No. 96-1389

In The

# Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

*Appellants,*

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

*Appellees.*

**On Appeal From The United States District Court For The Northern District Of Texas**

## MOTION TO AFFIRM

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## QUESTIONS PRESENTED

1. Is preclearance required under section 5 of the Voting Rights Act when a commissioners court changes the way it considers political party affiliation when deciding whom it will appoint as election judges?

2. If so, is the commissioners court required to obtain preclearance when it abandons an unprecleared standard and reinstates the most recent precleared standard?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

# TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES

## MOTION TO AFFIRM

Appellees move to affirm the judgment below on the ground that the question presented is so insubstantial as not to require further argument.

## STATEMENT OF THE CASE

Dallas County generally relies on the statement of the case presented by appellants. It does, however, believe that it is necessary to note three corrections to the appellants' statement of the case and that it is helpful to briefly outline the relevant statute and the various methods of selecting election judges discussed in this case.

### A. Corrections to appellants' statement of the case.

First, it is incorrect to say, as appellants do, that appellants or any other individuals were "removed" as election judges. *E.g.*, J.S. 11.[1] Election judges serve for a term of one year that ends on July 31. There is no right to

[1] The issues in this case were earlier presented in No. 96-987, an appeal from the denial of a preliminary judgment. While that appeal was pending, the district court dismissed the underlying case. This appeal, No. 96-1389, challenges the final judgment of dismissal and essentially subsumes the earlier appeal of the interlocutory order. *Shaffer v. Carter*, 252 U.S. 37, 44 (1920). Consistent with the practice of the appellants in their Jurisdictional Statement, citations to the Appendix ("App.") are to the Appendix in No. 96-987. Citations to the Jurisdictional Statement ("J.S.") are to the Jurisdictional Statement in this case, No. 96-1389, although as a practical matter the Jurisdictional Statements in the two cases are virtually identical.

continuation in office beyond that time, and no one has any entitlement to reappointment. While some individuals were not reappointed, they were not removed.

Second, the allegations in the jurisdictional statement of how many African-American and Hispanic judges were not reappointed is not in the record. J.S. 2-3. There is an affidavit on that issue that was attached to one of the appellants' pleadings; however, that information was never admitted at trial.

Third, the commissioners court order did not result in precincts being left without an election judge on election day. J.S. 3, 11. While it is correct that the October 8 order did not name judges in some precincts, both the order and the statute provide a method by which judges are to be appointed to fill vacancies that might exist in the initial list. App. 26a-27a; Tex. Elec. Code Ann., § 32.007. Further, if the position is still vacant on election day, the alternate judge serves as presiding judge. Tex. Elec. Code Ann., § 32.001(b).

**B. Summary of different methods of appointing election judges.**

While the specific method of appointing election judges that is before the Court in this appeal is the one that was adopted on October 8, 1996, it is necessary to be aware of the earlier methods that were used. Accordingly, the county believes it may be helpful to outline the various methods that have been used in Dallas County for appointing election judges beginning with the time section 5 of the Voting Rights Act was extended to cover Texas and extending through the present.

### 1. The statutory framework – section 32.002, Tex. Elec. Code

Section 32.002 of the Texas Election Code provides that election judges are to be appointed by the commissioners court. Other than various conditions of eligibility and ineligibility set out in companion statutes, *see* Tex. Elec. Code Ann. §§ 32.051-35.055 (*e.g.*, judge must be a qualified voter but may not be an elected public official, a candidate, campaign treasurer, etc.), the statute does not set out specific criteria for determining whom the commissioners court will appoint. The statute has been precleared by the Attorney General under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

### 2. Methods used by the commissioners court to determine the list of appointees

In Dallas County, the appointment of election judges involves compilation of a list of several hundred appointees. In 1996, for example, the list of appointees included approximately 500 presiding judges and approximately 500 alternates. In preparing a list of this size the county necessarily used some methodology as the sheer size of the task made it unlikely that each member of the court would be personally acquainted with each of the appointees.[2]

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[2] While the use of a method or formula to prepare a list for the commissioners court's consideration may be necessary in large counties such as Dallas County, that may not be the case in many, if not most, of Texas' 254 counties. Most counties will have a much smaller number of election judges with some

### (a) The method used from 1972 until 1983

Presumably, there were criteria that were used by the commissioners court between 1972 and 1983 for determining whom to appoint. To the extent that preclearance is required for a particular method, the method in use on November 1, 1972, which is the coverage date for the Voting Rights Act in Texas, was approved by operation of law. There is no evidence in the record, however, to indicate exactly what method was used at that time.

### (b) The Presidential precinct method – 1983-1994

The first methodology shown by the evidence in this case began to be used in 1983. For approximately eleven years beginning in 1983, the commissioners court appointed persons pursuant to a formula by which a Democrat would be appointed as the presiding election judge in each precinct that was carried by the Democratic presidential candidate and a Republican would be appointed as the presiding election judge in each precinct that was carried by the Republican presidential candidate. If a Republican was appointed as the presiding election judge, a Democrat would be appointed as the alternate and *vice versa*. A list of potential appointees would be submitted by the two parties. The formula was not formally set out in any order of the commissioners court,

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having as few as four. When the number of appointees is relatively small it is likely that the commissioners will be personally familiar with each appointee.

and the commissioners court was always free to reject any person recommended to it.

### (c) The Senatorial precinct method – 1995

In 1995, the commissioners court adopted its first order that expressly set out a formula to be used in the appointment of election judges. The order acknowledges that the Presidential precinct method was "one of the factors used in appointing election judges and alternates since 1983," and designates that a U.S. Senatorial precinct method will be used "as one of the factors, along with previous performance and other individual qualifications" in appointing election judges and alternates in 1995-97. Because Senator Kay Bailey Hutchinson carried more Dallas County precincts in the 1994 Senate race than President Bush carried in the 1992 Presidential election, the practical effect of using the Senatorial method was to appoint more Republicans and fewer Democrats than would have been appointed under the Presidential method.

### (d) The Senatorial precinct method (revised) – September 1996

In September of 1996, the commissioners court adopted a revision of the Senatorial method that presumably would result in the appointment of a larger number of Republicans and a smaller number of Democrats than would occur under the original senatorial model. Assuming that each commissioner acted on a partisan basis, all of the election judges in Dallas County

would be Republicans except in those precincts that were both carried by the 1994 Democratic nominee for the Senate and represented by the sole Democratic commissioner on the commissioners court. The order made it clear that partisan affiliation was only "one of the factors" to be considered by the commissioners court in making its appointments and that "a majority of the Commissioners Court may choose to not appoint any individual." App. 28a-29a. As indicated below, this order was rescinded one month after passage and thus was never implemented.

**(e) The October 1996 orders**

After passage of the revised Senatorial method in September 1996, it was alleged that preclearance was required for any method by which the commissioners court determined who its appointees would be. As no method or procedure that was unique to Dallas County had ever been submitted for preclearance, it was alleged that the use of formulas allocating positions between Democrats and Republicans was legally unauthorized. Without admitting that the allegations were legally valid, the commissioners court adopted an order on October 8, 1996 rescinding the orders setting out the two versions of the Senatorial method as well as "any and all policies or practices that provided a method of selecting and appointing presiding judges and alternate judges in Dallas County by any method other than that set out in Tex. Elec. Code, § 32.002 or its predecessor statutes." App. 22a. The commissioners court then adopted an

order appointing judges that relied solely on the provisions of section 32.002 and its related statutes. App. 24a. The list of appointees attached to this order named only Republicans as presiding election judges and only Democrats as alternate judges. There was, however, no order indicating that the commissioners court was using any formula or was limiting its discretion as to whom it might appoint.

## THE QUESTIONS ARE NOT SUBSTANTIAL

### A. The consideration of partisan affiliation by an appointing authority when it determines whom it will appoint is not a voting qualification or prerequisite to voting or a standard, practice or procedure with respect to voting within the meaning of section 5 of the Voting Rights Act.

Not every action affecting the election process is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" covered by section 5 of the Voting Rights Act. Here, for example, it is generally acknowledged that the statute creating the position of election judge is an election procedure requiring section 5 preclearance. Yet, at the same time all of the parties to this action agree that the actual decisions as to which individuals will be appointed under

that statute is not.[3] The appellants contend, however, that the process by which the commissioners decide which appointments will be filled with Democrats and which will be filled with Republicans is a covered practice. In effect, their position is that the decision to appoint Ms. Smith as election judge for precinct 1 is not an election practice although the decision that the position of election judge for precinct 1 will be filled by a Republican is such a practice. Thus, the issue raised in this appeal is how far, if at all, the preclearance requirement extends into the commissioners court's decision-making process as it determines which individuals will be appointed.

A major difficulty in determining how the Act applies to the commissioners court's consideration of various criteria in the decision-making process as it determines whom it will appoint is that there is no clear line in this context to separate what is an election practice requiring preclearance and what is not. If we assume, for

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[3] The appellants indicated in their Jurisdictional Statement that they

> "did not make the claim below that changes in the identity of individuals selected as poll judges are subject to Section 5 preclearance, and do not make such an argument in this Court.

J.S. at 16 n.7. They outlined their position in a more affirmative manner in the district court by stating:

> the appointment or the failure to reappoint a particular person as an election judge does not carry with it any change in a standard, practice or procedure, and thus is not a Section 5 covered change.

Plaintiffs' Brief in Support of Preliminary Injunctive Relief at 11, n. 3.

example, that a county adopts a list that appoints only Democrats as election judges, we can almost certainly also conclude that partisan affiliation was a major factor considered by the commissioners in making the appointment.[4] Has the county by adopting that single list implemented an election practice so that no Republicans can ever be appointed without Justice Department or district court approval? Presumably, the answer is no.[5] What if the appointment list contained only Democrats for the next year, or even for the next ten years? Would we then have an election practice? If so, there must be some specific point that we can identify when the repeated use of an list containing only Democrats matured into an election practice, since at that time it could not be implemented without preclearance. No such point, however, is

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[4] While a list containing representatives of only one party may be the most obvious example of using partisan affiliation as a decision-making factor, it is certainly possible to have a list that is split 50-50, 75-25, or in any other percentage that is just as dependent on party membership even though the relationship between the appointments and party affiliation may not be as immediately apparent.

[5] The county recognizes that repetition is not necessary for an action to be considered as an election practice since even a single act can affect an election. *See NAACP v. Hampton County Election Commission,* 470 U.S. 166, 178 (1985). In this case, however, the act that most directly affects the election process – *i.e.*, the actual appointment of the election judges – is concededly not an election practice requiring preclearance. *See* fn. 2, *supra.* The issue here is whether the use of particular criteria in the decision-making process represents a practice, and it often will be impossible to determine what criteria were used other than by observation over a period of time.

apparent. Further, it is not at all certain in the hypothetical that party affiliation is the only factor being considered by the commissioners court. This is precisely the situation posed in Dallas county by the use of the Presidential precinct method between 1983 and 1994. There was no formal order saying that the commissioners would follow a particular formula, but they admittedly made appointments pursuant to a specific methodology and did so year after year.

In 1995, of course, the commissioners court adopted a formal order saying that they would use the Senatorial election results "as one of the factors, along with previous performance and other individual qualifications" in determining whom to appoint. App. 31a. Certainly, the reference to "previous performance" or to "other individual qualifications" offers little insight into what might be considered in the decision-making process or to what role any of the three factors might play. Further, for every one of the three articulated criteria, there may have been several unarticulated ones. The problem is that review of the criteria amounts to review of the commissioners' thought process. Even when some aspects may be set out in writing, the matter is so subjective and ultimately unknowable that it is not amenable to principled review. This is one of the considerations that this Court relied on in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). There the Court rejected the argument that changes in a governmental body's decision-making authority were subject to section 5 preclearance in part because there was no principled way to determine when those changes in decision-making authority related to

voting and when they did not. *Id.* at 504. Here the difficulty in determining which criteria were used in the decision-making process and when and if an action matures into an election practice presents even greater difficulty.

It is also important to recognize exactly what an order outlining criteria the commissioners court will consider actually does. This order is not like a statute enacted by a higher authority that imposes a duty on the commissioners court or circumscribes its actions. The order was passed by the commissioners court and can be rescinded or ignored by the commissioners court. While it says the commissioners court will consider the election returns from the 1994 U. S. Senate race in making the list, there is nothing to preclude the court from adopting a list that bears no relationship to the results of the Senate race. All the order ultimately represents is a public agreement among the commissioners of how they will compile a list that can receive the three votes that represent a majority of the commissioners court. If three commissioners believe a different way of compiling the list would be preferable, they are not constrained by the order from pursuing that other course. In fact, the 1995 order states on its face that it will be used from 1995 through 1997, App. 31a-32a, yet it was abandoned in September 1996, App. 28a-29a, and again in October 1996. App. 22a-27a. In effect, the order is nothing more than a statement of internal operating policy and ultimately does not bind any citizen or even the commissioners themselves.

It is also important to recognize, as the district court did, that the "informing principle" of all the plans at issue is the allocation of appointments on the basis of

partisan affiliation. App. 3a. As the fortunes of the political parties shift with the election results, the composition of the appointments shift to reflect the new partisan order. The formulas have varied from the familiar winner-take-all principle to different plans for allocating appointments between the two parties. There is an obvious reluctance to extend judicial oversight under the Voting Rights Act to the assignment of political power on the basis of partisan strength. *See e.g., Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (White, J. concurring) (A Republican victory, even though most blacks supported the losing Democrats "is interest group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 [of the Voting Rights Act]"); *Whitcomb v. Chavis*, 403 U.S. 124, 150-153 (1971) (refusing to find racial discrimination under the Fourteenth Amendment when a pattern of Republican victories denied black voters the opportunity to elect the candidates they preferred). Although these cases do not directly address section 5, they do suggest the very understandable reluctance of the courts and Congress to bring purely partisan determinations within the scope of the Voting Rights Act.

While there will sometimes be instances when other factors may weigh more heavily in the balance, partisan considerations are a traditional and major consideration in the appointment process at virtually every level of American government at which the appointing authority is elected on a partisan basis. When a governor, county judge, county commissioner, or other official is elected on the Democratic ticket, one can be almost certain that affiliation with the Democratic party will be a factor in

determining who will be appointed by that official. If the official's successor is elected on the Republican ticket, the criterion for potential appointees will change so that preference will be given to Republicans. It is possible that the change will even be reflected in writing, as for example, in a memorandum from the governor to his or her appointments secretary or in a commissioners court order. It is inconceivable, however, that Congress ever intended that this sort of change that does nothing more than reflect partisan electoral success would require preapproval by the Attorney General or the district court of the District of Columbia.

Finally, the expansive interpretation of section 5 urged by appellants would raise serious constitutional concerns. Section 5 was determined to be constitutional by balancing the significant federalism cost inherent in section 5 against the extraordinary circumstances existing at the time of the passage of the Voting Rights Act. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *see also, Miller v. Johnson*, ___ U.S. ___, 115 S.Ct. 2475, 2493 (1995) ("our belief in *Katzenbach* that the federalism costs exacted by Section 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case."). Interpretation of section 5 in a manner that causes the appointment-decision-making process to be subject to review would pull the statute into a zone of doubtful constitutionality. The Act should be interpreted to avoid this constitutional issue.

**B. Even if the decision-making process is covered by section 5, a jurisdiction may abandon an unprecleared, legally unenforceable practice and reinstate the most recently precleared practice.**

The Voting Rights Act is structured so that the practice in effect on the coverage date, which in Texas is November 1, 1972, is frozen as a benchmark, and no change can be made in that practice without the approval of the district court in the District of Columbia or the Attorney General. Unless and until such approval is obtained, any change is legally unenforceable. *Connor v. Waller*, 421 U.S. 656 (1975). Once preclearance of a change is obtained, the new practice becomes the benchmark against which any subsequent change must be measured. *Gresham v. Harris*, 695 F. Supp. 1179 (N.D. Ga.) (3-judge court), *vacated and remanded for consideration of mootness*, 488 U.S. 978 (1988), *aff'd after remand*, 495 U.S. 954 (1990). The Attorney General, who has primary enforcement authority under the statute, has implemented regulations that expressly provide that an unprecleared practice cannot serve as a benchmark. Specifically, the regulation states:

> 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 except as provided in paragraph (b)(4) of this section,[6] the

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[6] Section (b)(4) relates to the situation when there is no preexisting benchmark, as for example when a governmental entity is created after the applicable date for the Act's coverage. That exception is not relevant here.

> comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

28 C.F.R. § 51.54(b)(1).

The appellants allege that Dallas County has gone through a series of four covered changes in the appointment of election judges and that none have been precleared. Assuming for the moment that the appellants are correct and that the various changes required preclearance, what would be Dallas County's obligation? Obviously, the county would not be permitted to use any of the unprecleared changes as they would be legally unenforceable. Its sole option would be to revert to the last legally enforceable practice, which in this case would be the last precleared practice or, if no practice had been precleared, the practice in effect on November 1, 1972. Of course, that is exactly what Dallas County did here. When it was alleged that the earlier practice required preclearance but had not been precleared, the county reverted to the last precleared practice – *i.e.*, the procedures set out in section 32.002 of the Election Code, which had been precleared in 1985.

This is mandated by the principles inherent in the structure of the Voting Rights Act – (1) the only valid practice is the most recently precleared practice, (2) if no practice has been precleared, then the practice in effect on the coverage date is the valid practice, and (3) unprecleared changes are legally unenforceable. Contrary to appellants' suggestion, the reversion to the last precleared practice is not inconsistent with *Perkins v. Matthews*, 400 U.S. 379 (1971). That opinion does not relate at all to the situation presented here. In *Perkins*, the city

used a practice on the coverage date, which in the case of Mississippi was November 1, 1964, that was different than the one authorized by Mississippi law. Under the Act, the procedure "in force and effect" on November 1, 1964, became the benchmark and could not be abandoned absent preclearance of the proposed change. The issue was whether the procedure that was "in force and effect" was the one that was actually used or instead was the one the city should have used under state law. This Court determined that the procedure that was actually used on the coverage date was the one in force and effect and therefore provided the benchmark against which future changes must be measured. *Id.* at 394-95; *see also City of Lockhart v. United States*, 460 U.S. 125, 132-33 (1983). It is difficult to understand how the *Perkins* decision, which is based on an interpretation of the statutory language that governs the determination of the practice that is afforded initial benchmark status, has any relevance to the very different question of what happens when that benchmark is abandoned through the use of an unprecleared change.

The effect of the appellants' position is that once an unprecleared, legally unenforceable change is implemented, the county would not be able to abandon that practice without a declaratory judgment from the district court in the District of Columbia or preclearance from the Attorney General. If that is the law, it represents a fundamental change in voting rights jurisprudence and leads to impractical and nonsensical results. For example, the appellants' theory would freeze jurisdictions into legally unenforceable practices rather than encouraging them to voluntarily revert to the only legally enforceable practice. Similarly, it would either give benchmark status to an

unprecleared practice – a concept fundamentally at odds with the rationale of the Act – or would put the Attorney General in the position of picking and choosing among various options, including ones that had never received section 5 preclearance and had been expressly rejected by the governmental body.[7] Such an expansive interpretation of the Act would raise serious constitutional issues. See discussion at p. 13, *supra*.

Certainly, the four cases cited by the appellants do not suggest that some different view of the rationale and structure of the Act is held by the district courts. *See* J.S. 26-28. One of the cases cited by appellants – *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668 (N.D. Ga. 1980) (3-judge court) – appears to be referring to abandonment of a precleared rather than of an unprecleared practice.[8] If so, it is clearly inapplicable.

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[7] For example, the appellants urge that the Presidential precinct method in use between 1983 and 1994, the 1995 Senatorial precinct method, the September 1996 revised Senatorial precinct method, and the October 1996 order appointing only Republicans as presiding judges are all practices requiring preclearance. The relief the appellants seek is reversion to the Presidential precinct method. In order to obtain his result it would be necessary for the Attorney General to choose a method that had never obtained the legal status that comes from preclearance and that had been rejected by the commissioners court in favor of other policy choices.

[8] The district court does not refer to the practice that was abandoned as being unprecleared. In that case the county had routinely approved requests to conduct voter registration drives but then adopted a formal order saying that it would no longer approve such requests. While it seems unlikely that the county had made a submission asking for preclearance of its "routine" practice of approving voter registration drives, it did ask for

Two cases – *City of Rome v. United States*, 472 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) and *City of Pleasant Grove v. United States*, C.A. No. 80-2589 (D.D.C. October 7, 1981) (unreported) – relate merely to whether a city that has implemented multiple annexations may temporarily fail to enforce some in an effort to submit the various annexations one at a time so that their cumulative effect is masked. In fact, the option the three-judge court gave the city in *Pleasant Grove* is entirely consistent with Dallas County's actions here. The court gave the city the choice of submitting all of the annexations as a single package or having its section 5 declaratory judgment action dismissed. App. 63a-64a. Dismissal of the declaratory action would mean that the annexations would not be precleared and that the city would revert to the boundaries as they existed prior to the unprecleared annexations. That, of course, is exactly what Dallas County is doing here. Upon the allegation that the changes regarding the decision-making criteria used in

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preclearance of the individual instances in which drives were authorized. *DeKalb*, 494 F.Supp. at 673 and n.3. Indeed, the court referred to the submissions to the Department of Justice as the means by which the procedure was "formalized." *DeKalb*, 497 F. Supp. at 673. No one, other than the appellants, appears to have read *DeKalb* to refer to abandonment of unprecleared changes. The *DeKalb* court itself used a hypothetical based on the abandonment of a precleared practice. *DeKalb*, 494 F. Supp. at 677. Further, the only court that has cited *DeKalb* in the context of abandonment of a voting practice did so in the context of applying its teaching to situations in which there were precleared plans. *Gresham v. Harris*, 695 F. Supp. at 1183.

appointing election judges had been implemented in violation of section 5, the county reverted to the last system that had been precleared.

The remaining case – *League of United Latin American Citizens #4552 (LULAC) v. Roscoe Ind. Sch. Dist.*, C.A. No. 1:96-CV-010-C (N.D. Tex. 1996) (3-judge court) (unreported) – appears to be the single case that possibly suggests that it is necessary to obtain preclearance prior to shifting from an unprecleared change to a precleared one, although the district court's summary order offers no explanation of its reasoning and the facts must be gleaned from sources outside the order. If the *Roscoe* court is holding that preclearance is required to abandon an unprecleared change in favor of a precleared one,[9] we respectfully suggest it is incorrect and is out of step with the general thrust of voting rights jurisprudence.

### C. A fair reading of the district court opinion does not reveal the departures from established Voting Rights jurisprudence suggested by the appellants.

The primary thrust of appellants' argument is not that this case presents an unsettled and important issue of law but rather is that the district court failed to follow

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[9] Since the briefs indicate that the school district was phasing in the precleared system, the practice that was actually before the court was a hybrid of the precleared and unprecleared systems. As this intermediate system had not been precleared, it is possible to construe *Roscoe* as requiring preclearance only for the hybrid system. Given the absence of any discussion by the court, however, it is impossible to know whether the district court was making that distinction.

long-established and well-recognized rulings of this Court. Indeed, the first three points in appellants' argument are that the district court erred (1) in considering the purpose or motivation behind the commissioners court's action, J.S. 12-16, (2) in determining that the Attorney General's 1985 preclearance implicitly precleared the county's pre-1985 practices. J.S. 17-20, and (3) in providing a discretionary acts exemption from the preclearance requirements of section 5. J.S. 20-24.[10] A fair reading of the district court opinion does not suggest that any of these contentions is based on an accurate interpretation of the court's order.

The county agrees that the scope of a section 5 enforcement court's inquiry is strictly limited to the issue of (1) whether section 5 applies, (2) if so, whether preclearance has been obtained, and (3) if not, what relief is appropriate. *E.g., Lopez v. Monterrey County*, ___ U.S. ___, 117 S.Ct. 340, 349 (1996). The appellants suggest that the district court exceeded its authority by "concluding that partisan politics and not racial discrimination motivated the changes in the procedures used to select election judges" and thus improperly invaded the province of the district court of the District of Columbia or the Attorney General. J.S. 13. There is absolutely nothing in the district court opinion, however, to suggest that the court made any conclusion regarding the substantive effect of the

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[10] The appellants list two of these issues as the second and third of the "questions presented" by this appeal. The county has not included them in its list of the questions presented as it believes the issues are based on a strained and inaccurate reading of the district court opinion.

appointments insofar as potential racial discrimination is concerned.

The court did recognize that partisan considerations were a driving force in the appointment process. That is hardly a surprising conclusion. Indeed, the parties stipulated as much, App. 12a-15a, and the appellants, who are now complaining that the district court analyzed the case in terms of partisan decision-making, expressly asked that court to make just such an analysis.[11] What the district court concluded was that the decision to vest the appointing authority in the commissioners court – a governmental body whose members are elected in partisan elections – necessarily encompassed the concept that the appointments might shift between Democrats and Republicans as those parties' relative power on the commissioners court shifted. The district court concluded that the shifts in the political affiliations of election judges was nothing more than a reflection of the shifts in partisan power on the commissioners court and was not a change in an election practice or standard. Rather than deciding, as the appellants contend the district court did, whether the changes in allocation were discriminatory, the district court merely determined that the changes in partisan affiliation did not represent a change in an election practice or procedure – an inquiry that is clearly within the scope of the authority of the district court.

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[11] The plaintiffs/appellants argued that preclearance was required because "the method and criteria used to make selections of election judges has changed: they have changed from essentially a bi-partisan approach to a partisan one. . . . " Plaintiffs' Brief in Support of Preliminary Injunctive Relief at 11, n. 3.

Similarly, the language of the district court opinion does not support the conclusion that the court was relying on an "implicit" preclearance of the use of a particular partisan formula. The appellants stretch the district court's statement that the 1985 preclearance of section 32.002 "precleared the process of selecting election judges in Texas" to suggest that the court was finding that the Department implicitly "precleared the 1983 change to a Presidential precinct method [as well as] the changes in 1995 and 1996." J.S. 17 and 18. The county recognizes that preclearance does not occur by implication, *McCain v. Lybrand*, 465 U.S. 236 (1984), and has never contended that the 1985 preclearance approved a particular formula or method other than the one set out in the statute. Nothing in the district court order suggests that it was finding that a particular method or formula was being approved. What the district court did conclude is that when the Attorney General approves a statute vesting the appointment authority in a group of persons who are elected on a partisan basis, it is reasonable to assume that it was contemplated that those persons might consider partisan affiliation when they make those appointments,[12] just as they might consider who supported them in their election efforts, who opposed them, who has done a good job in the past as an election judge, who has done a bad job, and many other factors that are likely to

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[12] For example, if a statute entrusted certain appointments of primary election officials to the county party chair, no one would suggest that preclearance was required of the Democratic party chair's practice of appointing Democratic party activists or of the Republican party chair's practice of appointing Republican party activists.

go into the decision-making process. When the commissioners court assigns greater or lesser weight to any of these factors, it is not a change in an election procedure just as it is not a change when one party or the other becomes more powerful on the commissioners court and effects a change in the partisan mix of the election judges.

Finally, it is incorrect to suggest that the district court found any sort of blanket exemption for actions that are within a governmental body's discretionary authority. That is not what the district court held and is not what Dallas County is contending. Unquestionably, discretionary decisions may be covered by section 5. The district court, far from carving a blanket exception, expressly recognized that there could be situations in which discretionary decisions taken under the authority granted by section 32.002 would require preclearance. App. 4a. It simply found that considerations of partisan affiliation in the appointment process did not constitute a practice or standard that required preclearance. That decision, however, was based on an analysis of the specific issue and not on any conclusion or belief that discretionary decisions were somehow exempt under the Act.

### D. The appeal comes before the Court on an incomplete record that does not contain the evidentiary basis necessary to sustain the appellants' argument and reverse the district court.

The Voting Rights Act is structured to require jurisdictions that are covered by section 5 of the Voting Rights Act to obtain a declaratory judgment from the district court of the District of Columbia or preclearance from the

Attorney General before they implement a voting qualification or prerequisite to voting or a standard, practice, or procedure relating to voting that is different than that in effect on the coverage date. In the case of Dallas County, the coverage date is November 1, 1972. The practice in effect on November 1, 1972 becomes the benchmark against which subsequent changes must be measured. If, however, there is an approved change from the 1972 standard, that new practice becomes the benchmark. *Gresham v. Harris*, 695 F. Supp. 1179 (N.D. Ga.) (3-judge court), *vacated and remanded for consideration of mootness*, 488 U.S. 978 (1988), *aff'd after remand*, 495 U.S. 954 (1990); 28 C.F.R. § 51.54(b)(1).

Accordingly, the determination of the benchmark is a critical issue in any section 5 case as it is necessary to know what the benchmark is in order to determine if there has been a change that triggers the application of that section of the Act. In this case there are two potential standards that might be considered to be approved practices. One is the 1985 enactment of section 32.002 of the Texas Election Code that establishes the procedure for the appointment process and that was precleared by the Attorney General on August 16, 1985.[13] The October 8, 1996 order appointing election judges is in strict compliance with that provision.

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[13] The predecessor to section 32.002 was in effect on November 1, 1972 and became a benchmark. Subsequent amendments, which did not change the general tenor of the statute, were precleared by the Attorney General. Thus, section 32.002 operates as a benchmark whether by virtue of its existence on November 1, 1972 or of the subsequent preclearance of the amendments and codification.

The appellants' argument, however, is based not so much on the procedure for the appointment, but on the formal and informal criteria used by the commissioners court when it determines whether its appointees will be Democrats or Republicans. If this aspect of the decision-making process is an election practice within the meaning of section 5, then the manner by which such decisions were made on November 1, 1972 becomes of critical importance. As the district court notes in a footnote on page 2 of its order and as appellants admit in footnote 12 of the Jurisdictional Statement, the record is silent on that point. *See* App. 2a, note; J.S. 25, n. 12. The appellants had the burden on that issue, but they have not presented the Court with a sufficient record to determine whether the current procedure represents a change from the benchmark. In the absence of a full record on the legal issues presented by the appeal, it would be improvident to afford this matter plenary consideration. *C.f., Wainwright v. City of New Orleans*, 392 U.S. 598 (1968); *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (all dismissing writs of certiorari as improvidently granted due to insufficiency of the record).

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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