No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

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

JURISDICTIONAL STATEMENT

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Questions Presented

(1) Did the District Court err in holding that, in preclearing an election law under section 5 of the Voting Rights Act, the Attorney General must be deemed to preclear as well all *future* changes in election practices and procedures which may occur in the implementation of that law?

(2) Did the District Court err in holding that changes in election practices and procedures need not be precleared under section 5 of the Voting Rights Act if those changes occur in the implementation of a separate election law which itself had earlier received such preclearance?

(3) Did the District Court err in holding that the implementation of a non-precleared change in election procedures cannot be enjoined under section 5 of the Voting Rights Act unless that change is in fact "alleged to have had either racially discriminatory purpose or effect"?

(4) Did the District Court err in holding that state action knowingly and illegally implementing a change in election law to which the Attorney General had objected under section 5 is never to be invalidated by the federal courts so long as that change subsequently receives preclearance?

Parties

The appellants in this action are the National Association for the Advancement of Colored People, Inc., the Hampton County, South Carolina Branch of the National Association for the Advancement of Colored People, Inc., Benjamin Brooks, Jack J. DeLoach, Jessie M. Taylor, Rev. Ernest McKay, Sr., Soletta Taylor, Jesse Lee Carr, W.M. Hazel, John Henry Martin, Washington G. Garvin, Jr., Dora E. Williams, James Fennell, Vernon McQuire, Bossie Green and Earl Capers.

The appellees in this action are:

(1) The Hampton County Election Commission and its members, Randolph Murdaugh, III, Richard Sinclair, James Wooten, and W.H. Smith,

(2) The Hampton County School District No. 1 and its trustees, Philip Stanley, Lenon Brooker, Rebecca Badger, Wiley Kessler and Gerald Ulmer,

(3) The Hampton County School District No. 2 and its trustees, T.M. Dixon, Willie J. Orr, Virgin Johnson, Jr., Rufus Gordon, and Lee Manigo,

(4) Willingham Cohen, Sr., Marcia Woods, Louise Hopkins, Charlie Crews and William Bowers, the members of the Hampton County Council, and

(5) Wilson P. Tuten, Jr., the Hampton County Treasurer.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants National Association for the Advancement of Colored People, etc., *et al.*, appeal from the order of September 9, 1983, of the three-judge United States District Court for the District of South Carolina denying injunctive relief and dismissing the complaint in this action insofar as it sought relief under section 5 of the Voting Rights Act of 1965.

Opinion Below

The opinion of the district court of September 9, 1983, which is not reported, is set out at pp. 1a-11a of the appendix hereto.

Jurisdiction

The order of the three-judge district court, denying injunctive relief and dismissing the complaint insofar as it sought relief under section 5 of the Voting Rights Act, was entered on September 9, 1983. (App. 1a). A timely notice of appeal was filed on October 10, 1983.[1] (App. 12a). See 28 U.S.C. § 2101(b). On December 7, 1983, the Chief Justice extended the date for docketing this appeal until December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Statutes Involved

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set out at pp. 14a-16a of the appendix hereto. Acts 547 and 549 of the South Carolina Laws of 1982 are set out at pp. 17a-18a and pp. 19a-21a of the appendix.

Statement of the Case

From prior to 1964 until 1982 the Hampton County public school system was controlled by the Hampton County Board of Education. During this period the six members of the County Board were appointed by the Hampton County members of the South Carolina legislature. The school system was in turn divided into two school districts with separate Boards of Trustees, whose members were appointed by the County Board. Over 91% of all white public school students in the county attend the schools

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[1] The thirtieth day after September 9, 1983, was a Sunday, October 9, 1983. Accordingly, the notice of appeal was due on October 10, 1983, the date on which it was filed. Rule 6(a), Federal Rules of Civil Procedure; Supreme Court Rule 29.1.

in District No. 1, while the student population of the District No. 2 schools is 92% black. Each school district has operated autonomously under the general supervision of the County Board and of an elected County Superintendent of Education.

On February 18, 1982, the South Carolina legislature enacted Act 547, which provided that, beginning January 1, 1983, the six members of the County Board were to be elected rather than appointed. The Superintendent of Education, while continuing to be elected at-large, was to serve as a seventh voting member of the newly constituted County Board. The first elections for the new County Board were to be conducted in November, 1982. The purpose for electing the County Board members, rather than appointing them, was apparently to create a County Board responsive to consolidating School Districts Nos. 1 and 2. Act 547 was promptly submitted to the United States Attorney General for preclearance under section 5 of the Voting Rights Act, and received that preclearance on April 28, 1982.

The adoption of Act 547, however, provoked substantial opposition among the white residents of District No. 1. According to the complaint, those whites circulated a petition calling for the abolition of both the County Board and the position of County Superintendent of Education, thus severing the connection between Districts One and Two. As a result of that petition, and with the backing of the Hampton County Council, a white member of the county legislative delegation introduced legislation to overturn Act 547. This new measure was enacted on April 9, 1982 as Act 549. Act 549 abolished the Hampton County Board of Education and the position of Hampton County Superintendent of Education. It provided that their duties were to be assumed by the Trustees of School Districts 1 and 2. Beginning in November, 1982, the Trustees of those school

districts were to be elected at-large at the general election. Act 549 provided that candidates for election to these newly reconstituted school boards were to file with the county Election Commission between August 16 and 31, 1982. Implementation of Act 549, however, required approval of a referendum of Hampton County voters to be conducted in May, 1982.

When Act 549 was adopted there was ample time, a total of 129 days, to obtain preclearance before the scheduled filing period was to begin on August 16. But although Department of Justice regulations expressly authorized consideration of a preclearance request prior to the holding of any necessary referendum, 28 C.F.R. § 51.20, no effort was made to submit Act 549 during either April or May of 1982. When the necessary referendum approved Act 549 on May 25, 1982, there remained sufficient time, 83 days, in which to obtain preclearance prior to the commencement of the filing period. But state and local officials delayed still further. Not until June 24, 1982, some 30 days later, was the necessary submission received by the United States Attorney General; by then the time remaining until the statutory filing period was to begin was less than the 60 days normally required for preclearance under section 5.

As a result of these delays, the Attorney General had taken no action on Act 549 when the filing period for elections under that Act commenced on August 16, 1982. Despite the fact that section 5 of the Voting Rights Act forbids any implementation of a new election practice or procedure which lacks preclearance, Hampton County election officials, who were well aware of the requirements of federal law, began to accept petitions for candidates seeking election in the new districts created by Act 549. On August 23, 1982, the Attorney General objected to Act 549 insofar as it abolished the County Board. Despite this

objection, Hampton County officials continued to implement the Act 549 filing period. On September 1, 1982, after that filing period had ended, county officials submitted to the Attorney General a request for reconsideration of his objection. They also began for the first time to accept filings for election under Act 547, the only law which then had the necessary preclearance. On November 2, 1982, having received no response to their request for reconsideration, county election officials held elections for the County Board under Act 547. Of the six board members elected on that date, three were black and three were white.

On November 19, 1982, the Attorney General withdrew his objection to Act 549. On November 29, 1982, the chairman of the Hampton County Election Commission wrote the South Carolina Attorney General and requested his opinion on three questions:

(1) Should an election be held to elect Trustees for Hampton County School Districts 1 and 2?

(2) If so, when should such an election be held?

(3) Should the filing period for the respective District Boards of Trustees be "reopened"?

The state Attorney General responded on January 4, 1983, advising the County that it should hold new elections "[a]s soon as possible" and that it need not "reopen" the filing period. Acting on this advice, the Hampton County Election Commission conducted elections in Districts 1 and 2 on March 15, 1983. The six individuals elected in November, 1982, to the County Board of Education were never permitted to take office.

The advice given by the state Attorney General and acted upon by the county had two distinct effects of im-

portance to this litigation. First, although the express language of Act 549 authorized election of District Trustees only during a general election, the Trustees were in fact chosen at a special off-year election. Second, despite the fact that Act 549 contemplated that the filing period would begin several months after the Act went into effect, the filing period for the 1983 election in fact closed more than two months *before* the statute became effective. The only time at which candidates for District Trustee were permitted to file for that office was when the conduct of such filings was illegal under section 5 of the Voting Rights Act.

The appellants, two civil rights organizations and several residents of Hampton County, commenced this action in the United States District Court for the District of South Carolina seeking an injunction to forbid the proposed elections as illegal under section 5 of the Voting Rights Act,[2] and to place in office the duly elected members of the County Board of Education. Appellants alleged that the proposed elections violated section 5 because they were to occur at a time other than that provided for in Act 549, and because the elections were limited to candidates who had filed for election during the illegal August 1982 filing period.[3] A three judge court was con-

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[2] The complaint also alleged that the Election Commission, in violation of section 3 of Act No. 549, had failed to certify to the South Carolina Code Commissioner the results of the May 1982 referendum. Although we disagree with the district court's reasons for rejecting this claim, our review of the record indicates that that certification was in fact made. Accordingly, we do not seek review of the district court's denial of injunctive relief regarding the alleged lack of certification.

[3] The complaint also alleged that the abolition of the elected County Board of Education violated section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. These claims were not dismissed, and are the subject of continuing litigation in the district court.

vened to hear the case, as required by 42 U.S.C. § 1973c. Appellants unsuccessfully sought to enjoin the March 15, 1983, special election. Subsequently, on September 9, 1983, the district court denied appellants' request for injunctive relief and dismissed their complaint insofar as it sought to state a claim under section 5 of the Voting Rights Act.

The Questions Presented Are Substantial

This case presents yet another attempt on the part of a jurisdiction subject to section 5 of the Voting Rights Act to avoid compliance with the provision's requirement that no alteration in any election practice or procedure be implemented until and unless precleared by the Attorney General of the United States or the United States District Court for the District of Columbia. The voting changes involved in this appeal took place in connection with an election for school trustees, which was held under new procedures which either lacked preclearance under the Voting Rights Act or had in fact been objected to by the Attorney General. The district court, in denying any injunctive relief, created no less than four new exceptions to the requirements of section 5. The decision below, if upheld by this Court, would substantially impair the scope and effectiveness of section 5, and seriously interfere with the ability of the Attorney General to carry out his administrative responsibilities under the Voting Rights Act.

This case arose, quite simply, because the appellees ignored section 5 not once but several times in the course of changing the system of selecting school boards in Hampton County. First, the implementation of the new statute, Act 549, was begun without the required preclearance, and continued even after an objection had been entered by the Attorney General. Following an interlude of compliance during which implementation stopped and a scheduled elec-

tion was canceled, the violations began anew after the Attorney General withdrew his section 5 objection to Act 549. At that point the appellees proceeded to set a new election and to adopt election procedures different from those in the text of Act 549, without any effort to preclear these new changes. Finally, in conducting the new election the appellees barred from the ballot all candidates except those who had filed under Act 549 at a time when the conduct of a filing period under Act 549 was clearly illegal under the Voting Rights Act. One of the would be candidates rejected because of a failure to participate in this illegal filing period was the chairman of the about to be abolished County Board of Education, who wished to run for a seat on one of the trustee boards which was to replace his office.

The first election law change which has never received preclearance under section 5 is an alteration of the date for conducting the initial election of the trustees of the local school boards. Section 1(b) of Act 549, as earlier approved by the Attorney General, authorized the election of district trustees only at the "general election" held in November of even-numbered years in South Carolina. A state statute altering the election date from the general election to March of an off-year would clearly have been a change in a "standard, practice or procedure with respect to voting . . ." 42 U.S.C. § 1973c. This Court has repeatedly held that Congress intended section 5 "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. 544, 566 (1969). In *Berry* v. *Doles,* 438 U.S .190 (1978), this Court held that section 5 applied to a state statute changing the time at which certain Georgia county officials were to be elected. Such a change in the timing of an election has an obvious potential adverse impact on the number of minority voters participating when, as here,

the election is moved from a regular general election to a special election, since voter turnout at special elections is predictably lower. In the instant case, for example, over 6000 Hampton County voters participated in the November 1982 general election,[4] while less than half that number voted in the March 1983 special election.

Second, the procedures adopted by appellees effectively constituted a change in the candidate filing rules. Act 549, as approved by the Attorney General, authorized only two filing periods, the August 16-31 period for a contemplated November, 1982, school board election, and the usual filing period for subsequent school board elections. The Act neither established any filing period for a March 1983 special election, nor sanctioned the use of the August 1982 filings for any election other than that to occur in November, 1982. This Court has repeatedly held that such candidate qualification rules are subject to section 5. *City of Rome* v. *United States,* 446 U.S. 156, 160-61 (1980) (residence requirement); *Dougherty County* v. *White,* 439 U.S. 32 (1978) (mandatory leave for candidate in government job); *Hadnott* v. *Amos,* 394 U.S. 358 (1969) (filing requirements for independent candidates); *Whitely* v. *Williams,* 393 U.S. 544, 570 (1969) (filing requirements for independent candidates). The Justice Department section 5 regulations expressly require submission of "[a]ny change affecting the eligibility of persons to become candidates." 28 C.F.R. § 51.12(g). Submission of changes in such laws is required because candidate qualification rules may "undermine the effectiveness of voters who wish to elect . . . candidates" excluded by those rules. *Allen* v. *Board of Elections,* 393 U.S. at 570.

The filing rule at issue in this case to an extraordinary degree "burdens entry into elective campaigns and, con-

[4] Complaint, Exhibit 15-1.

comitantly, limits the choices available to voters." *Dougherty County* v. *White,* 439 U.S. at 40. The standard adopted in January 1983 for the March 1983 special election required prospective candidates to have filed no later than August 31, *1982.* By the time that that requirement was announced, the deadline it imposed was more than four months past. This unusual *ex post facto* requirement had an obvious discriminatory impact. First, the March special election was open only to candidates who had been willing to participate in the palpably illegal August 1982 filing, which had been conducted at a time when implementation of the statute involved violated section 5. Prospective candidates could only obtain a place on the March 1983 ballot by "obeying" in August 1982 election rules to which an objection had been interposed by the Attorney General and which under the Voting Rights Act were not and could not then have been "effective as laws." *Connor* v. *Waller,* 421 U.S. 656 (1975). Second, since only one black candidate[5] had filed for election as a trustee of District No. 1 during the illegal August 1982 filing period, the rule guaranteed white domination of that District regardless of the wishes of minority voters, and deprived those voters of any opportunity to vote for more than a single black candidate. Thus, had the decision to require an August, 1982 filing been contained in a state statute and submitted to the Attorney General, there was good reason to believe that he would have objected to it.

The district court nonetheless held that these new election procedures did not require preclearance under section 5, offering in support of its conclusion several different theories, each of which is, in our view, incompatible with the Voting Rights Act.

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[5] Lenon Brooker. He was among the five candidates elected in March, 1983.

The district court reasoned, first, that once an election law is precleared, section 5 is simply inapplicable to any alterations in election procedures which occur in the implementation of that precleared law. Thus the new procedures involved in this case, it asserted, did not

> constitute "changes" within the meaning of Section 5. Each of these acts were not alterations of South Carolina law, but rather steps in the implementation of a new statute. . . . [T]he preclearance requirement of Section 5 applied to the new statute, Act No. 549, while the ministerial acts necessary to accomplish the statute's purpose were not "changes" contemplated by Section 5, and thus did not require preclearance. (App. 8a-9a).

On the district court's view, once Act 549 was precleared, Hampton County election officials were free to select any date for the trustee elections and to adopt any filing requirement, regardless of whether, as in fact occurred, the date and filing requirement were different than those in the Act submitted to and approved by the Attorney General of the United States.

Were that the rule, preclearance of any election law under section 5 would free state and local election officials to alter at will any other election practice or procedure that might be involved in the implementation of the precleared law. Such an exemption from the coverage of section 5, carrying with it an open invitation to evasion of the requirements of the Voting Rights Act, is clearly inconsistent with the intent of Congress "to give the Act the broadest possible scope." *Allen* v. *Board of Elections*, 393 U.S. at 567. This Court has consistently refused to create an exception to section 5 for purportedly "minor" changes made by local election officials, see e.g. *Perkins* v. *Matthews*, 400 U.S. 379 (1971), and the Attorney General

has properly insisted that even those technical changes in election procedures needed to implement longstanding election laws must be submitted for preclearance. *City of Rome* v. *United States*, 446 U.S. 156, 183 (1980).

The district court apparently applied this novel exception to section 5 in rejecting appellants' claim that the appellees had prematurely abolished the position of Superintendent of Education. Act 549 did abolish that position as of June 30, 1985, but plaintiffs complained that by mid-1983 the Superintendent had been stripped of his prior responsibility and authority.[6] The district court reasoned that since Act 549 had been precleared under section 5, "Section 5 does not reach this aspect of plaintiffs' complaint", despite the fact that abolition of that position was being implemented two years earlier than the particular date actually authorized by Act 549 and approved by the Attorney General.

The district court suggested, in the alternative, that the new election procedures at issue in this case had somehow "been precleared along with the . . . provisions of Act No. 549." (App. 9a). In particular the court asserted, apparently with regard to the illegal August 1982 filing period, that "the eventual preclearance of Act 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished." (App. 10a). But this Court has repeatedly rejected suggestions that the Attorney General be deemed to have approved changes in election procedures where those changes were not formally submitted to him in full compliance with the applicable section 5 regulations. *City of Rome* v. *United States*, 446 U.S. at 169 n. 6; *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 136 (1978); *Allen*

[6] Affidavit of John W. Dodge, Hampton County Superintendent of Education, dated July 13, 1983.

v. *Board of Elections,* 393 U.S. at 571. It is not sufficient that the Attorney General may have known of a proposed change; the responsible authorities must "in some unambiguous and recordable manner submit any legislation or regulation in question to the Attorney General with a request for his consideration pursuant to the Act." *Allen* v. *Board of Elections,* 393 U.S. at 571. "[T]he purposes of the 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." *United States* v. *Sheffield Board of Commissioners,* 435 U.S. at 136.

In the instant case the Attorney General could not possibly have evaluated or intended to approve the changes at issue when he withdrew his objection to Act 549, since that objection was withdrawn in November, 1982, and the decisions at issue—to hold a special election and to require candidates to have registered in August, 1982—were made in January 1983, two months *after* the Attorney General's action. If a decision by the Attorney General to preclear a new statute has the sweeping effect attributed to it by the district court, approving as well both premature implementing steps of which the Attorney General may be unaware, and subsequent implementation actions which he could not foresee, it would be impossible for the Attorney General to carry out his responsibilities under section 5 in an informed and conscientious manner. Under the best of circumstances "[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." *Georgia* v. *United States,* 411 U.S. 526, 540 (1973). But if the Attorney General cannot know in advance what implementing steps he is implicitly approving, it would be manifestly impossible to make the critical judgment which Congress contemplated.

In addition, the district court concluded that the November, 1982, preclearance of Act 549 *ipso facto* removed all taint of illegality from the August 1982 filing period. Relying on this Court's decision in *Berry* v. *Doles,* 438 U.S. 190 (1978), the court below held that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval." (App. 10a). In *Berry,* as in *Perkins* v. *Matthews,* 400 U.S. 379 (1971), the issue before this Court was whether an election held without the necessary section 5 preclearance must be voided and conducted anew even though the changes at issue subsequently received the required preclearance. Neither case established a *per se* rule that such relief was never appropriate. *Perkins* held only that "[i]n certain circumstances" invalidation of an action taken in violation of section 5 might not be required, 400 U.S. at 396, and *Berry* merely found such circumstances to be present on the particular facts of that case. 438 U.S. at 192. Both cases recognized the desire of Congress to prevent the implementation of *all* election changes which had not received section 5 preclearance, not just those to which such preclearance would ultimately be denied.

Fourteen years ago, noting that the scope of section 5 raised "complex issues of first impression", this Court indicated a temporary reluctance to overturn elections conducted without preclearance. *Allen* v. *Board of Elections,* 393 U.S. at 572. In extending section 5 in 1982, however, Congress made clear its desire that the Voting Rights Act be strictly complied with. Congress amended the bailout provisions of the Act to ensure that exemption from coverage by section 5 not be accorded to jurisdictions which had violated that provision. The Senate Report emphasized:

> "[I]t is the Committee's intent that compliance with Section 5 means that even if an objection is ultimately

> withdrawn or the judgment of the District Court for the District of Columbia denying a declaratory judgment is vacated on appeal, the jurisdiction is still in violation if it had tried to implement the change while the objection or declaratory judgment denial was in effect." S.Rep. No. 97-417, p. 48.

Virtually identical language appears in the House Report, H.R. Rep. No. 97-227, p. 42. Both the House and Senate Reports include extensive references to the failure of covered jurisdictions to make the timely submissions required by section 5.

As Justice Brennan noted in his concurring opinion in *Berry*, in the absence of any credible threat that actions violative of section 5 will be invalidated by the federal courts, "the political units covered by § 5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes." 438 U.S. at 194. That is precisely what occurred in the instant case. The defendant election officials knowingly implemented Act 549 when it lacked section 5 preclearance, in the hope that such preclearance would eventually be obtained, and in the apparent belief that subsequent preclearance would immunize from redress that unlawful implementation. The district court's decision encourages precisely the sort of section 5 violation which concededly occurred in August 1982, and flies in the face of the clear intent of Congress.

Finally, the district court held that an allegation of "either racially discriminatory purpose or effect" was "essential to a Section 5 action." (App. 8a). This is a thinly disguised version of a construction of section 5 that has been repeatedly and unanimously rejected by this Court. In *Allen* v. *Board of Elections* this Court held:

> A declaratory judgment brought by the *State* pursuant to § 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a *private litigant* does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. 393 U.S. 558-59. (Emphasis in original).

In *Perkins* v. *Matthews,* 400 U.S. 410 (1971), the district court dismissed a section 5 action because it believed that the election law changes at issue lacked any discriminatory purpose or effect. This Court reversed:

> The three-judge court misconceived the permissible scope of its inquiry into [plaintiff's] allegations. . . . What is foreclosed to such district court 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." 400 U.S. at 383-85.

That rule has since been reaffirmed in *Dougherty County* v. *White,* 439 U.S. 32, 42 (1978) and *United States* v. *Board of Supervisors,* 429 U.S. 642, 645-46 (1977). Neither the evidence adduced in a private action to enforce section 5, nor the allegations of the complaint in such an action, are to be tested by standards which Congress has expressly reserved to a preclearance proceeding in the District Court for the District of Columbia or before the Attorney General.

The decision of the district court in this case is thus wholly at odds with both the intent of Congress in enacting the Voting Rights Act and the established construction of section 5. That decision is likely to encourage the problems of noncompliance with section 5 which have continued to engage this Court. *See, e.g., Blanding* v. *Dubose,* 454 U.S. —— (1982); *Canady* v. *Lumberton Board of Education,* —— U.S. —— (1982); *McCain* v. *Lybrand,* No. 82-282. Summary affirmance by this Court would require federal courts throughout the country to adhere to the ill-considered standards applied below, until and unless this Court directed otherwise. *Hicks* v. *Miranda,* 422 U.S. 332, 344-45 (1975). Summary affirmance would as a practical matter overrule, at least in part, virtually every section 5 decision handed down by this Court since *Allen* v. *Board of Elections,* and would wreak havoc in the implementation and administration of section 5. The questions presented by this appeal are as substantial as the decision of the district court is unsound.

CONCLUSION

For the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

Order of District Court, September 9, 1983

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

Civil Action 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., etc., et al.,

Plaintiffs,

—versus—

HAMPTON COUNTY ELECTION COMMISSION, a public body politic; et al.,

Defendants.

On July 21, 1983, this case came before a three-judge district court for arguments on whether certain actions alleged by the plaintiffs constituted changes in election practice or procedure which had not received preclearance by the United States Attorney General, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973(c). It was conceded that if there had been no "change" within the meaning of Section 5, or if such change had been properly precleared, the portion of this action brought under Section 5 should be dismissed, and the three-judge court dissolved. After consideration of the arguments and memoranda of counsel, this court unanimously concluded that there had been no Section 5 changes accomplished without preclearance in this matter. For that

reason, the three-judge court dismissed the Section 5 portion of this case in an oral Order. The instant Order incorporates and memoralizes that earlier ruling from the bench.

The factual background of this action focuses upon the history of governance of the public school system of Hampton County, South Carolina. Since the provisions of Section 5 apply to departures from the voting standards, practices, or procedures that existed on November 1, 1964, that date becomes significant as the baseline against which Section 5 "changes" are measured.[1] Since well before that point, the Hampton County Public School System was controlled by the Hampton County Board of Education (the "County Board"), the Hampton County Superintendent of Education (the "Superintendent"), and the Boards of Trustees for School Districts One and Two (the "Trustees"). The six member County Board was appointed by the Hampton County Legislative Delegation. In turn, the County Board appointed Hampton County residents to serve as Trustees of the individual Districts, each trustee board having six members. A County Superintendent elected at large by the qualified voters of Hampton County served as an advisor to the teachers and trustees of each district. Each school district operated separately under the general supervision of district superintendents.

On February 18, 1982 the South Carolina General Assembly passed Act No. 547, Acts and Joint Resolutions,

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[1] Section 5 requires South Carolina and its political subdivisions to obtain federal approval from the United States Attorney General or the United States District Court for the District of Columbia before enforcing any "practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

1982 (R311), which changed the government body for the Hampton County public school system. Beginning January 1, 1983, the County Board was to be composed of six at-large members, who were to be elected, rather than appointed. The Superintendent, while continuing to be elected at-large, was to serve as an *ex officio* County Board member, having all rights and privileges of other members including the right to vote. The purpose for electing the County Board members, as opposed to appointing them, was to create a County Board that would be responsive to consolidating School Districts One and Two. Act No. 547 was submitted by the South Carolina Attorney General to the United States Attorney General, who precleared it, pursuant to Section 5 of the Voting Rights Act, on April 28, 1982.

Act No. 547, however, was superseded by another piece of legislation, Act No. 549, Acts and Joint Resolutions, 1982 (R398). On April 9, 1982, the Governor of South Carolina signed Act No. 549, which abolished the Hampton County Board of Education and the Hampton County Superintendent of Education. Once these offices were abolished, their respective duties were to be assumed by the Trustees for School District One and Two.

Beginning with the November 1982 general election, the District One and Two Trustees were to be elected at-large, rather than appointed, by a plurality vote of the electors within each respective district. The number of Trustees serving on each board was reduced from 6 to 5. Act No. 549 stated that a candidate offering for election in November 1982 must file with the Hampton County Election Commission during the period August 16-31, 1982. Act No. 549 contains no language giving local election officials the authority to hold a filing period other than the one specified.

These changes in the school system's governing body were contingent upon approval by a majority of the qualified electors voting in a referendum in May 1982. Accordingly, the Hampton County Election Commission conducted a referendum on May 25, 1982. A majority of the voters approved Act No. 549. Therefore, by mandate of the voters of Hampton County, the offices of the County Board and Superintendent of Education were to cease to exist on June 30, 1982 and June 30, 1985, respectively.

As required by Section 5 of the Voting Rights Act, Act No. 549 was submitted to the United States Attorney General for preclearance on June 16, 1982. The next week, June 23, the sitting County Board members adopted an Order of Consolidation that consolidated Districts One and Two into a unitary school district. The following week, however, the same County Board voted to rescind its earlier Order of Consolidation.

Act No. 547 had already been precleared by the United States Attorney General. Thus, Act No. 549, in order to supersede Act 547, had to receive preclearance itself.

The situation was further complicated by the fact that the Attorney General is given 60 days to respond to a request for preclearance. In addition, the Attorney General may request additional information from the submitting authority. Such a request tolls the original 60-day period so that it does not start to run until the additional information is received. Thus it is possible that the submitting jurisdiction may have to wait for 120 days before it receives a response on preclearance.

When this fact is taken into account, there existed the chance that the filing period for candidates for District One and Two Trustees, August 16-31, would expire before the Attorney General precleared Act No. 549. If Act

No. 549 was precleared, pursuant to state law, it would supersede Act No. 547. But if preclearance came after August 31, Trustee elections could not be held as scheduled, because no candidate would have qualified by filing during the specified statutory filing period.

To avoid this potential dilemma, the Hampton County Election Commissioner began accepting Trustee filings on August 16, 1982. On August 23, 1982, a full 60 days after Act No. 549 was submitted, the Attorney General objected to a portion of Act No. 549. The Attorney General found neither a discriminatory purpose nor effect in the change of the method of selecting Trustees from appointment to election, but he was unable to conclude that the proposal to terminate the County Board was not discriminatory toward black Hampton County residents. The Attorney General noted, however, in his objection letter that the "Procedures for the Administration of Section 5 (28 C.F.R. 51.44) permit you to request the Attorney General to reconsider the objection."

Because the Attorney General's objection was received in the middle of the filing period, the Hampton County Election Commission continued to accept filings until the end of August while Hampton County officials determined whether they would submit a request for reconsideration of the objection.

Hampton County submitted a request for reconsideration on September 1, 1982. Because there remained the chance that the request for reconsideration would be denied, the Election Commission also began accepting filings for the election of County Board members under Act No. 547. A candidate who had filed for the office of Trustee was also permitted to file for the County Board. As of November 1, 1982, the Attorney General had not responded

to the request for reconsideration. Accordingly, the Hampton County Election Commission held elections for County Board members on November 2, 1982.

Shortly thereafter, the Attorney General withdrew his objection to Act No. 549. In his letter of November 19, 1982, the Attorney General withdrew his objection to the abolition of the County Board because "a reappraisal of South Carolina law establish[ed] that the county board lacks authority to effect a consolidation and its abolition . . . will not have the potentially discriminatory impact we had initially perceived."

Once the Attorney General precleared Act No. 549, Act No. 547 became void. Even though the election for County Board members had been held in November 1982, Act No. 547 became a nullity when the Attorney General precleared Act No. 549.

Threafter, the Hampton County Election Commission prepared to hold elections for the Trustees of Districts One and Two. On November 29, 1982, Randolph Murdaugh, III, Chairman of the Hampton County Election Commission, wrote the South Carolina Attorney General and requested an Attorney General's opinion on the following three questions:

(1) Should an election be held to elect Trustees for Hampton County School Districts Nos. 1 and 2?

(2) If so, when should such an election be held?

(3) Should the filing for the respective District Board of Trustees be reopened?

The South Carolina Attorney General responded to these questions in a January 4, 1983 opinion. Referring to an earlier Attorney General opinion that the proposed con-

solidation of Districts One and Two was of no effect, the South Carolina Attorney General concluded that "the provisions of Act [No. 549] are now in effect and it requires that an election be held for the school trustees." In response to Mr. Murdaugh's question about the timing of such an election, the South Carolina Attorney General responded: "As soon as possible." Finally, regarding the question as to whether the filing period should be reopened, South Carolina's chief legal officer concluded that "there is no reason to reopen filing as only the date of the election has changed." Acting upon this legal advice, the Hampton County Election Commission published a Notice of Election setting March 15, 1983, as election day.[2]

From the foregoing chain of events, plaintiffs have identified five claimed Section 5 changes that they urge were enforced without proper preclearance by the Hampton County Election Commission. These alleged changes are as follows:

(1) conducting an election for Trustees without first certifying the results of the referendum to the South Carolina Code Commissioner as required by Section 3 of Act No. 549 (R398);

(2) accepting of filings for the Trustees' positions after the Attorney General objected to Act No. 549;

(3) (a) conducting an election for Trustees without first seeking authority for a filing period;

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[2] Five Trustees were elected to the District Two Board on March 15, 1983, all of whom are black. One black person and four white persons were elected Trustees of District One.

(b) conducting an election for Trustees without holding a filing period subsequent to withdrawal of the Attorney General's objection;

(4) conducting an election for Trustees after the May, 1982, date specified for such elections in Act No. 549; and

(5) the abolition of the office of the Hampton County Superintendent of Education and the devolution of his duties on the Trustees of Hampton County School Districts One and Two.

In this court's view, plaintiffs' first contention does not involve a change in voting practice or procedure within the meaning of Section 5. Even though Section 3 of Act No. 549 (R398) required certification of the results of the referendum by the county election commission to the county legislative delegation and the South Carolina Code Commissioner, the failure of the election commissioner to so certify is purely a state law problem. Moreover, the failure of the election commissioner to certify the referendum results to the code commission is not alleged to have had either racially discriminatory purpose or effect. Such an allegation is essential to a Section 5 action. Otherwise, federal courts "would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Powell* v. *Power*, 436 F.2d 84, 86 (2d Cir. 1970).

Plaintiffs' second, third and fourth alleged changes also fail to constitute "changes" within the meaning of Section 5. Each of these acts were not alterations of South Carolina law, but rather were steps in the implementation of a

new statute. It is not questioned that Act No. 549 constituted a Section 5 "change" that require preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not "changes" contemplated by Section 5, and thus did not require preclearance.

Even if plaintiffs' second, third and fourth alleged changes were to be considered as "changes" under Section 5, this court concludes that they have now been precleared along with the remaining provisions of Act No. 549. The fact that the eventual preclearance of Act No. 549 followed the filing period for the Trustees' positions is not a bar under Section 5. In *Berry* v. *Doles*, 438 U.S. 190 (1978), the Supreme Court recognized the necessity of taking a practical approach toward reducing the disruptive delays frequently generated by requests for preclearance. The Court in *Berry* was confronted with a Section 5 challenge to a change in a Georgia statute regulating voting procedures for the election of the members of the Peach County Board of Commissioners of Roads and Revenues. The *Berry* case was filed four days prior to the contested election, and the election was held as planned. The three-judge district court held that the change, which had not been precleared at the time of the election, violated Section 5, but refused to set aside the election. On appeal, the Supreme Court affirmed the finding of a Section 5 violation, but reversed the denial of affirmative relief regarding the election. The Supreme Court concluded that the

appropriate remedy was to permit the responsible officials to have 30 days within which to apply pursuant to Section 5 for approval of the change in question. Citing *Perkins* v. *Matthews,* 400 U.S. 379 (1971), the Court noted as follows:

> We indicated in [*Perkins*] that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." 400 U.S., at 396-397. The circumstances present here make such a course appropriate.
>
> In this case, appellees' undisputed obligation to submit the 1968 voting law change to a forum designated by Congress has not been discharged. We conclude that the requirement of federal scrutiny imposed by §5 should be satisfied by appellees without further delay. . . . If approval is obtained, the matter will be at an end.

438 U.S. at 192-193.

By its decision in *Berry,* the Supreme Court clearly indicated that a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval. Thus, it is the court's view that in the case at bar the eventual preclearance of Act No. 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished.

The fifth and final change asserted by the plaintiffs, the abolition of the office of Hampton County Superintendent of Education and the devolution of his duties on

the Trustees, was provided for by Act No. 549.[3] As indicated in the preceding discussion of the second, third, and fourth alleged changes, this action was approved when the Act itself was precleared by the Attorney General. Thus, Section 5 does not reach this aspect of plaintiffs' Complaint.

For the reasons set forth above, the court concludes that the five instances alleged by the plaintiffs do not represent changes in election practice or procedure within the meaning of Section 5 of the Voting Rights Act of 1965 which were instituted without preclearance by the Attorney General. Further, the alleged changes have in fact been ratified and approved by the United States Attorney General's eventual preclearance of Act No. 549 in its entirety. Therefore, the court denies plaintiffs' request for injunctive relief and dismisses those portions of the Complaint which seek any relief from this three-judge court under Section 5 of the Voting Rights Act of 1965.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN
Robert F. Chapman
United States Circuit Judge

/s/ CHARLES E. SIMONS, JR.
Charles E. Simons, Jr.
United States District Judge

/s/ FALCON B. HAWKINS
Falcon B. Hawkins
United States District Judge

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[3] The Hampton County Superintendent of Education was elected for a four-year term commencing July 1, 1981 and expiring June 30, 1985. Act No. 549 abolishes this position effective June 30, 1985.

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

Filed October 10, 1983

Civil Action No. 83-612-6

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

Plaintiffs,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Defendants.

Plaintiffs National Association for the Advancement of Colored People, Inc., Hampton County, South Carolina, Branch of the National Association for the Advancement of Colored People, Inc., Benjamin Brooks, Jack J. Deloach, Jessie M. Taylor, Rev. Ernest McKay, Sr., Soletta Taylor, Jesse Lee Carr, W. M. Hazel, John Henry Martin, Washington G. Garvin, Jr., Dora E. Williams, James Fennell, Vernon McQuire, Bosie Green and Earl Capers, hereby appeal to the Supreme Court of the United States from the order of the District Court denying injunctive relief on the claims based upon 42 U.S.C. Section 1973c entered in this case on September 9, 1983. This appeal is taken

pursuant to 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

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October 10, 1983.

Voting Rights Act of 1965, Section 5

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, provides:

> § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court
>
> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek 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, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek 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, 1968, or whenever a State or politcal subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek 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, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submis-

sion, the Attorney General may reserve the right to reexamine the submisson if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Act No. 547, South Carolina Laws (1982)

Act No. 547, South Carolina Laws 1982, provides:

Composition of Hampton County Board of Education

SECTION 1. Notwithstanding any other provision of law, beginning January 1, 1983, the Hampton County Board of Education shall be constituted and elected as follows:

A. (1) Six members shall be elected at large from the county in an election conducted by the county election commission at the time general elections are held beginning with the general election of 1982.

(2) To have his name placed on the ballot a person must file with the election commission, not less than forty-five days before the election, a petition signed by not less than fifty qualified electors of the county. Each signature shall be followed by the voter registration number of the petitioner. Petitions must be approved by the county board of voter registration.

(3) No political party designation shall appear on the ballot in connection with the names of candidates.

(4) The six candidates receiving the highest vote in the election shall be declared elected. In the event of a tie vote, procedures provided in the state election laws shall apply.

B. Terms of members shall be for four years and until their successors are elected and qualify except that in the initial election of 1982 the three members elected who receive the smallest vote shall serve initial terms of two years only.

C. Vacancies shall be filled in the next general election for a full term or unexpired term as the case may

be except that if a vacancy occurs more than one year prior to a general election it shall be filled by appointment by the Governor upon recommendation of a majority of the county legislative delegation for a period until the vacancy can be filled by election.

D. In addition to the elected members, the county superintendent of education shall serve *ex officio* as a member of the board and in such capacity shall have all rights and privileges of other board members, including the right to vote.

E. As of December 31, 1982, the terms of all board members then serving shall expire.

F. Except as provided in this act the powers, duties and procedures of the board as prescribed by law shall continue in full force and effect.

Time effective

SECTION 2. This act shall take effect upon approval by the Governor.

Act No. 549, South Carolina Laws (1982)

Act No. 549, South Carolina Laws, provides:

Board of education abolished, trustees elected

SECTION 1. Contingent upon approval of the total proposal by a majority of the qualified electors voting in a referendum to be held in May, 1982, as hereafter provided for, the following shall occur:

(a) The Hampton County Board of Education shall be abolished at midnight on June 30, 1982; the office of the Hampton County Superintendent of Education shall be abolished at midnight on June 30, 1985; upon abolition their respective duties shall devolve upon the trustees for Hampton County School Districts Nos. 1 and 2; and after June 30, 1982, the Hampton County Treasurer shall pay any proper claim approved by a majority of the trustees of either School District No. 1 or School District No. 2, on behalf of their respective districts, provided sufficient funds are on deposit in the proper district account.

(b) 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. The three candidates in each district receiving the highest number of votes shall serve for terms of four years and the remaining two trustees shall have initial terms of two years, after which all terms shall be for four years. In each case trustees shall serve until their successors are elected and qualify

and each school board shall elect its chairman annually. Trustees shall receive no salary but shall be reimbursed for actual expenses incurred. 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.

Referendum conducted

SECTION 2. The Hampton County Commissioners of Election shall conduct a referendum within the respective county school districts during May, 1982, to determine whether the provisions of Section 1 of this act shall be implemented. The specific date for the referendum shall be determined by the county election commission. The county election commission shall thrice publish notice of the referendum in a newspaper of a countywide circulation, the last publication to be not less than one nor more than two weeks before the referendum. All election laws contained in Title 7 of the 1976 Code applicable to county referendums shall apply. Ballots shall be prepared and distributed to the various voting precincts of the county with the following printed thereon:

"Shall the Hampton County Board of Education be abolished on June 30, 1982, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; shall the office of the Hampton County Superintendent of Education be abolished on June 30, 1985, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; and shall the trustees for Hampton County School Dis-

tricts Nos. 1 and 2 (five trustees per district), rather than being appointed, be elected by plurality vote during general elections for representatives beginning with the election in Novembr, 1982, with their terms to begin January 1, 1983, and with terms of office to be four years, except that of those initially elected two from each district shall have initial terms of two years?

I agree to the above proposals ☐ Yes ☐ No

Place a check or cross mark in the block which expresses your answer."

Results certified

SECTION 3. The Hampton County Commissioners of Election shall certify the results of the referendum directed in Section 2 of this act to the Hampton County Legislative Delegation and to the South Carolina Code Commissioner.