of a substantial federal question."[89]

We believed there was a fair likelihood that the Supreme Court would agree to hear our appeal because the Court historically has recognized very few exceptions to the section 5 preclearance requirement, because the rights of thousands of registrants in Mississippi were at stake, and because the case presented an important question concerning the construction of a new federal statute, the NVRA.[90] On October 1, 1996—just prior to the first Monday in October, the traditional start of the Supreme Court's term—the Court announced several cases in which it would hear argument. *Young v. Fordice* was one of them.

That was the good news. The bad news was that, because the Court was eager to fill its January argument calendar, the cases on the Court's October 1, 1996, orders list were given expedited briefing schedules. That is how *Young v. Fordice* became known around my house as "The Case that Ate Christmas." The schedule called for the plaintiff-appellant's final brief (the reply brief) to be filed by 3:00 p.m. on December 27, with oral argument before the Supreme Court scheduled

88. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977).

89. ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, KENNETH S. GELLER, SUPREME COURT PRACTICE 210-11 (7th ed. 1993).

90. Our confidence was shaken a bit when the United States, which had been a party in the district court, decided at the last minute not to perfect its Supreme Court appeal. Despite the United States' decision, the plaintiffs strongly believed that the district court's ruling, if not reversed, would open very harmful loopholes in the coverage of section 5 of the Voting Rights Act, and we decided to go forward with our appeal. The Solicitor General's office does not issue public explanations when it decides not to appeal an adverse ruling, and the result was particularly inscrutable in this case, in light of the Solicitor General's later decision to file a brief *amicus curiae* in the Supreme Court in support of the plaintiffs' appeal. In the end, the support of the United States, even as *amicus*, was very valuable because of the United States' important role in enforcing section 5 and because the Supreme Court generally considers very carefully the views of the United States in cases before the Court.

for January 6, 1997. Whatever may be the practice in the lower federal courts, one does not ask the Supreme Court for extensions to facilitate holiday plans.

A few fortunate and very skilled attorneys make a regular practice of arguing before the Supreme Court. Most other lawyers who get the opportunity to argue before the Court must rely upon a little bit of luck—having a case with the right issue, at the right time, that will attract the Court's interest. I was in the latter category and was arguing my first case before the Supreme Court.[91]

My conclusion is that having a case before the Supreme Court is about the most fun a lawyer can have. Admittedly, it was also, for me, a somewhat obsessive experience. There probably were not a great many days between October 1 and January 6 when I did not have the argument in the back—and often the front—of my mind. I was keenly aware of the grilling that attorneys receive from members of the Supreme Court because I had frequently attended Supreme Court arguments in the many voting rights cases that the Court has heard over the last five years or so. The members of the Court, while almost always polite to arguing counsel, have become (based on my observations over the past few years) ever more pitiless in pressing any weakness in an attorney's argument and in jumping upon any concessions that counsel may make. Although it can be sobering to observe the Justices' aggressive questioning and the occasional humiliation suffered by attorneys at the hands of the Supreme Court, attending these arguments was very helpful preparation. Being familiar with the awe-inspiring courtroom, with the Court's somewhat imposing rituals, and even with the questioning habits of individual Justices, somewhat dampened (but by no means entirely removed) the anxiety surrounding the experience.

It is customary, and highly recommended, for attorneys to submit themselves to one or more moot courts in advance of a Supreme Court argument. I had two. I imposed upon some very talented voting rights attorneys and Supreme Court advocates to hear my argument, fire questions at me, and then—most important of all—tell me afterwards what the correct answers should be. I believe I was more nervous in making my moot court arguments than in making the real one. That is probably because I realized that my moot court "justices" would know exactly what questions I was likely to dread the most, and would zero in on those mercilessly. They did not disappoint me. Afterwards, however, they were all quite generous in providing their advice about the case, while kindly hiding any dismay they may have felt about my presentation. This part of the preparation for a Supreme Court argument is fascinating, because one quickly sees the points on which a consensus exists about the best approach, as well as the points that evoke completely opposite reactions from different participants. For example,

91. In reporting on the experience of arguing a case before the Supreme Court, an article such as this risks creating a false impression: that the Supreme Court argument is the most important moment in the case. Except in rare circumstances, it is not. Of far more importance to the outcome of *Young v. Fordice* was the individual plaintiffs' decision to demand vindication of their rights and their perseverance in pursuing the lawsuit despite the many obstacles that were encountered. Further, the argument was secondary to the work of co-counsel in developing the factual record and otherwise laying the groundwork in the trial court. The facts and arguments that were ultimately presented to the Supreme Court—which are summarized in this article—were very much the joint work of the plaintiffs and all the co-counsel in this case.

after my first moot court, several of the judges were puzzled that I did not, in my opening remarks, make reference to the 1987 district court ruling that found Mississippi's prior dual registration system to be racially discriminatory. At my second moot court, I tried working that in, but the judges were not impressed and urged me to get to the heart of the legal issues more quickly. Part of the challenge in using moot courts to prepare for an argument lies in sifting the advice you receive while ultimately applying your own judgment to decide what will work and what will not.

When I stood to argue on behalf of the appellants, I managed to complete perhaps three sentences of my planned presentation. At that point, Justices Scalia and O'Connor broke in with questions, and I did not again, to the best of my recollection, look down to consult my notes during the remainder of the argument. Justice O'Connor wanted to know whether appellants contended that the Justice Department could object, under section 5, to Mississippi's implementation of the NVRA for federal elections only. I responded that the Justice Department could object under section 5, but only if it found that Mississippi's federal-election-only plan was racially discriminatory in purpose or effect. I did not talk quickly enough to succeed in elaborating on this point before other questions intervened. Justices Scalia and O'Connor, joined from time to time by Chief Justice Rehnquist and Justice Kennedy, pressed the question of whether a federal-election-only NVRA plan could violate section 5 when Congress had specifically provided that the NVRA applied only to federal elections. Civil rights advocates have learned to pay close attention to Justice O'Connor's questions at oral argument, because she is often the key swing vote in any divided decision in a civil rights case. I was therefore concerned to see some of the most skeptical questions coming from Justice O'Connor.

Fortunately, the pace of the Justices' questions really did not provide time to brood over the ultimate import of Justice O'Connor's views. I could only focus on trying to respond to the Justices' questions while finding opportunities to stress our most important points: that the State had made lots of discretionary choices in implementing the NVRA, that these choices had the potential for being racially discriminatory, and that the Court's precedents were squarely on the side of requiring preclearance whenever a state makes changes in its voting practices, regardless of the reason for the changes. I tried to emphasize a compelling, concrete example of the problems created by Mississippi's system by pointing out the misleading nature of the NVRA registration forms: the forms strongly implied that voters were registering for all elections, even though they were actually valid only for federal elections. This did seem to concern many of the Justices. There also seemed to be a slight pause in the questioning—however brief—when I described NVRA voters having to stand in separate lines on election day and vote separate ballots because of their limited status.

By the time I sat down, I believe that all of the Justices, save Justice Thomas, had joined in the questioning. As often happens in Supreme Court arguments, a question posed by a Justice often appeared designed more as an answer to another Justice's questions than as an inquiry to me. In my case, Justices Stevens and Ginsburg and, to a lesser extent, Justices Breyer and Souter, posed a number of

such sympathetic "questions." In such circumstances, counsel is expected to respond by expressing her agreement with the premise of the question. I complied with the prescribed ritual, feeling a bit of sympathy for the position of the board in a game of ping-pong. Although I was fully aware of how humble my role was in the drama, it was nevertheless an unforgettable thrill to be on the stage at all.

No matter how exhilarating the experience of arguing before the Court, it is frustrating when the red light goes on. An argument presents the only opportunity most attorneys will ever have to speak directly to the Justices about the merits of an important issue—one, at least, very important to my clients and to voting rights advocates throughout the country. The argument time, however, goes by with lightning speed. Inevitably, one is left to contemplate the brilliant responses that were not given. More specifically, I was concerned about the apparent skepticism of several of the Justices concerning the breadth of the appellants' interpretation of section 5.

There are some cases, however, in which the Court appears somewhat unhappy with both sides during the argument, and ours was one. Justice O'Connor, who had questioned me rather vigorously, also pressed my very able opponent about the registration forms being given to NVRA registrants and why the forms did not notify voters that their registration would be limited only to federal elections. Even Justice Scalia—who rarely sides with a broad interpretation of civil rights statutes—appeared to have some misgivings about the State's position. Justice Ginsburg stressed what seemed to be an important concession made by the State in its brief—the concession that at least some aspects of the State's NVRA plan were required to be precleared. Few, if any, of the Justices appeared receptive to the State's argument that the Justice Department's February 1, 1995, preclearance letter should be read to grant preclearance to the dual system that was initiated later by the State.

Waiting for the Supreme Court's decision is not the most enjoyable part of the Supreme Court experience. When waiting for a decision from any other court, one knows that a further appeal is still at least a theoretical possibility, should the court fail to rule in one's favor. When the Supreme Court has taken your case under advisement, no such comforting thought is available. Furthermore, the stakes are high. Not only will one's clients be bitterly disappointed at a loss, but so will everyone else whose rights may be restricted by an adverse Supreme Court precedent. The anxiety is only enhanced by knowing that the Supreme Court is the one court not truly bound by precedent. For example, we strongly believed that the Supreme Court's seminal 1969 ruling in *Allen v. State Board of Elections*[92] should control the outcome of our case. But, when I cited one of *Allen*'s holdings in answer to a question from Chief Justice Rehnquist, the Chief Justice indicated some dissatisfaction with the holding. Surely the Court could not go back on *Allen*. "Or could it?" said a small nagging voice that I could occasionally hear in the wee hours of the morning.

92. 393 U.S 544 (1969).

As it turned out, the suspense was relatively brief. The Supreme Court issued its decision on March 31, 1997, less than three months after the argument. The decision, authored by Justice Breyer, was unanimous, which came as a pleasant surprise in light of the grilling I had received from some of the Justices at oral argument. The Court held that "Mississippi has not precleared, and must preclear, the 'practices and procedures' that it sought to administer on and after February 10, 1995."[93] That was the principle from which the plaintiffs had started when they filed their complaint almost two years earlier. Without belaboring the obvious, we were glad to see the principle set forth in a Supreme Court opinion.

The opinion reaffirmed the Court's prior holdings requiring section 5 review for any change in voting practices or procedures—no matter how limited—that reflected policy choices by state officials, holding that "[i]nsofar as [the voting changes] embody discretionary decisions that have a potential for discriminatory impact, they are appropriate matters for review under § 5's preclearance process."[94] To illustrate the discriminatory potential of the State's NVRA procedures, Justice Breyer cited the possibility of voter confusion as to registrants' eligibility for state and local elections. The NVRA registration forms created by the State, according to the Court, showed that this possibility was more than theoretical:

> [B]y their lack of specificity, [the forms] probably would have led those voters—and the Attorney General—to believe that NVRA registration permitted them to vote in all elections. These forms—perfectly understandable on the "single registration" assumption—might well mislead if they cannot in fact be used to register for state elections.[95]

While noting that the State's federal-election-only NVRA plan thus had the clear potential for discrimination, the Court emphasized that the ultimate question of whether the State's procedures were, in fact, discriminatory in their impact or purpose was not within the jurisdiction of the local three-judge district court but was reserved for the United States Attorney General or the District Court for the District of Columbia.[96]

The Court rejected one of the plaintiffs' arguments by holding that the State's implementation of NVRA procedures on a unitary basis in early 1995 was not a practice "in force or effect" for purposes of section 5 and thus did not become part of the baseline against which to measure further changes in the State's practices.[97] The Court reasoned that the unitary system, which the Court called the "Provisional Plan," was not intended to be permanent unless the legislature enacted NVRA legislation, that the plan was in place for only a few weeks, and that no elections had been held while the unitary plan was in place. These fac-

93. Young v. Fordice, 117 S. Ct. 1228, 1239 (1997).

94. *Id.* at 1236.

95. *Id.* at 1237 (citations omitted). *See also id.* at 1237 (noting that state discretion in deciding what kind of information to provide NVRA registrants concerning their ineligibility for state and local elections "makes Mississippi's changes to the New System the kind of discretionary, nonministerial changes that call for federal [Voting Rights Act] review").

96. *Id.* at 1239 (stating that a question of actual discriminatory impact or purpose "is an argument about the merits").

97. *Id.* at 1235.

tors, the Court concluded, distinguished this case from the circumstances addressed in *Perkins v. Matthews*, in which an election system that was illegal under state law was nevertheless deemed a practice "in force or effect" for purposes of section 5.[98] The Court concluded, however, that the legal status of the unitary NVRA plan used in early 1995 did not change the outcome of the case, because the State's federal-election-only NVRA plan reflected a change from the procedures in effect prior to 1995.[99] In so concluding, the Court rejected Mississippi's two major arguments against the application of section 5 to its federal-election-only NVRA plan.

First, the Court ruled that the State's December 1994 section 5 submission to the United States Attorney General had failed to identify with specificity the federal-election-only nature of the NVRA plan the State ultimately implemented.[100] The Court pointed out, for example, that "the submission included no instructions to voter registration officials about treating NVRA registrants differently from other voters and provided for no notice to NVRA registrants that they could not vote in state elections."[101] The mere reference to the possibility of a dual registration system in one passage in the State's submission did not, the Court held, provide adequate notice to the Attorney General that the State intended to implement a dual system in the absence of legislative action.[102] Citing its holdings in *Clark v. Roemer* and *McCain v. Lybrand*, the Court decisively rejected the State's argument that preclearance of a dual registration system should be presumed because the Attorney General could have made further inquiries to clarify the State's intentions before acting on the State's section 5 submission.[103] As the Court explained:

> [T]he issue, of course, is not whether [the Attorney General] should or should not have issued a preclearance letter on February 1, 1995, but rather *what it was* that she precleared. Her failure to seek added information makes it more likely, not less likely, that she intended to preclear what she took to be the natural import of the earlier submission, namely a proposal for a single state/federal registration system.[104]

Second, the Court rejected Mississippi's argument that, by simply maintaining its prior registration requirements for state and local elections, and implementing the NVRA for federal elections as required by the NVRA, the State made no changes in voting procedures subject to section 5 review. While acknowledging that "the State has no choice but to [adopt the NVRA federal registration system]" and that "a State's retention of a prior system for state elections, by itself, is not a change," the Court held that implementing the NVRA involves discretionary choices and thus requires preclearance.[105] As the Court explained:

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98. Perkins v. Matthews, 400 U.S. 379, 394-95 (1971).
99. Young v. Fordice, 117 S. Ct. 1228, 1235 (1997).
100. *Id.* at 1237.
101. *Id.*
102. *Id.*
103. *See* Clark v. Roemer 500 U.S. 646 (1991); McCain v. Lybrand 465 U.S. 236 (1984).
104. *Young*, 117 S. Ct. at 1238.
105. *Id.* at 1239.

> The problem for Mississippi is that preclearance typically requires examination of discretionary changes in context — a context that includes history, purpose, and practical effect. *See City of Lockhart v. United States*, 460 U.S., at 131 ("The possible discriminatory purpose or effect of the [changes], admittedly subject to § 5, cannot be determined in isolation from the 'preexisting' elements of the council."). The appellants and the government argue that *in context* and in light of their practical effects, the particular changes and the way in which Mississippi administers them *could* have the "purpose [or] . . . effect of denying or abridging the right to vote on account of race or color. . . ." We cannot say whether or not that is so, for that is an argument about the merits. The question here is "preclearance," and preclearance is necessary so that the appellants and the Government will have the opportunity to find out if it is true.[106]

Accordingly, the Court directed that Mississippi must submit for preclearance "the 'practices and procedures' that it sought to administer on and after February 10, 1995,"[107] reversing the judgment of the district court and remanding the case for implementation of an appropriate remedy.[108]

VIII. CONCLUSION

The Supreme Court's decision in *Young v. Fordice* reaffirms the central role of section 5 of the Voting Rights Act in protecting minority citizens against racial discrimination in the electoral process. Shortly after Congress enacted section 5 in 1965, the Court insisted that section 5 must be given "the broadest possible scope" to require preclearance of all changes in laws or practices affecting voting, even if they appear to be minor or innocent.[109] This expansive reading accords with Congress' conclusion that case-by-case litigation was ineffective in overcoming states' "unremitting and ingenious defiance of the Constitution," whereby new barriers to equal political participation were constantly being erected whenever an existing practice was struck down by the federal courts.[110] The requirement of preclearance for all changes affecting voting in covered jurisdictions has served as a critical safeguard against racial discrimination in the electoral process.

Notwithstanding the Supreme Court's repeated and forceful pronouncements upholding a broad construction of section 5's scope, covered jurisdictions have continually tested the federal courts' commitment to section 5 by arguing for exemptions and by refusing to submit changes for preclearance even when informed by the Justice Department that their failure to do so violates federal law.[111] These efforts to evade the preclearance requirement would undoubtedly

106. *Id.*
107. *Id.*
108. *Id.*
109. Allen v. State Bd. of Elections, 393 U.S. 544, 566-67 (1969).
110. South Carolina v. Katzenbach, 383 U.S. 301, 309, 334-35 (1966).
111. *See, e.g.*, Clark v. Roemer, 500 U.S. 646 (1991) (State of Louisiana refused to submit changes related to state-court judicial elections for section 5 preclearance, despite Justice Department's longstanding objection to unprecleared changes); NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) (county election commission refused to seek preclearance for change in date of election, despite Justice Department's request for submission).

intensify and could easily overwhelm the ability of the Justice Department and private plaintiffs to enforce section 5, were the Supreme Court to signal any significant retreat from its categorical requirement of preclearance for all changes affecting voting. Because the circumstances in *Young* were somewhat unusual, with the changes at issue having been prompted by the requirements of another federal statute, the case could have offered an inviting target had the Supreme Court been inclined to retreat from its past precedents and begin recognizing exceptions to the preclearance requirement. The Court's refusal to do so in *Young* is a clear reaffirmation of the continuing vitality of precedents first established during a far more liberal era on the Court.

Indeed, by regularly noting jurisdiction and reversing cases where lower courts have declined to enforce the section 5 preclearance requirement, the Supreme Court has sent fairly strong signals that help discourage end runs around section 5 and promote uniform application of the law.[112] The fact that several of these decisions over the last few years, including *Young v. Fordice*, have been unanimous, is particularly striking given the deep divisions on the Court on other issues involving race and the political process.

The subsequent history of *Young v. Fordice* underscores the importance of the section 5 preclearance requirement, particularly as it applies to Mississippi. Following the Supreme Court's decision, the Justice Department finally was able to conduct its section 5 review of the State's dual NVRA registration procedures. The evidence demonstrated serious racial disparities in the impact of the dual registration requirement. These disparities took several forms but had the result of disproportionately "preventing [African American citizens] . . . from voting in state and local elections."[113] The evidence showed, for example, that drivers' license offices in Mississippi, a majority of whose visitors are white, have been providing registrants with a choice of federal-election-only NVRA forms or state mail-in forms that will make a voter eligible for all elections. The public assistance agencies in Mississippi, however, which are also designated as NVRA registration sites, do not offer their clients the opportunity to register on state mail-in forms but offer only the NVRA forms that result in eligibility for federal elections only. The majority of these clients are African American.[114] Thus, it appears that the majority of those citizens relegated to the separate federal-election-only poll lists are African American. Moreover, there is wide variation from county to county in the type of notice given to NVRA registrants concerning their limited status and in the opportunities that are offered to register separately for state and local elections.[115] As the Justice Department notes, "[s]everal of the State's poorest counties with significant black populations appear to be among those which have had the least success in registering NVRA voters for state elec-

112. In its 1996 Term alone, the Supreme Court issued three unanimous decisions overturning district court decisions that had found the section 5 preclearance requirement inapplicable to particular voting changes. In addition to *Young v. Fordice*, these were *Lopez v. Monterey County*, 117 S. Ct. 340 (1996), and *Foreman v. Dallas County*, 117 S. Ct. 2357 (1997) (per curiam).

113. Letter dated September 22, 1997, from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division, to Sandra M. Shelson, Special Assistant Attorney General, State of Mississippi, at 5.

114. *Id.* at 3-4.

115. *Id.* at 4-5.

tions."[116] The end result of the dual NVRA system—just like the result of Mississippi's prior dual registration system—is to "hamper[] the ability of black persons to participate in the political process."[117] The open animus toward so-called "welfare voters" expressed by some state officials also casts significant doubt on the State's assertion that the dual NVRA plan was free of any racially discriminatory purpose or effect.[118]

As these facts about the operation of the dual NVRA system indicate, the requirement of section 5 preclearance remains a critical tool in the effort to protect African American citizens in Mississippi from racial discrimination in the exercise of their most fundamental right—the right to vote. Criticisms of section 5 as an intrusion on states' rights thus begs an important question: what do we mean when we talk about "the State" whose rights should be preserved? If the State is understood to include black citizens as well as white, the poor as well as the well-off, then section 5 serves the State well by guarding against deprivations of the basic rights of state citizenship. Extending the franchise as broadly as possible does not endanger the State, but strengthens it. That straightforward proposition probably best summarizes the perspective of the plaintiffs in *Young v. Fordice.*

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116. *Id.*
117. *Id.* at 5.
118. *Id.*