No. 83-1015

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL., APPELLANTS

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

BARBARA E. ETKIND
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the scheduling of a qualifying period for candidates and the setting of a date for an election are "changes" subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether, when he withdrew his objection to Act No. 549, the Attorney General precleared the scheduling thereafter of a special election to be held on March 15, 1983, or the use of an already expired August 1982 qualifying period for that election.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1015

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL., APPELLANTS

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

On February 21, 1984, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a brief urging summary reversal, and the Court noted probable jurisdiction on June 18, 1984.

This case raises questions concerning the preclearance of voting changes pursuant to the Attorney General's enforcement responsibilities under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General must review

changes in election laws submitted by covered jurisdictions in order to determine whether such changes have either the purpose or the effect of denying or abridging the right to vote on account of race or color. The Attorney General has authority under the Act to initiate suits to prevent implementation of changes in election laws prior to compliance with the preclearance procedures of Section 5. See Section 12(d), 42 U.S.C. 1973j(d). The Court's resolution of the questions presented in this case will affect the Attorney General's execution of these statutory responsibilities.

OPINION BELOW

The order of the three-judge district court (J.S. App. 1a-11a) is not reported.

JURISDICTION

The order of the three-judge district court was entered on September 9, 1983 (J.S. App. 1a). A notice of appeal was filed on Monday, October 10, 1983 (J.S. App. 12a-13a). By order of December 7, 1983, the Chief Justice extended the time in which to docket the appeal to December 16, 1983, and the appeal was docketed on that date. The Court noted probable jurisdiction on June 18, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1253.

STATEMENT

Appellants, two civil rights organizations and several residents of Hampton County, South Carolina, filed this action in the United States District Court for the District of South Carolina on March 11, 1983, to enjoin the holding of elections for two boards of trustees of the Hampton County public schools. Appellants alleged that the County had not

received preclearance from the Attorney General under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to conduct the elections. A three-judge court declined to enjoin the scheduled March 15, 1983 election and, on September 9, 1983, issued an order denying appellants' request for further injunctive relief and dismissing their complaint insofar as it sought relief under Section 5. J.S. App. 1a-11a.[1]

1. Prior to 1964, the Hampton County public schools were governed by a six-member County Board of Education (the County Board). The members of the County Board were appointed by the Hampton County delegation to the South Carolina legislature. The County Board, in turn, appointed two six-member Boards of Trustees, each of which administered one of the County's two separate school districts. The County's voters elected at-large a County Superintendent to serve as an advisor to the teachers and the trustees of the two school districts. J.S. App. 2a.

On February 18, 1982, the South Carolina General Assembly passed Act No. 547, 1982 S.C. Acts 3495 (J.S. App. 17a-18a), which restructured the mode of governance of the Hampton County school system. Specifically, Act No. 547 provided that beginning January 1, 1983, the County Board was to be composed of six members who were to be elected at-large, rather than appointed. The Superintendent, who would continue to be elected at-large, was to serve as an ex officio member of the Board, with all of the rights and privileges of the other members,

---

[1] Appellants also alleged violations of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Those claims are still pending in the district court. J.S. 6 n.3.

including the right to vote. J.S. App. 2a-3a. The first elections for the newly constituted Board were to be held in November 1982. As the three-judge court found (*ibid.*), the purpose of electing, rather than appointing, the County Board members was to create a Board that would be responsive to the consolidation of the County's two separate school districts. Act No. 547 was submitted for preclearance by the Attorney General pursuant to Section 5, and the Act was precleared on April 28, 1982 (J.S. App. 3a).

On April 9, 1982, however, legislation was enacted to overturn Act No. 547. Act No. 549, 1982 S.C. 3497 (J.S. App. 19a-21a), abolished the County Board and the office of Superintendent and turned governance of the Hampton County public schools over to the two boards of trustees. Act No. 549 further provided that, beginning with the November 1982 general election, the trustees of each of the two school districts were to be elected at-large by a plurality of the voters in each respective district. Act No. 549 also reduced the number of trustees serving on each board from six to five and required every candidate for election in November 1982 to file with the Hampton County Election Commission during the period August 16-31, 1982. Implementation of Act No. 549 required approval by a majority of the qualified voters of Hampton County in a referendum to be held in May 1982. On May 25, 1982, the Hampton County Election Commission conducted the required referendum and a majority of the voters approved Act No. 549. J.S. App. 3a-4a.

The County submitted Act No. 549 for Section 5 preclearance by the Attorney General on June 16,

1982.[2] On August 16, 1982, while the request for preclearance was pending, the County began accepting filings under Act No. 549 for the position of trustee. On August 23, the Attorney General interposed an objection to Act No. 549, stating that he was unable to conclude that abolition of the County Board did not discriminate against black residents of Hampton County. The Election Commission nevertheless continued to accept filings for the election of trustees under Act No. 549, as well as filings for the election of County Board members under Act No. 547. On September 1, 1982, the County requested the Attorney General to reconsider his objection to Act No. 549. J.S. App. 4a-5a.

As of November 2, 1982, the Attorney General had not responded to the County's request for reconsideration of his objection to Act No. 549. Accordingly, the County proceeded on that date, pursuant to Act No. 547, to hold elections for the offices of County Board members and Superintendent of Education. On November 19, 1982, the Attorney General withdrew his objection to Act No. 549. Thereafter, on the advice of the South Carolina Attorney General, the Election Commission scheduled a special election for March 15, 1983, to select the trustees of the boards of the two school districts. Only those candidates who had filed for these positions during the

---

[2] Although Department of Justice regulations expressly authorize submission and preclearance of "a change for which approval by referendum * * * is required * * * if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken" (28 C.F.R. 51.20), the County waited until approximately three weeks after the referendum to submit Act No. 549 for preclearance by the Attorney General. The Attorney General received the submission on June 24, 1982 (J.S. 4).

August 1982 qualifying period were permitted to stand for election. One black and four white trustees were elected to the District One Board; all five trustees elected to the District Two Board are black. J.S. App. 5a-7a & n.2.

2. Appellants sought to enjoin the holding of the scheduled March 15, 1983 election on the grounds, inter alia, that the County had violated or would violate Section 5 by:

1. Continuing to accept filings for the trustee positions after the Attorney General had objected to Act No. 549;
2. conducting an election for trustees without seeking authority for a filing period;
3. conducting an election for trustees without holding a filing period subsequent to the Attorney General's withdrawal of his objection to Act No. 549;
4. conducting an election for trustees on a date other than that specified in Act No. 549; and
5. abolishing the office of Superintendent of Education and transferring his duties to the two boards of trustees.[3]

Concluding that the County had complied with its obligations under Section 5, the three-judge court refused to enjoin the scheduled election and, by order dated September 9, 1983, denied any further injunctive relief (J.S. App. 8a-11a). The court held (*id.* at 9a) that the first four actions challenged by ap-

[3] Appellants have abandoned their further contention that the County violated Section 5 by holding the election for trustees without first certifying the results of the May 1982 referendum to the South Carolina Code Commissioner, as required by Act No. 549 (J.S. 6 n.2).

pellants were not changes within the meaning of Section 5, but merely "the ministerial acts necessary to accomplish [Act No. 549's] purposes." Even assuming these actions were Section 5 changes, the court concluded (J.S. App. 9a-10a) that the Attorney General had precleared them when he withdrew his objection to Act No. 549. Relying on this court's decision in *Berry* v. *Doles*, 438 U.S. 190 (1978), for the proposition that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval" (J.S. App. 10a), the court held (*ibid.*) that "the eventual preclearance of Act No. 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished."

Finally, the court held (J.S. App. 10a-11a) that the abolition of the office of Superintendent of Education and the devolution of his duties upon the boards of trustees of the two school districts had been provided for by Act No. 549 and therefore were precleared by the Attorney General when he withdrew his objection to the Act.

SUMMARY OF ARGUMENT

The district court failed to follow this Court's consistent admonition that all changes in voting practices and procedures must be unambiguously submitted and precleared before they can be implemented by jurisdictions covered by Section 5 of the Voting Rights Act.

I

The district court held that the scheduling of a filing period for candidates and the setting of an election date were not changes subject to Section

5 preclearance because they were simply "ministerial acts" necessary to implement a new law. Section 5, however, provides no exception from its preclearance requirement for such "ministerial acts." To the contrary, this Court has consistently construed the statutory language as reaching "*any* state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969) (emphasis added). Applying this construction of the statute, the Court has required Section 5 preclearance of such changes as the relocation of polling places. For the same reasons that a change in the location at which an election is held is a change within the meaning of Section 5, a change in the timing of an election also is subject to the preclearance requirement. Moreover, the Court has expressly held that the preclearance requirement applies to changes in the requirements for candidate qualifications.

In addition, the Attorney General, the official charged with the administration of Section 5, has consistently construed that statute as applying to the types of changes in voting practices and procedures that are involved in this case. His consistent course of administrative interpretation and practice is entitled to considerable deference.

II

The district court erred in holding that the Attorney General precleared the changes at issue here when he withdrew his objection to Act No. 549, which provided for the selection of school board trustees at the general November 1982 election and established an August 16-31, 1982 qualifying period for candidates for that election. This Court has fre-

quently emphasized (*United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 136 (1978)) that "the purposes of the [Voting Rights] Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." In this case, when the Attorney General withdrew his objection to Act No. 549 on November 19, 1982, he was aware, *at most*, that the submitted election date had passed and that a new date would have to be set. Such knowledge does not constitute preclearance of a new election date that was never submitted and, indeed, was yet to be set at the time of the alleged approval.

Likewise, the Attorney General's withdrawal of his objection to Act No. 549 did not preclear the selection of the August 16-31, 1982 filing period for candidates for the rescheduled election. While Act No. 549, as submitted to the Attorney General, provided for an August 16-31, 1982 filing period, that filing period was for candidates for the November 1982 election. As discussed above, however, the election for school board trustee members was not held in November 1982. The Attorney General's approval of a filing period for candidates for a specified election date cannot be deemed also to constitute approval of the same filing period for a different election date that was never submitted to him.

ARGUMENT

I. THE SCHEDULING OF A FILING PERIOD FOR CANDIDATES AND THE SETTING OF AN ELECTION DATE ARE CHANGES SUBJECT TO SECTION 5 PRECLEARANCE

The district court held that the County's scheduling of a filing period for candidates and setting of a date for the election itself are not changes subject to Section 5 preclearance because they were simply "ministerial acts" necessary to implement a new law. But neither the language of Section 5 nor this Court's broad construction of it leaves room for any exception from the preclearance requirement for such "ministerial" acts.

Recognizing the discriminatory potential inherent in changes in voting practices and procedures, Congress determined that before certain jurisdictions would be permitted to put any such changes into effect the changes would have to be precleared either by the United States District Court for the District of Columbia or the Attorney General. Section 5 of the Voting Rights Act of 1965 thus requires Hampton County, as a covered jurisdiction, to obtain a declaratory judgment from the United States District Court for the District of Columbia or preclearance from the Attorney General whenever it

> enact[s] or seek[s] to administer *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 (emphasis added).

In order to achieve the prophylactic purpose of Section 5, this Court has consistently construed the

statutory language to reach "*any* state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections*, 393 U.S. at 566 (emphasis added). In so doing, the Court has recognized (*id.* at 568) Congress's "intention that all changes, no matter how small, be subjected to § 5 scrutiny."

This broad interpretation of Section 5 is buttressed by the regulations pursuant to which the Attorney General enforces Section 5.[4] They too emphasize that

> [*a*]*ny* change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

28 C.F.R. 51.11 (emphasis added).

Applying this construction of the statute, this Court has required Section 5 preclearance of such changes as the relocation of polling places, on the ground that (*Perkins* v. *Matthews*, 400 U.S. 379, 387 (1977)): "The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise."

---

[4] Recognizing "the central role of the Attorney General in formulating and implementing § 5," the Court has accorded "particular deference" to his interpretation of the scope of the provision, as codified in the regulations. *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 39 (1978). See also *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 138.

For the same reasons that a change in the location at which an election is held is a change within the meaning of Section 5, a change in the timing of an election also is subject to the preclearance requirement.

In addition, in holding that the relocation of polling places is a change covered by Section 5, the Court in *Perkins* relied (400 U.S. at 387-388) on legislative history that makes clear that Section 5 also was intended to cover a change from voting by ballot to voting by machine. *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 61-62, 95 (1965). See also *Allen* v. *State Board of Elections*, 393 U.S. at 568. Surely the setting of dates for candidate qualification and the scheduling of the election itself are no more "ministerial" than is a change from paper ballots to voting machines.

Moreover, the Court has expressly held that the preclearance requirement of Section 5 applies to changes in the requirements for candidate qualifications. In both *Hadnott* v. *Amos*, 394 U.S. 358, 365-366 (1969), and *Allen* v. *State Board of Elections*, 393 U.S. at 551, 570 (*Whitley* v. *Williams*), the Court required preclearance of a change in the date by which an independent candidate was required to file a declaration of his candidacy.[5] See also 28 C.F.R.

---

[5] Indeed, in a subsequent decision holding preclearance required for the imposition of a financial impediment to candidacy, the Court reasoned that the rule there at issue "erects 'increased barriers' to candidacy as formindable as the filing date changes at issue in" *Hadnott* and *Allen*. *Dougherty County Board of Education* v. *White*, 439 U.S. at 43. The Court also analogized the rule there at issue to the "inhibition on entry into the elective process" resulting from "filing-fee changes * * * to which the Attorney General has

51.12(g) (describing as a change subject to preclearance "[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices"). These authorities make clear that the County's adoption of the August 16-31, 1982 filing period for candidates to be elected in March 1983 was a change subject to the preclearance requirement of Section 5.[6]

Accordingly, the computerized Department of Justice Section 5 files reveal that, since 1980, approximately 58 changes in election dates and approximately 10 changes in dates for candidate qualifying periods have been submitted to the Attorney General for Section 5 preclearance. Our records show that the Attorney General considered each of these submissions to represent a "change" within the meaning of Section 5. For example, the Attorney General interposed objections to two of the latter types of changes: to one, on the ground that there had been insufficient public notice of the change until shortly before the

---

successfully interposed objections." *Id.* at 40. The selection of an already-expired qualifying period obviously has no less potential for impeding candidacy.

[6] In committee reports accompanying its enactment of extensions of the expiration date of the Voting Rights Act, Congress has repeatedly cited with approval the broad interpretation of the Act's coverage contained in *Allen* v. *State Board of Elections* and *Perkins* v. *Matthews*. See H.R. Rep. 94-196, 94th Cong., 1st Sess. 9 (1975); S. Rep. 94-295, 94th Cong., 1st Sess. 16 (1975). Accordingly, this Court has reaffirmed these prior holdings in *United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 122-123, and *Dougherty County Board of Education* v. *White*, 439 U.S. at 37-40. See also S. Rep. 97-417, 97th Cong., 2d Sess. 8 (1982); H.R. Rep. 97-227, 97th Cong., 1st Sess. 6 (1981).

qualification period began; and to the second, on the ground that the requirement that independent candidates must qualify at the same time as political party candidates would discriminate against black candidates (who had constituted the vast majority of independent candidates) and their constituents.[7] These examples of the Attorney General's practice, together with the regulations previously discussed,[8] manifest a consistent course of construction by the official charged with the administration of the statute

---

[7] An objection also was interposed to one of the 58 submitted changes in election dates. The basis for that objection was that, while the submitted change in election date would coincide with an election for local school board members in which a significant number of non-minority voters could be expected to participate, it would not coincide with the date on which the predominant proportion of minority voters would be voting for local school board members.

When a jurisdiction submits a purported "change" in voting practice or procedure that the Attorney General does not consider to be covered by Section 5, he so advises the jurisdiction. No such advice was given with respect to any of the 68 submissions we have surveyed. To the contrary, with the exception of those jurisdictions whose submissions are still pending, each jurisdiction was sent a letter advising either that the submitted change had been precleared or that an objection to it had been interposed.

[8] The substance of 28 C.F.R. 51.11 (discussed at page 11, *supra*) was initially promulgated in 1971, as part of the first regulations implementing Section 5 (28 C.F.R. 51.4(a) (1972); 36 Fed. Reg. 18186, 18187 (1971)):

> All changes affecting voting, even though the change appears to be minor or indirect, to expand voting rights or to remove the elements which caused objection by the Attorney General to a prior submission, must either be submitted to the Attorney General or be made the subject of an action for declaratory judgment in the U.S. District Court for the District of Columbia.

that is entitled to considerable deference.[9] See *United States* v. *Clark*, 454 U.S. 555, 565 (1982); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The danger inherent in recognizing an exception to Section 5 coverage for "ministerial" acts is evident. Potential for discrimination exists not only in the practices and procedures surrounding the actual casting of ballots, but equally in the more mundane steps preliminary to the election itself. Under the interpretation of the Act adopted by the district court a covered jurisdiction could obtain preclearance of a general statute without specifying the steps necessary for its implementation. Thereafter it would be free to implement the statute through steps that had the purpose or effect of discriminating against minority voters. Such a result clearly is contrary to the very purpose of Section 5.

II. THE WITHDRAWAL BY THE ATTORNEY GENERAL OF HIS OBJECTION TO ACT NO. 549 DID NOT PRECLEAR THE CHANGES IN THE DATES OF THE ELECTION OR THE QUALIFYING PERIOD

A distinct question is whether the changes at issue were precleared when the Attorney General withdrew his objection to Act No. 549. For the reasons discussed below, we agree with appellants that they were not.[10]

---

[9] Although our computerized Section 5 files extend back only to 1980, we are advised by longstanding Civil Rights Division staff that the types of changes at issue here—scheduling of election dates and qualifying periods—have always been treated by the Attorney General as covered by the preclearance requirement of Section 5.

[10] We agree with the district court (J.S. App. 10a-11a) that the abolition of the office of Hampton County Superin-

A. In our view, the district court erred as a matter of both fact and law in holding that the Attorney General's withdrawal of his objection to Act No. 549 precleared the setting of the March 1983 election date. As a matter of fact, the district court clearly erred in viewing the setting of the March 1983 election date as an "act[] of implementation [of Act No. 549] which had already been accomplished" (J.S. App. 10a) at the time of the November 19, 1982 withdrawal of objection. To the contrary, as the district court itself elsewhere found (*id.* at 7a-8a), the March 15, 1983 election date was not set until January 1983, two months *after* the Attorney General withdrew his objection.

Moreover, the consistent decisions of this Court preclude the conclusion that the withdrawal by the Attorney General of his objection constituted an implicit preclearance of an election date to be set sometime in the future. The Court has frequently emphasized

---

tendent of Education and the devolution of his duties on the boards of trustees were specifically provided for by Act No. 549 and therefore were precleared when the Attorney General withdrew his objection to that Act. Appellants alleged in the district court, however, that the Superintendent was prematurely stripped of his duties and authority (J.S. 12). We lack sufficient knowledge to determine whether this action requires further Section 5 clearance. To the extent that the Superintendent's loss of responsibility is an inevitable and foreseeable consequence of the abolition of the County Board which he served, the change has been precleared. If, however, the County has abolished the office of Superintendent prior to June 30, 1985, contrary to Act No. 549, it has shortened the term of an elected official and must seek clearance of the change under Section 5. See 28 C.F.R. 51.12(i) (defining as a change subject to preclearance "[a]ny change in the term of an elective office or an elected official or in the offices that are elective").

(*United States* v. *Sheffield Board of Commissioners*, 435 U.S. at 136) that

> the purposes of the [Voting Rights] Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.

Accord, *McCain* v. *Lybrand*, No. 82-282 (Feb. 21, 1984), slip op. 12; *Allen* v. *State Board of Elections*, 393 U.S. at 571 ("[a] fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act"). In this case, when the Attorney General withdrew his objection to Act 549 on November 19, 1982, he was aware, *at most*, that the submitted election date had passed and that a new date would have to be set. Under the foregoing authorities, such knowledge decidedly does not constitute preclearance of an election date that was never submitted and, indeed, was yet to be set at the time of the alleged approval.[11]

---

[11] The same authorities undermine appellees' reliance (Mot. to Dis. or Aff. of Hampton County School Districts 18) on the Attorney General's failure to note in his letter withdrawing his objection to Act No. 549 that the setting of a new election date would be subject to further submission. Section 5 clearly places the burden of submitting a voting change on the covered jurisdiction, regardless of whether the Attorney General has made a specific request for a submission.

Appellees have never claimed that they submitted the March 15, 1983 election date for preclearance. Rather, in addition to the spurious "implicit preclearance" argument answered in the text above, they argue that the establishment of a new date for the election was not a change and that, as a practical

Advance preclearance of future, unspecified changes thus is contrary to the basic concept of Section 5. It is also inconsistent with the practicalities of administering the statute. In the small percentage of cases in which an objection is interposed, the objection is based not on abstract surmise, but rather on the practical realities of the specific changes proposed, which often are brought to the Attorney General's attention by members of the communities that will be affected by the change. For example, the objections interposed to the changes in qualifying periods and election date discussed above (pages 13-14 & note 7, *supra*) all were based, at least in part, on information and comments received by the Attorney General from other "interested parties." Indeed, the Attorney General's regulations (28 C.F.R. 51.27) specifically provide for the submission of comments by interested individuals and groups.[12] Such comments obviously are most usefully addressed to specific

---

matter, submission of election dates for preclearance would be impossible, since the Attorney General might not respond before the scheduled date (Mot. to Dis. or Aff. of Hampton County Election Commission and Treasurer 17-21; Mot. to Dis. or Aff. of Hampton County School Districts 17-20). Because the Attorney General must respond to any submission within 60 days after he receives all of the necessary information (28 C.F.R. 51.8, 51.35, 51.37), however, a covered jurisdiction need only select an election date sufficiently far in the future to allow preclearance. Indeed, here, if appellees had made a complete submission of the date change in question at the time that change was made—January 1983—there is no reason to believe that the Attorney General's decision could not have been made prior to the scheduled March 15 election date.

[12] The regulations also advise jurisdictions having a significant minority population that "[r]eview by the Attorney General will be facilitated if", in addition to the information

changes that are proposed in the jurisdiction's submission. Hence, the entire administration of the Act would be undermined if as yet unspecified future changes were held precleared by implication at the time of preclearance of related legislation. As this Court has reiterated, Section 5 is concerned " 'with the reality of changed practices as they affect Negro voters.' " *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 41 (1978) (quoting *Georgia* v. *United States*, 411 U.S. 526, 531 (1973)).

B. For the same reasons, the withdrawal by the Attorney General of his objection to Act No. 549 also did not preclear the setting of the August 16-31, 1982 filing period for candidates for the rescheduled March 15, 1983 election. To be sure, Act No. 549, as submitted to the Attorney General and as approved by him when he withdrew his objection on November 19, 1982, provided for an August 16-31, 1982 filing period.[13] That filing period, however, was for "candi-

---

that is required to be submitted, they also provide "the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members who can be expected to be familiar with the proposed change or who have been active in the political process." 28 C.F.R. 51.26, 51.26(f).

[13] Act No. 549 provides in pertinent part (J.S. App. 19a-20a):

> Beginning with the general election in November, 1982, trustees for Hampton County School Districts Nos. 1 and 2 shall be elected by a plurality vote of the electors within their respective district qualified and voting at the general election for representatives. The number of trustees shall be five for each school district and their terms of office shall begin January 1, 1983. * * * A candidate for membership on a school board must reside in the school district he seeks to represent and all candidates offering for election in November, 1982, must file during the period August 16-31, 1982.

dates offering for election in November 1982" (note 13, *supra*). As discussed above (page 5, *supra*), because of the Attorney General's initial objection to Act No. 549, no election for trustee was held in November 1982; rather, in January 1983 the County rescheduled the election for March 15, 1983. At the same time, the County selected the August 16-31, 1982 period as the filing period for the rescheduled, March election (J.S. App. 7a). Because Act No. 549, as submitted to the Attorney General, provided for an August filing period for candidates *for a November election*, his approval of that legislation cannot be deemed clearance of the County's subsequent selection of the already expired August 1982 filing period for the March election (or any ensuing elections).[14]

---

[14] In our view, a filing date for candidates cannot be viewed in isolation from the particular election for which the candidates are filing. Cf. *Local 3489, United Steelworkers* v. *Usery*, 429 U.S. 305, 310-311 (1977) (pointing out, in union democracy context, that non-incumbent candidacy is likely to be stimulated by, and responsive to, issues that arise or become more pronounced "shortly before elections"). Accordingly, the use of an August 16-31, 1982 filing period for candidates for a March 1983 election was an innovation and, hence, a change within the meaning of Section 5—in contrast to a recurring fixed filing period (where repeated preclearance would not be required). In any event, even if the qualifying period itself did not require further approval, the March 15, 1983 election date requires preclearance, and one of the factors the Attorney General may take into account in considering the discriminatory effect or purpose of the rescheduled election date is the relation between the August filing period and the March election date.

CONCLUSION

The Court should reverse the judgment of the district court insofar as it failed to hold that the County violated Section 5 by not submitting for preclearance the August 1982 filing period for the March 1983 election and the March 15, 1983 election date itself, and remand the case for the entry of appropriate orders.[15]

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

BARBARA E. ETKIND
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

AUGUST 1984

---

[15] This Court has held that in certain circumstances the appropriate remedy for failure to preclear a voting change is not automatically to invalidate an entire election, but rather to afford the offending jurisdiction a reasonable opportunity within which to seek clearance of the change. *Berry* v. *Doles*, 438 U.S. 190, 192-193 (1978); *Perkins* v. *Matthews*, 400 U.S. at 396-397. Similarly, in numerous instances, the Attorney General has extended retroactive clearance to a belatedly submitted change that had already been put into effect. We do not address whether appropriate circumstances for retroactive clearance are presented by this case, since that question is properly addressed in the first instance to the equitable remedial authority of the district court. *Perkins* v. *Matthews*, 400 U.S. at 397.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10024