IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DAVID W. MYERS, CHARLENE, FLIPPIN, THAXTER PITTMAN, SUANE HUFF, and GAIL HUFF,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:05CV481
CITY OF MCCOMB, MISSISSIPPI,	)	
Defendant.	)	

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

I. INTRODUCTION

This Court should deny the City of McComb's Motion to Dissolve Injunction and affirm its November 23, 2005 Order prohibiting enforcement of the Mississippi Supreme Court's ruling in Myers v. City of McComb, 943 So. 2d 1 (Miss. 2006), pending compliance with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, amended by The Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006). In Myers, the Mississippi Supreme Court found that the prohibition on David Myers' dual service, as Selectman in McComb and state legislator, was not a new interpretation of state law but rather an old proscription that pre-dates the enactment of the Voting Rights Act. On that basis, the Court ruled that the prohibition of Myers' dual service did not constitute a voting change in need of preclearance under Section 5.

The Mississippi Supreme Court, however, did not have authority to address the Section 5 issue because this Court had already considered and ruled on that issue approximately one year before any state court considered it, and this Court prospectively enjoined the Mississippi Supreme Court's decision in the event it affirmed the lower state court's ruling. The limited jurisdiction that state courts have over collateral Section 5 issues cannot be distorted to allow the Mississippi Supreme Court to exercise, in essence, appellate review over this Court's injunction.

Even if the Mississippi Supreme Court had the authority to address the Section 5 issue, the Court incorrectly analyzed whether the prohibition of Myers' dual service constituted a voting change under Section 5. To determine whether a voting change has occurred, Section 5 requires that courts compare the challenged practice with the practice in existence on the jurisdiction's coverage date under Section 5. In determining whether its ruling constituted a change, however, the Mississippi Supreme Court compared the prohibition of Myers' dual service with what the law required, not with the practice in effect, on Mississippi's coverage date. Such an analysis constitutes error because, as this Court noted, the evidence in the record shows that the only practice that was ever actually in effect permitted Myers' dual service. Because the Supreme Court's order prohibiting Myers' dual service deviates from the actual practice in effect on Mississippi's coverage date, there has been a change within the meaning of Section 5. Moreover, as this Court found, the change affects the eligibility of Myers to remain a holder of elective office, and is thus a change "affecting voting" under Section 5.

Because this Court correctly decided the Section 5 issue, and since it is not bound by the Mississippi Supreme Court's ruling, this Court should deny the City's Motion to Dissolve Injunction.

II. STATEMENT

Since October 1991, Plaintiff David W. Myers has served as a Selectman on the City of McComb's Board of Mayor and Selectmen, which is the City's governing body. In 1995, Myers was elected to the Mississippi House of Representatives, and he began his service as a state legislator in January 1996. Since then, Myers has consecutively and simultaneously held both offices.

On March 12, 2002, after a dispute between Selectman Myers and other members of the Board of Mayor and Selectmen, the City adopted an ordinance prohibiting its elected officials from serving in the state legislature.[1] Upon passing the ordinance, the City sought an opinion from the Office of the Mississippi Attorney General on two questions: "(a) Whether the holding of dual elected public offices [as it relates to Myers] violates the state constitution, public policy and the laws of Mississippi; and (b) Whether the [City's newly-passed] ordinance is a valid exercise of municipal authority." 2002 WL 1833290 (Miss. A.G. Mar. 2002).[2] The Office of the Mississippi Attorney General responded that (1) it did not violate Mississippi's separation of powers clause for an elected municipal alderman to serve in the state legislature, as both positions fell within the legislative branch; (2) in order for the City to change the qualifications of candidates for elected office, the City would have to pass an amendment to its special charter,

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[1] In pertinent part, the ordinance made it unlawful for any of the City's elected officials to "[s]erve as an elected official in any governmental entity which appropriates funds to be received by the City of McComb . . . in the administration of municipal governmental affairs" or to "[s]erve as an elected official in any governmental entity which is empowered to grant or deny any request by the City of McComb for any relief, funding, or other action relating to the operation of the municipal government of the City of McComb." City of McComb, Miss., Ordinance #1:03/02 (Mar. 12, 2002).

[2] Westlaw has incorrectly dated this advisory opinion as July 3, 2002.

not an ordinance; and (3) the Mississippi legislature had recently enacted Chapter 590, a law prohibiting municipalities from imposing any additional requirements on holding municipal elective office, and such law was being reviewed by the Attorney General for preclearance under Section 5 of the Voting Rights Act before taking effect. Id.

On July 9, 2002, the City voted to conditionally amend its special charter to include a prohibition on dual service that mirrored the one contained in the prior ordinance. See Amendment to Municipal Charter of the City of McComb, With Respect to Conflicts of Interest, § 1(b) & (c) (July 9, 2002). The amendment was conditional in that in order to become effective, it needed to be approved under Section 5 of the Voting Rights Act. Id. § 2.

On July 22, 2002, the Attorney General precleared Chapter 590, enacted by the Mississippi legislature, which provides: "No municipality . . . shall impose any additional requirements on holding any municipal elective office or receiving compensation for any elective office except as may be provided by law," Miss. Code Ann. § 21-15-2 (2006).

On August 8, 2002, the City submitted its conditional amendment prohibiting dual service to the governor of Mississippi pursuant to Miss. Code Ann. § 21-17-9, which requires that such changes be reviewed by the Mississippi Attorney General to ensure that they are "consistent with the Constitution and Laws of the United States, and the Constitution of this State," Miss. Code Ann. § 21-17-9 (2006). 2002 WL 32087433 (Miss. A.G. Aug. 2002).[3] In response, the Office of the Mississippi Attorney General found that McComb's conditional amendment was inconsistent with Chapter 590, which became effective on July 22, 2002, and refused to approve the amendment. Id. The amendment never took effect.

[3] Westlaw has incorrectly dated this advisory opinion as "March 56, 2002."

On August 24, 2002, the City of McComb filed an amended complaint against Selectman Myers in the Pike County Circuit Court, seeking, among other things, a declaration that: (i) Myers' dual service in the state legislature and the City's Board of Mayor and Selectmen violated the Mississippi Constitution's separation of powers clause; and (ii) such dual service violated the common law doctrine of incompatible offices. Myers removed the case to the United States District Court for the Southern District of Mississippi. In his answer, Myers denied that his dual service violated state law and alleged that the City's attempt to prohibit his dual service constituted a voting change in need of preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

After the parties filed cross motions for summary judgment, this Court (Wingate, J.), on September 30, 2003, ruled in Myers' favor. See City of McComb v. Myers, No. 3:02-cv-1397HTW (S.D. Miss. Sept. 30, 2003). The Court found that Myers' dual service did not conflict with either the Mississippi Constitution or the common law doctrine of incompatible offices. See id.

The City appealed the grant of summary judgment, and on December 6, 2004, the Fifth Circuit vacated this Court's ruling for lack of federal jurisdiction because there was no diversity of citizenship and the cause of action was based solely on state law. See City of McComb v. Myers, 122 Fed. Appx. 698, 699-70 (5th Cir. 2004). The case was remanded to state court. Id.

On May 13, 2005, the Pike County Circuit Court, on remand, held that the separation of powers clause in Mississippi's constitution and the common law doctrine of incompatible offices prohibited Myers from serving in both positions. City of McComb v. Myers, No. 02-CA-124 (Pike County Circuit Court May 13, 2005). The Pike County Circuit Court did not address the

issue of whether its ruling constituted a change under Section 5. Id. Myers appealed the decision to the Mississippi Supreme Court on June 29, 2005.

On August 3, 2005, while Myers' appeal to the Mississippi Supreme Court was pending, Myers filed the instant action, seeking, among other things, an order declaring that the Pike County Circuit Court's ruling prohibiting dual service constituted a voting change in need of preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (Compl. ¶ 37(c)). On November 23, 2005, this Court granted Myers' motion for preliminary injunction and enjoined the enforcement of the Pike County Circuit Court order, pending compliance with Section 5. (Order, Nov. 23, 2005 at 18). This Court found that the state court's ruling prohibiting Myers' dual service was a new interpretation and application of state law that constituted a voting change because until the Pike County Circuit Court's ruling, "no court had interpreted [Mississippi's separation of powers clause] to prevent simultaneously holding office in a municipality's governing body and the legislature." Id. at 12. Though this Court did not stay Myers' appeal to the Mississippi Supreme Court, it ruled that should the Mississippi Supreme Court "affirm the state court order, *that order, and McComb's enforcement of it, remain enjoined pending § 5 compliance*." Id. at 10 (emphasis added). On February 7, 2006, this Court ordered a stay of further proceedings pending resolution of Myers' appeal to the Mississippi Supreme Court. (Order, Feb. 7, 2006 at 4).

On October 5, 2006, the Mississippi Supreme Court affirmed the Pike County Circuit Court. See Myers v. City of McComb, 943 So. 2d 1 (Miss. 2006). The Mississippi Supreme Court held that as a private charter city, Miss. Code. Ann. § 21-1-9 (2006), with a "weak mayor/strong council" form of government, members of McComb's Board of Mayor and

Selectmen perform functions that are both legislative and executive in nature, including enacting local laws and appointing the agents who enforce them. Myers, 943 So. 2d at 3-4. The Mississippi Supreme Court concluded that (1) the State's separation of powers clause and the common law doctrine of incompatible offices prohibited Myers from simultaneously holding both of his elected offices; (2) such a prohibition has been the law in Mississippi long before the Voting Rights Act was enacted and that, consequently, the Mississippi Supreme Court's ruling on the matter did not constitute a voting change under Section 5; and (3) even if it did, the ruling did not have the purpose or effect of denying or abridging the right to vote on account of race or color. Id. at 7-11. On December 15, 2006, the Court denied rehearing. Myers, 943 So. 2d at 1.

On November 3, 2006, the City filed a Motion to Dissolve Injunction in this Court, arguing that this Court should reconsider its decision that the Pike County Circuit Court's order was a voting change in need of Section 5 preclearance in light of the Mississippi Supreme Court's ruling. (Mot. to Dissolve Inj., ¶ 8). More specifically, the City argues that this Court is bound by the doctrines of collateral estoppel and res judicata to follow the Mississippi Supreme Court's ruling on the Section 5 issue. Id. Alternatively, the City asks that this Court defer to the Mississippi Supreme Court's findings of fact and conclusions of law. (Mem. In Supp. of Def.'s Mot. to Dissolve Inj. at 10 n.5).

On January 12, 2007, this Court sent a letter to the United States Attorney for the Southern District of Mississippi "inviting the government to participate herein either by intervening or filing an amicus curiae brief." The United States files this brief as amicus curiae pursuant to the Court's invitation.

III. ARGUMENT

A. Because the Mississippi Supreme Court did not have authority over the Section 5 issue already determined by this Court, its ruling on the Section 5 issue cannot have preclusive effect.

Once this Court assumed jurisdiction of and determined the Section 5 coverage question, the state courts did not have authority to address it. The Voting Rights Act vests jurisdiction in three-judge federal district courts to determine whether voting changes are subject to the preclearance requirements of Section 5. 42 U.S.C. §§ 1973c & 1973j(d); see also Allen v. State Bd. of Elections, 393 U.S. 544, 557-560 (1969). Whether in an action brought by the Attorney General or a private citizen, these courts also have the power to enjoin implementation of voting changes covered by Section 5 until the preclearance requirements have been met. Allen, 393 U.S. at 560-563; 42 U.S.C. § 1973j(d) & (f). A district court's ruling on a Section 5 issue is subject to review only by the United States Supreme Court. 42 U.S.C. § 1973c.

Here, Myers and other plaintiff voters filed the Section 5 action, this Court was properly convened to address it, and this Court enjoined implementation of the state court's order until Section 5's preclearance requirements were met. The Mississippi Supreme Court's adjudication of the Section 5 preclearance question was in effect a review of this Court's previous determination that the Pike County Circuit Court's ruling is subject to Section 5's preclearance requirements, and it was improper for it to do so. Id. ("[A]ny appeal [under Section 5] shall lie to the Supreme Court.").

The United States Supreme Court's decision in Hathorn v. Lovorn, 457 U.S. 255 (1982), supports this conclusion. Although Hathorn recognized that state courts have concurrent jurisdiction to address a Section 5 issue where it arises as a collateral question, such jurisdiction

does not permit state courts to engage in a reconsideration of an issue already determined by a properly-convened federal court. In Hathorn, five Mississippi voters filed suit in state court seeking to enforce a state statute regarding elections for the boards of trustees of municipal separate school districts. 457 U.S. at 257-58. The Mississippi Supreme Court ordered that an election be held pursuant to the statute, despite claims that the election could not go forward without preclearance under Section 5. Id. at 259-61. On review to the United States Supreme Court, it was undisputed that the election procedures ordered by the Mississippi Supreme Court constituted a change subject to Section 5 preclearance, id. at 265, but respondents argued that state courts do not have authority under the Voting Rights Act to decide whether their rulings constitute a Section 5 change. Id. at 265-66. The Supreme Court held that a state court may properly determine, as a collateral matter, whether a state law must be precleared before it is implemented. Id. at 268-69. Indeed, "[g]ranting state courts the power to decide, as a collateral matter, whether § 5 applies to contemplated changes in election procedures will help insure compliance with [Section 5's] preclearance scheme." Id. at 268. The Court explained that, absent a state court's authority to determine Section 5's coverage under these "limited" circumstances, state courts may be placed "in the uncomfortable position of ordering voting changes that they suspect, but cannot determine, should be precleared under § 5." Id. at 268-69.[4]

[4] The Hathorn Court explained, however, that "[i]t is possible that [42 U.S.C. § 1973c] grant[s] federal courts exclusive jurisdiction over action[s] under § 5 . . . ." 457 U.S. at 267-268. The Hathorn Court did not need to address whether direct claims, such as the claim before this Court, must be heard exclusively in federal court because there was no pending Section 5 action in Hathorn at the time the issue arose in the state court proceeding. It was only after the Mississippi Supreme Court issued its ruling on the state claims that a federal case was brought in Hathorn. 457 U.S. at 261 n.8.

The Section 5 claim here was not a collateral claim properly considered by the Mississippi Supreme Court under Hathorn. Unlike in Hathorn, here a federal court had already considered and ruled on the Section 5 coverage question, approximately one year before any state court considered it, and this Court prospectively enjoined the Mississippi Supreme Court's decision in the event it affirmed the lower state court's ruling. This Court's order served to "insure compliance with [Section 5's] preclearance scheme" and there was no possibility that the Mississippi Supreme Court would be placed "in the uncomfortable position of ordering voting changes that [it] suspect[s], but cannot determine, should be precleared under § 5." 457 U.S. at 268-69. In short, there was no collateral Section 5 issue to be resolved in state court, nor was there concomitant authority to do so, because this Court had already exercised jurisdiction over it. The "limited" jurisdiction allowed for in Hathorn cannot be distorted to allow a state court to exercise, in essence, appellate review over a properly-convened Section 5 court.

Moreover, the Hathorn Court implicitly recognized the authority of federal courts over state courts when simultaneous parallel proceedings arise involving Section 5. Subsequent to the state court proceedings in Hathorn, the Attorney General filed a suit challenging the election practices at issue. 457 U.S. at 261 n.8. After enjoining the implementation of the election practices ordered by the state court, the Hathorn Court left the issue of remedy to the federal court considering the Attorney General's claim – a tacit recognition that the district court "entertaining the suit" brought under Section 5 is the proper court to resolve Section 5 issues, even those that first arose in a state court proceeding. Id. at 270. Here, the claim brought pursuant to Section 5 was first entertained by and ruled upon by this Court, not the state court.

Under these circumstances, Hathorn provides strong support for maintaining the Section 5 issue within the jurisdiction of the federal court.

Because the Mississippi Supreme Court had no authority to address the Section 5 issue, its ruling on the matter cannot bind this Court.[5]

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[5] Even if this Court were to rule that the Mississippi Supreme Court had authority to address the Section 5 issue, its ruling has no collateral estoppel or res judicata effect on this Court because the parties in the state court case are not the same as the parties here, and there is no privity between Myers and the non-parties to the state court case. Here, four plaintiffs were not parties to the original state court case. (Compl. at 1). For collateral estoppel or res judicata to apply to them, there must be privity between them and Myers. Black v. City of Tupelo, 853 So. 2d 1221, 1225 (Miss. 2003); Weaver v. City of Pascagoula, 527 So. 2d 651, 653 (Miss. 1988); Black v. N. Panola Sch. Dist., 461 F.3d 584, 588 (5th Cir. 2006) (noting that federal courts must apply the preclusion law of the state in which the original action is filed). The City's mere assertion that such privity exists because "Myers is a party in both actions and the interest of the additional parties in this case was represented by Myers in the state court case," (Mem. In Supp. of Def.'s Mot. to Dissolve Inj. at 8), is unavailing. For Myers to have adequately represented the non-party plaintiffs in state court, there must have been "an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." Meza v. General Battery Corp., 908 F.2d 1262, 1272 (5th Cir. 1990). There is no indication of any express or implied legal relationship between Myers and the non-party plaintiffs – the non-party plaintiffs were not even associated with Myers when the City filed its state court lawsuit against him. In fact, Myers and the non-party plaintiffs did not file the instant suit until three years after the City filed its state court action. Moreover, we are aware of nothing in the record to support the conclusion that the non-party plaintiffs consented to Myers' representation or that Myers has any contractual or statutory duty to represent them.

It is also apparent that the requirement of identity of quality or character is lacking here, a requirement that is necessary for res judicata or collateral estoppel to apply. Dunaway v. W.H. Hopper and Assoc., Inc., 422 So. 2d 749, 751 (Miss. 1982); Smith v. Malouf, 826 So. 2d 1256, 1260 (Miss. 2002). In state court, the City sued Myers in his official capacity as a Selectman of McComb to have him removed from office and to have his dual service declared unlawful. Conversely, Myers brought his Section 5 claim here in his personal capacity as just another voter seeking to elect a candidate of his choice. (Compl. at 2) ("Plaintiffs are African-American adult resident citizens and electors of Ward 3 McComb, Mississippi who wish to support and vote for plaintiff Myers as selectman of ward 3 . . . .").

B. This Court correctly concluded that the Pike County Circuit Court's ruling, now affirmed by the Mississippi Supreme Court, effectuated a voting change under Section 5 and is thus legally unenforceable until preclearance is obtained.

Section 5 of the Voting Rights Act requires covered jurisdictions, like Mississippi, to submit for review "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. No new voting practice may be legally enforced unless and until the covered jurisdiction obtains a declaratory judgment from the United States District Court for the District of Columbia that the proposed change does not have the purpose or effect of denying or abridging the right to vote on account of race or color, or the Attorney General declines to object to a change submitted to him. Id.

"The Act requires preclearance of all voting changes," including changes that relate to or stem from state court orders. Branch v. Smith, 538 U.S. 254, 262 (2003) (noting that "there is no dispute that this [case] includes voting changes mandated by order of a state court"); Hathorn, 457 U.S. at 266 n.16 ("[T]he presence of a [state] court decree does not exempt the contested change from Section 5."); see also League of United Latin Am. Citizens of Texas v. Texas, 113 F.3d 53, 55 (5th Cir. 1997); Gresham v. Harris, 695 F. Supp. 1179, 1183-84 (N.D. Ga. 1988); Turner v. Webster, 637 F. Supp. 1089, 1092 (N.D. Ala. 1986); In re McMillin, 642 So. 2d 1336, 1339 (Miss. 1994) (ruling that order by state court "enjoining the judicial primaries constitutes a change in voting standards, practices and procedures also subject to Section 5 preclearance or approval").

1. To determine whether a voting change has occurred here, this Court must compare the prohibition of Myers' dual service as announced in the

> Mississippi Supreme Court's ruling with the actual practices in effect in the jurisdiction on November 1, 1964.

To determine whether a voting change has occurred under Section 5, courts "must compare the challenged practices with those in existence before they were adopted. Absent relevant intervening changes, the Act requires [courts] to use practices in existence on November 1, 1964, as [the] standard of comparison." Presley v. Etowah County Comm., 502 U.S. 491, 495 (1992); City of Lockhart v. United States, 460 U.S. 125, 132 (1983) (same); Young v. Fordice, 520 U.S. 273, 282 (1997) (same).[6]

It is the actual practice of the jurisdiction – either on its coverage date or after the implementation of a subsequent precleared change – that sets the benchmark. This is true even if the actual practice in effect deviates from or conflicts with state law. In Perkins v. Matthews, 400 U.S. 379 (1971), the City of Canton, Mississippi, held elections by wards in 1965, even though a 1962 Mississippi statute required at-large elections for the City. Id. at 394. On November 1, 1964, the date of Mississippi's coverage under Section 5, there was no municipal election in Canton. Id. When the City sought to have an election in 1969 under an at-large method, a suit was filed against the City claiming that the at-large method was a change from the

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[6] A "relevant intervening change" becomes the benchmark practice to be used as the standard of comparison only if the change has received preclearance under Section 5 and is in force and effect. Kennedy v. Riley, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006) ("Changes 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."); see also Young, 520 U.S. at 282 (same); Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended, 28 C.F.R. § 51.54(b) (Section 5 benchmark is established by comparing "the submitted change to the voting practice or procedure in effect at the time of submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under Section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.").

ward system that had not been precleared under Section 5. Id. at 382-83. The Supreme Court stated that "Section 5's reference to the procedure 'in force or effect on November 1, 1964' must be taken to mean the procedure that would have been followed if the election had been held on that date." Id. at 394. Since Canton did not hold an election on that date, however, that determination would have to be inferred from the relevant facts. Id. The Supreme Court continued:

> Ordinarily we presume that officials will act in accordance with the law. If the only available facts showed that Canton had conducted its 1961 election by wards but that the Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption. With the benefit of hindsight, however, we know that Canton elected its alderman by wards in its June 1965 municipal election. The record reflects no relevant change between November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven months earlier.

Id. at 395 (internal citations omitted). The Court concluded that the ward system was in force or effect in Canton on November 1, 1964, even though it was illegal under state law. Thus the 1969 at-large election method, even though authorized by a state law enacted prior to the coverage date, constituted a change under Section 5 in need of preclearance. Id.

The Supreme Court addressed the benchmark question again in City of Lockhart v. United States, 460 U.S. at 127. The City of Lockhart, Texas, held elections using a "numbered post" system under which commissioner candidates specified the post for which they sought election. Id. The City maintained such a system through its coverage date under Section 5, even though it may have been illegal under state law for Lockhart to use a numbered-post system. Id. at 127 & 132. Subsequently, the City adopted a new municipal election system, which also

incorporated numbered posts. Id. at 127-29. To determine whether the new election system constituted a change under Section 5, the district court compared the new system to what the old practice would have been without numbered posts. Id. at 132. The district court justified this comparison on the grounds that Lockhart was not entitled to use a numbered-post system under state law. Id. The Supreme Court reversed the district court's ruling, holding that "the proper comparison is between the new system and the system actually in effect on [the coverage date], regardless of what state law might have required." Id. The Court saw its ruling as in accord with the Voting Rights Act's underlying policy of "halt[ing] actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." Id. at 133; see also Young, 520 U.S. at 283 (explaining that "the 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'" because a jurisdiction "after all, might maintain in effect for many years a plan that technically, or in one respect or another, violated some provision of state law"); LULAC, 113 F.3d at 55 ("[I]n determining whether a voting change has occurred, a court must look to the state's actual practices, not to what those practices should have been under a correct application of the state's voting law.").

Under Perkins and City of Lockhart, the analysis of whether the state court's rulings regarding the validity of Myers' dual service resulted in a change subject to Section 5 begins with a determination of the appropriate benchmark standard, practice, or procedure. The benchmark here is the practice in force or effect on November 1, 1964, unless a modification, which has been precleared under Section 5, has been implemented.

We do not understand there to be any contention that the State of Mississippi has ever obtained Section 5 preclearance of the dual service practice at issue, nor of any prohibition against it.[7] Accordingly, the benchmark to be used as the standard of comparison must be the practice in effect at the time of Mississippi's coverage date, whether or not it comports with Mississippi law, and this Court must compare the prohibition of Myers' dual service dictated by the Mississippi Supreme Court's ruling with the practices in effect on November 1, 1964.

2. The most recent standards, practices, and procedures in force or effect prior to the Mississippi Supreme Court's ruling allowed Myers to serve as both selectman and state representative and indicate that a prohibition on dual service was not in effect on November 1, 1964, or since that time.

The actions of the City and the State's executive branch – both recent and over time – reinforce the conclusion that dual service was a permissible practice. A number of factors support reaffirmance of this Court's earlier finding that a prohibition on dual service was not in effect as of the Section 5 coverage date.

First, for six years, from 1996 to 2002, Myers served in dual roles without the City or State ever challenging his authority or prohibiting such service. Had the dual service prohibition been in effect Myers likely would not have been able to hold both positions, and certainly not for such a long time.

Second, in 2002, the City of McComb passed an ordinance prohibiting dual service. City of McComb, Miss., Ordinance #1:03/02 (March 12, 2002). Had there been a prohibition of dual service in effect, there would have been no need for the City to outlaw what was already illegal.

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[7] Mississippi has submitted changes for preclearance under Section 5 to the Attorney General on the topic of public servant conduct; none resulted in preclearance of the dual service at issue. A summary of these Section 5 submissions, along with the Attorney General's determination letters, are contained in attached Exhibit A.

Third, after the City passed the ordinance, it sought an opinion from the Office of the Mississippi Attorney General on the validity of Myers' holding of dual offices under "the state constitution, public policy and the laws of Mississippi." 2002 WL 1833290 (Miss. A.G. March 2002). In its response, the Office of the Mississippi Attorney General found Myers' dual service did not violate Mississippi's separation of powers clause. The opinion states:

> We direct you to a previous opinion from this office to Honorable David Jordan dated November 25, 1992. In that opinion, we held that it was not a violation of [separation of powers] for a member of the state legislature to simultaneously serve as an elected municipal alderman, as both positions are squarely within the legislative branch. We see no reason to depart from our prior opinion.

Id. The Mississippi Attorney General, the chief legal officer of the State, plainly recognized the legality of Myers' dual service, endorsed the practice, and saw no difference between Myers' situation and David Jordan's dual service from 1992, which had been endorsed by the Office of the Mississippi Attorney General 10 years earlier, see 1992 WL 614295 (Miss. A.G. Nov. 25, 1992).

Fourth, on July 9, 2002, the City voted to amend its charter to prohibit Myers' dual service, conditioned upon Section 5 approval. Amendment to Municipal Charter of the City of McComb, With Respect to Conflicts of Interest, § 1(b) & (c) (July 9, 2002). Again, had such service been prohibited by the practice in effect, there would have been no need for the City to seek an amendment outlawing what was already illegal or condition the amendment on Section 5 approval.

Fifth, the City submitted its conditional amendment prohibiting dual service to the Mississippi Attorney General for review pursuant to Miss. Code Ann. § 21-17-9, to ensure that it

was "consistent with the Constitution and Laws of the United States, and the Constitution of this State." 2002 WL 32087433 (Miss. A.G. 2002). The advisory opinion concluded that the conditional amendment ran afoul of Miss. Code Ann. § 21-15-2, which went into effect on July 22, 2002.[8] See id. Again, had there been a prohibition of dual service in effect, the City would not have needed to go to such lengths to prevent Myers from serving in both roles.

Finally, the City of McComb conceded to this Court that the issues presented in its state court case regarding the prohibition of dual service raised issues of first impression. (Order, Nov. 23, 2005, at 14). The City has not argued that there has been, in practice, a prohibition on dual service in effect.

Moreover, neither the City nor the Mississippi Supreme Court cited a single case in which a court ruled that either the separation of powers clause or the doctrine of incompatible offices prohibited a municipal legislator in a weak mayor/strong council form of government from serving in the state legislature. Equally telling, none of the 59 advisory opinions from the Office of the Mississippi Attorney General cited by the City in its Response to Myers' Motion for Rehearing in the Mississippi Supreme Court apply the separation of powers clause or the doctrine of incompatible offices to such dual service, let alone prohibit it. (Mot. to Dissolve Inj. Attach. #4).

To the contrary, the Mississippi Attorney General's advisory opinions explain why cities like McComb and elected officials have understood that the type of dual service at issue here is permissible. Whereas the Mississippi Supreme Court held that the functions of an alderman in a

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[8] Chapter 590 provides: "No municipality . . . shall impose any additional requirements on holding any municipal elective office or receiving compensation for any elective office except as may be provided by law," Miss. Code Ann. § 21-15-2 (2006).

private charter city like McComb are partly executive in nature and cannot be characterized as purely legislative, see Myers, 943 So. 2d at 3, 4, & 9, the Office of the Mississippi Attorney General has repeatedly determined that the position of municipal alderman, in any city, falls "squarely within the legislative branch."[9] In fact, none of these Attorney General advisory

[9] See, e.g., 2005 WL 3298101 (Miss. A.G. Oct. 7, 2005) (stating, without analysis of the city charter, that the "office of alderman is in the legislative branch of government"); 2005 WL 1994194 (Miss. A.G. July 1, 2005) (same); 2002 WL 1833290 (Miss. A.G. March 2002) (concluding that Myers' position as selectman in a private charter city is within the legislative branch); 2001 WL 880459 (Miss. A.G. June 29, 2001) ("A city council of a private charter municipality, such as the City of Gautier, is in the legislative branch of government."); 2001 WL 1627667 (Miss. A.G. Nov. 2, 2001) ("A member of the municipal board of aldermen is in the legislative branch of government."); 2001 WL 880497 (Miss. A.G. July 13, 2001) (same); 2001 WL 668729 (Miss. A.G. May 25, 2001) (same); 1997 WL 612563 (Miss. A.G. Sept. 18, 1997) ("A member of the board of aldermen is in the legislative branch of government."); 1997 WL 549173 (Miss. A.G. Aug. 8, 1997) ("Members of boards of aldermen and municipal councilmen are members of the legislative branch of government."); 1996 WL 744347 (Miss. A.G. Dec. 13, 1996) ("Members of boards of aldermen and municipal councilmen are members of the legislative branch of government."); 1995 WL 779732 (Miss. A.G. Dec. 13, 1995) (same); 1994 WL 240877 (Miss. A.G. May 5, 1994) ("A position as alderman is clearly an exercise of core powers of the Legislative Branch."); 1994 WL 329913 (Miss. A.G. June 16, 1994) (same); 1993 WL 669108 (Miss. A.G. Feb. 10, 1993) (same); 1992 WL 614121 (Miss. A.G. Aug. 26, 1992) (same); 1992 WL 614295 (Miss. A.G. Nov. 25, 1992) (concluding that municipal councilman in a mayor-council form of government falls within the legislative branch); 1990 WL 548251 (Miss. A.G. Mar. 22, 1990) (stating that municipal alderman position falls within the legislative branch of government); 1989 WL 503337 (Miss. A.G. Aug. 2, 1989) (same); 1989 WL 504157 (Miss. A.G. Jan. 16, 1989) (same); 1989 WL 40159 (Miss. A.G. Sept. 28, 1981) ("The position of alderman is an office within the legislative branch of government."); 1987 WL 121802 (Miss. A.G. Aug. 18, 1987) (same); 1987 WL 121725 (Miss. A.G. July 3, 1987) (same); 1987 WL 121503 (Miss. A.G. Apr. 2, 1987) (same); 1987 WL 121510 (Miss. A.G. March 31, 1987) (stating that the office of municipal alderman is in the legislative branch in the private charter city of Natchez); 1987 WL 121580 (Miss. A.G. Feb. 27, 1987) (same for private charter city of Corinth); 1987 WL 121440 (Miss. A.G. Feb. 5, 1987) (stating that the position of alderman falls within the legislative branch of government); 1986 WL 82099 (Miss. A.G. Nov. 20, 1986) (same); 1984 WL 247549 (Miss. A.G. Jan. 26, 1984) (same); 1982 WL 44547 (Miss. A.G. Aug. 5, 1982) (stating that aldermen in a private charter municipal government are in the legislative branch); 1980 WL 28143 (Miss. A.G. May 26, 1980) (stating that municipal aldermen fall under the legislative branch of government); 1979 WL 41580 (Miss. A.G. Nov. 30, 1979) (same); 1979 WL 41306 (Miss. A.G. Sept. 10, 1979) (same); 1979 WL 40885 (Miss. A.G. April 27, 1979) ("This office has previously ruled on numerous occasions that an alderman is in the

opinions, spanning more than 25 years, makes the distinction drawn by the Supreme Court in 2006 between aldermen in a private charter city with a "weak mayor/strong council" form and other city councilors, Myers, 943 So. 2d at 3 n.4. The Mississippi Attorney General for decades has been, in effect, authorizing the dual service at issue here since both positions – alderman and state legislator – are within the legislative branch.

These opinions are of special relevance because they come from the Mississippi Attorney General, the chief legal officer and enforcer of state law. It is unsurprising then that cities like McComb have relied upon these opinions to permit the type of dual service at issue here. In fact, the Mississippi Attorney General's March 2002 advisory opinion relating to Myers' dual service was not the first one issued to McComb on whether its selectmen fall within the legislative branch of government. On March 28, 1986, the Office of the Mississippi Attorney General, in response to a request from McComb Selectman Quordiniah Lockley relating to the separation of powers between a selectman and a city administrator, stated, "[T]he Selectmen are members of the Legislative department of government." 1986 WL 81516 (Miss. A.G. March 28, 1986).

It is notable that in many of these advisory opinions, the Office of the Mississippi Attorney General has relied upon a 1960 Mississippi Supreme Court case, City of Jackson v. Freeman-Howie, Inc., 121 So. 2d 120, 124 (1960), for the proposition that the position of municipal alderman in any city falls within the legislative branch of government.[10] Absent

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Legislative branch of government."); 1979 WL 41168 (Miss. A.G. July 26, 1979) (noting that municipal aldermen in a code charter city have the power to hire and fire municipal employees but are treated as falling within the legislative branch).

[10] See, e.g., 1994 WL 329913 (Miss. A.G. June 16, 1994) ("The Mississippi Supreme Court has ruled that a municipal board of aldermen is in the legislative branch of government. City of Jackson v. Freeman-Howie, Inc., 121 So. 2d 120 (1960)."); see also 2001 WL 1627677

evidence to the contrary, this Court could presume that officials acted, on Mississippi's coverage date, in accordance with the law as announced in the Supreme Court's ruling in Myers. Perkins, 400 U.S. at 395. However, "with the benefit of hindsight," id., it is clear that state officials have consistently and repeatedly misconstrued state law to authorize dual service since at least 1979, and likely much earlier. See 1979 WL 40885 (Miss. A.G. April 27, 1979) ("This office has previously ruled on numerous occasions that an alderman is in the Legislative branch of government."). That the Mississippi Attorney General for decades has relied on a Mississippi Supreme Court case that pre-dates the State's coverage under Section 5 to conclude that municipal aldermen perform legislative and not executive functions provides compelling evidence that the type of dual service at issue in this case has not, until now, been prohibited. The record reflects no relevant change between November 1, 1964 and April 1979 to suggest that state officials would not have continued to rely on Jackson to permit dual service.[11] Cf. Perkins, 440 U.S. at 395.

(Miss. A.G. Nov. 2, 2001) (same); 2000 WL 1511844 (Miss. A.G. Sept. 1, 2000) (same); 1998 WL 94400 (Miss. A.G. Feb. 20, 1998) (same); 1993 WL 669108 (Miss. A.G. Feb. 10, 1993) (same); 1990 WL 548251 (Miss. A.G. March 22, 1990) (same); 1987 WL 121580 (Miss. A.G. Feb. 27, 1987) (same for private charter city of Corinth); 1984 WL 247549 (Miss. A.G. Jan. 26, 1984) (citing to Jackson to support the proposition that municipal aldermen fall within the legislative branch of government); 1982 WL 44547 (Miss. A.G. Aug. 5, 1982) (same); 1981 WL 40159 (Miss. A.G. Sept. 28, 1981) (same).

[11] Whether the Mississippi Supreme Court's decision in Jackson actually supports the interpretation that the Office of the Mississippi Attorney General has given it is irrelevant. The crucial fact is that the Office of the Mississippi Attorney General has repeatedly and consistently read Jackson to mean that the position of municipal alderman falls within the legislative branch and thus there is no reason to believe that its analysis would have differed on November 1, 1964, or that it would have enforced a prohibition on the type of dual service at issue here on that date.

Based on the foregoing, it simply cannot be presumed that officials would have implemented the prohibition of dual service, as announced by the Mississippi Supreme Court, on Mississippi's coverage date. Perkins, 400 U.S. at 440. In fact, all the evidence points to the opposite conclusion – that the practices and procedures that have permitted dual service in McComb have been in effect since Mississippi's coverage date. Accordingly, this Court correctly concluded that "although the state court decision may have been based on language written in 1890, in practice, it was a new application of a constitutional rule," (Order, Nov. 23, 2005 at 14), and therefore a change under Section 5.

3. The Mississippi Supreme Court erred in its analysis of whether the dual service prohibition was a change under Section 5 by focusing on what Mississippi law required, rather than on the practices in force or effect on the coverage date.

The Mississippi Supreme Court erred in its analysis of whether its ruling would effectuate a change within the meaning of Section 5 by limiting its consideration to whether the prohibition of Myers' dual service was authorized by law. The Court defined the issue as follows: "[W]e must determine if the Mississippi Constitution generally, and Article 1, Sections 1 and 2 specifically, control this dispute and are applicable to municipalities and the persons or collection of persons which compose same. This Court has answered the latter inquiry in the affirmative for at least a century." Myers, 943 So. 2d at 6. Recognizing that several of its decisions stated or suggested otherwise, the Court "expressly overrule[d] any language in prior opinions" to the contrary. Id. The Court then went on to conclude:

> The Mississippi Constitution of 1890 was 'in force or effect' over 70 years prior to the Voting Rights Act of 1965, while the common law doctrine of incompatible offices is far older. The decisions of this Court applying the separation of powers article of the 1890

> Constitution to municipalities are over 100 years old. Accordingly, there is no change in the law affecting voting which is different from November 1, 1964.

Id. at 10-11. In short, the Court determined the issue of whether its own ruling constituted a change within the meaning of Section 5 by focusing exclusively on whether Myers' dual service was illegal under the state law in existence before the coverage date. It was sufficient for its ruling that the challenged practice had been illegal under the state constitution of 1890 and under common law doctrine that was even older. Id.

As discussed supra, the proper analysis requires a comparison of the dual service prohibition mandated by the Mississippi Supreme Court with the existing practice in effect on Mississippi's coverage date. See Presley, 502 U.S. at 495; Kennedy, 445 F. Supp. 2d at 1336; see also 28 C.F.R. § 51.54(b). Where, as here, there is undisputed evidence that officials implemented standards, practices, or procedures different from what was authorized by law as of the coverage date, it is error to assume that the law on the books automatically translates into an existing practice on the ground.[12] Perkins, 400 U.S. at 395.

While the Mississippi Supreme Court's opinion has controlling weight on the lawfulness of the dual service under Mississippi law, the Section 5 federal question is not answered in this case by what state law permits. For this reason, the Mississippi Supreme Court's Section 5 determination is erroneous and not entitled to deference by this Court. See Standard Oil Co. v. Johnson, 316 U.S. 481, 483 (1942) ("Since this determination of a federal question was by a state

[12] This is especially true because, as noted, none of the cases that the Mississippi Supreme Court relied upon to reach its conclusion that there has always been a prohibition of Myers' dual service dealt with a municipal legislator in a weak mayor/strong council form of government serving simultaneously as a state legislator.

court, we are not bound by it. We proceed to consider whether it is correct."); Grantham v. Avondale Indus. Inc., 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question.").

Moreover, the Mississippi Supreme Court went further to opine that its ruling would not be discriminatory in purpose or effect. See Myers, 943 So. 2d at 11.[13] That determination, however, can only be made by the Attorney General or the United States District Court for the District of Columbia under Section 5. 42 U.S.C. § 1973c(a). As the Supreme Court has repeatedly and consistently held, "What is foreclosed to [all other courts] is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General – the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" Perkins, 400 U.S. at 385; United States v. Bd. of Supervisors of Warren County, 429 U.S. 642, 645 (same); Hathorn, 457 U.S. at 267 (same).

4. The prohibition on dual service affects the eligibility of persons to become or remain holders of elective office, and thus "affects voting" within the meaning of Section 5

The Attorney General's guidelines for Section 5 clearly state that "[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in

[13] Four sentences comprised the Mississippi Supreme Court's analysis on this issue: "Finally the judgment of this Court will not negatively affect the racial composition of the Board, as the city district represented by Myers is 77.5% African-American. There will be no dilution of minority political power, voting strength, or voting rights. In short, it 'neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color . . . .' The application of these principles is race-neutral." Myers, 943 So. 2d at 18-19.

primary or general elections, or to become or remain holders of elective office" is a change that affects voting. 28 C.F.R. § 51.13(g). Moreover, as this Court correctly noted, "Regulations promulgated by the Department of Justice interpreting [a statute it enforces] are, of course, entitled to considerable weight." (Order, Nov. 23, 2005 at 15) (citing Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir. 1996)); Dougherty County, Ga. Bd. of Educ. v. White, 439 U.S. 32, 39 (1978) ("Given the central role of the Attorney General in formulating and implementing Section 5, [his] interpretation of its scope is entitled to particular deference."); Dupree, 776 F. Supp. at 300 (same); Lucas v. Townsend, 698 F. Supp. 909, 911 (M.D. Ga. 1988) ("Though not binding upon this . . . court, the Attorney General's interpretation of both the scope of Section 5 and his regulations promulgated thereunder is entitled to particular deference.").

This Court correctly concluded that the change at issue clearly affects Myers' ability to remain the holder of his elective office, as well as affects other office holders who are similarly situated. The Mississippi Supreme Court ordered Myers to "vacate the office of Selectman for the City of McComb forthwith." Myers, 943 So. 2d at 11. Nevertheless, the Mississippi Supreme Court opined that its ruling, even if assumed to be a change, did not "affect voting." The Court noted that "there is no candidate qualification issue, as Selectman for the City of McComb is free to seek a seat in the legislature and is not disqualified to run for the legislature. However, if victorious in obtaining a seat in the legislature, the Mississippi Constitution and accompanying case law require vacating the Selectman position." Id. The Mississippi Supreme Court's reasoning, however, demonstrates exactly why its ruling effects a voting change for holders of elective office – a municipal legislator would not be able to "remain a holder of [municipal] elective office" if he is successful in obtaining a seat on the state legislature. 28

C.F.R. § 51.13(g); see also Dougherty County, 439 U.S. at 34 (holding that a rule requiring employees to take leaves of absence while they campaign for elective offices constitutes a change that affects voting); Caudell v. City of Toccoa, 153 F. Supp. 2d 1371, 1375-77 (N.D. Ga. 2001) (ruling that the city's prohibition of dual service – encompassing the offices of city commissioner and hospital board member – "is certainly a change affecting the eligibility of plaintiff and others to become or remain candidates for election to the City Commission"). It is hard to imagine a clearer case of a voting change that affects the ability of one to remain the holder of elective office.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm its order enjoining the Mississippi Supreme Court's ruling unless and until it receives administrative preclearance by the Attorney General or a declaratory judgment is obtained from the United States District Court for the District of Columbia pursuant to Section 5.

Respectfully submitted,

DUNN O. LAMPTON
United States Attorney
Southern District of Mississippi

By: */s/Felicia C. Adams*
FELICIA C. ADAMS
Assistant United States Attorney
MSB #1049

JOHN K. TANNER
Chief, Voting Section
REBECCA J. WERTZ
Deputy Chief, Voting Section
ALBERTO RUISANCHEZ
JARED M. SLADE

Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7255 - G St.
950 Pennsylvania Ave., NW
Washington D.C. 20530
Phone: (202) 305-1291
Fax: (202) 307-3961
Email: alberto.ruisanchez@usdoj.gov

CERTIFICATE OF SERVICE

I, Felicia C. Adams, do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification to the following:

Ellis Turnage, Esq.
P.O. Box 216
Cleveland, MS 38732-0126

Willie J. Perkins, Sr.
P. O. Box 8404
Greenwood, MS 38930-8404

James W. Craig
111 E. Capitol Street
Suite 600
P.O. Box 23066
Jackson, MS 39225-3066

Norman B. Gillis, Jr.
P. O. Drawer 1907
McComb, MS 39648

William T. Siler, Jr.
P.O. Box 23066
Jackson, MS 39225-3066

This the 1st day of March, 2007.

/s/ Felicia C. Adams
FELICIA C. ADAMS

EXHIBIT "A"

Summary of Mississippi's Relevant Section 5 Submissions

On February 16, 1988, the Attorney General precleared Chapter 469 of the 1983 Laws of Mississippi. Chapter 469 repealed several statutes related to public service and replaced them with a uniform set of standards related to conflicts of interests by public officials. Among other things, the law prohibits public officials from using their official position to obtain pecuniary benefits and from contracting with their own agency, but it does not contain a prohibition on dual service. See Miss. Code Ann. § 25-4-105. See Attachment to this Exhibit, Letter from William Bradford Reynolds to Mike Moore (Feb. 16, 1988).

On February 6, 1995, the Attorney General interposed an objection under Section 5 to Chapter 625 of the 1994 Laws of the State of Mississippi on the grounds that the State had failed to carry its burden of demonstrating that the submitted change had neither a discriminatory purpose nor discriminatory effect. See Attachment to this Exhibit, Letter from Deval L. Patrick to Sandra Murphy Shelson (Feb. 6, 1995). Chapter 625 sought to amend Miss Code Ann. § 25-4-105, to prohibit anyone from serving as a member of the state legislature and as an elected member of any political subdivision of the state. The objection letter noted that "until the [Attorney General's] objection is withdrawn or a judgment from the District of Columbia Court is obtained, the voting change incorporated within Chapter 625 (1994) continues to be legally unenforceable." Id. The law never took effect.

On July 22, 2002, the Attorney General precleared Chapter 590 (2002), which provides: "No municipality . . . shall impose any additional requirements on holding any municipal elective office or receiving compensation for any elective office except as may be provided by law," Miss. Code Ann. 21-15-2 (2006). See Attachment to this Exhibit, Letter from Joseph Rich to Heather P. Wagner, (July 22, 2002).

Finally, on June 9, 2003, the Attorney General precleared Chapter 455 (2003), which clarifies that the prohibition against municipalities imposing any additional qualifications for municipal elective office applies to all forms of municipal government in Mississippi. See Attachment to this Exhibit, Letter from Joseph Rich to Heather P. Wagner (June 9, 2003).

U.S. Department of Justice

Civil Rights Division

JDR:RPL:HMM:nj
DJ 166-012-3
2003-1444

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

June 9, 2003

Heather P. Wagner, Esq.
Assistant Attorney General
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Ms. Wagner:

This refers to Chapter 447 (2003), which authorizes a county election commissioner to become a candidate in a special vacancy election for another office if the commissioner resigns from his/her position within 10 days of calling the special election; and Chapter 455 (2003), which clarifies that the prohibition against municipalities imposing any additional qualifications or receiving compensation for municipal elective office applies to all forms of municipal government for the State of Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on April 23, 2003.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

/s/ Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:MJP:CEI:nj
DJ 166-012-3
2002-3146

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

July 22, 2002

Heather P. Wagner, Esq.
Assistant Attorney General
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Ms. Wagner:

This refers to Chapter 590 (2002), which authorizes the appointment of student interns to perform certain duties at the polls on election day; makes it a crime to intentionally vote twice in an election; and prohibits municipalities from imposing additional requirements on the holding of elective office for the State of Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 30, 2002.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

For Joseph D. Rich
Chief, Voting Section

Enclosure

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

FEB 0 6 1995

Sandra Murphy Shelson, Esq.
Special Assistant Attorney General
P. O. Box 220
Jackson, Mississippi 39205-0220

Dear Ms. Shelson:

This refers to Chapter 625 (1994), which provides that after July 1, 1997, a person shall be prohibited from serving both as a member of the legislature and as an elected member of any political subdivision of the State of Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 452 U. S. C. 1973c. We received your submission on December, 1994; supplemental information was received on January 25, 1995.

We have given careful consideration to the information and materials you have submitted, as well as to comments and information from other interested parties. It appears that the proposed change was initiated principally by leaders of the white community of the City of Greenwood and Leflore County to prohibit a specific black leader of the city and county, David Jordan, from serving both in the Mississippi Senate and on the Greenwood City Council. We note that Mr. Jordan has been re-elected to the council since this controversy began, and by a considerable margin. Based on the information available to us, it appears clear that Mr. Jordan's race and his vigorous advocacy of the interests of his black constituents was a motivating factor behind the change. The proposed change would reduce the choices available to the black voters of his council and senate districts, and it appears that this effect was intended.

With regard to lawmakers holding dual offices, our analysis indicates that this change was adopted for racial discriminatory reasons, and that black voters will be adversely affected by this change.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Chapter 625 (1994), which prohibits lawmakers from holding dual offices in the State.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the voting change incorporated within Chapter 625 (1994) continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Mississippi plans to take concerning this matter. If you have any questions, you should call John K. Tanner (202-307-3143), Acting Chief of the Voting Section.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

T. 2/16/88
WBR:MAP:GS :vs:gmh
DJ 166-012
T5416

February 16, 1988

Honorable Mike Moore
Attorney General
P. O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to Chapter 469, S.B. No. 2768 (1983), which provides for uniform standards of conduct for elected officials in the State of Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on December 18, 1987; supplemental information was received on February 9, 1988. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

In reviewing this submission, we necessarily have considered Chapter 469 in light of the construction given various of its provisions by decisions of the Mississippi courts in State v. Logan, No. 128,919 (Miss. 1st Ch. July 22, 1986), and Frazier v. State, 504 So. 2d. 675 (Miss. 1987). As so construed, the Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.41 and 51.43.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section

cc: Records Chron Vincent Reynolds Schneider
Jones/Weinberg/Hancock/Coleman/Posner/Wertz/Williams/
Jackson Inv. File Public File USA - Miss. Statewide